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PROPHYLACTIC USE OF FORCE IN INTERNATIONAL LAW: THE ILLEGITIMACY OF CANADA’S PARTICIPATION IN “COALITIONS OF THE WILLING” WITHOUT UNITED NATIONS AUTHORIZATION AND PARLIAMENTARY SANCTION

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The author examines the legitimacy of Canada’s participation in acts of non-defensive aggression in light of Canada’s international obligations and international law. He contends that in the domestic terrain, constitutional conventions, practices, and applicable laws as factors that shape Canada’s decisions to participate in international conflicts, must also be critically reconsidered.

I. INTRODUCTION

In the Cold War aftermath, with the apparent willingness of states or groups of states to use force unconstrained by the United Nations Charter¹ in purported attempts to remove “threats to international peace,”² the question has arisen as

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² C.G. Fenwick, “When Is There a Threat to Peace?” (1967) 61 Am. J. Int'l L. 753. The problem with a juridical application of the concept of “threat to international peace” is that it is essentially a political concept and if it must be deployed judiciously and judicially, a multilateral framework or institution is indispensable. In the words of Professor Henkin, “threat to peace” is not capable of legal definition. It is an imprecise political concept and

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to what Canada's role should be. These non-defensive actions have often been justified on the grounds of alleged imminent danger to regional stability,\(^3\) or the ostensible need to restore or create democracies,\(^4\) or to alleviate alleged humanitarian crises.\(^5\) What is often characteristic about these recent cases of non-defensive use of force by groups of states is the absence of prior authorization by the United Nations Security Council.\(^6\)

Many states or groups of states constituting themselves into arbiters of global morality, world peace, and democratic values have frequently used or threatened to use force in imposing their visions of good governance\(^7\) and humanitarianism on an increasingly skeptical and violent world. The overriding purpose of

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international law on the use of force, particularly as articulated in the post-U.N. Charter regime, is to commit states to use force only as a last resort after the failure or exhaustion of diplomatic and other pacific means of conflict resolution. Hence, it is a fundamental principle of contemporary legal and political order that, save the narrow confines of the right to self-defence (collectively or individually), force may only be used under the authority and supervision of the Security Council. Given that most of the examples of non-defensive use of force by states in recent times have been motivated by the narrow self-interests of powerful states, or groups of states, the emerging practice of coalitions of states enthusiastic to use force outside the constraints of the U.N. Charter would condemn established norms on the use of force to irrelevance. In addition, it is a phenomenon which discomfits the global legal order, particularly in a “violent world” grappling with new forms of threats to peace such as international terrorism.

Recently, Iraq has become the focus of an assemblage of states willing and ready to use force in a purported war on terrorism and in their determination to disarm that country of its “weapons of mass destruction.” Laudable as this objective would appear, the newly formed habit of ready embrace of military force by groups of states or the so-called “coalitions of the willing” acting

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outside the restraining and deliberative institutions of contemporary global order probably marks the beginnings of a "demolition of world order" as presently constituted. Agreed that the modern world faces new forms of threats to international peace, for example, free-lance terrorists operating from failed states, it is very doubtful whether a destruction of the existing world legal order without provisions for a replacement is the answer to the threat of free-lance terrorists and outlaw states. International law is not static, and thus there is little doubt that the messianic militarism immanent in such seemingly humanitarian or pro-democratic justifications for unilateral use of force by states outside the confines of the U.N. *Charter* is not the proper way to address contemporary global disorder.

In this article, I examine the role which Canada should play in the attempts by the so-called coalition of the willing to disarm Iraq by force without express and unambiguous U.N. authorization. I argue that Canada should critically evaluate both domestic and international procedures regulating non-defensive use of force in international relations. In shaping my argument, I contend that in the domestic terrain, constitutional conventions, practices, and applicable laws as factors that shape Canada's decisions to participate in international conflicts, must be critically reconsidered. This position is espoused because an important element in the emerging practice of non-defensive use of force and its implications for the global order is the domestic political process which shapes or influences individual state participation in extra-legal use of force. Consequently, I examine the interrelationship between Canadian democratic conventions and international law on use of force. Particular attention is paid to the opinion gaining ground in several quarters that the Security Council is of doubtful legitimacy and overly politicized by the cynical and expedient interests of veto-carrying members.

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For purposes of clarity and ease of analysis, this article is divided into five parts. Part 2 briefly reviews and summarizes the Iraqi problem. In Part 3, I introduce the concept of just war as it applies to Iraq. Part 4 is the central part of the article and examines the development of Canadian law and political practices on use of force in international relations. For purposes of convenience, the analysis in Part 4 is in two themes. The first theme deals with Crown prerogative in matters of foreign relations and the impact of legislative and judicial developments on this difficult issue of law. The second theme extends the arguments beyond the legal doctrine of Crown prerogative and examines the legitimizing function of parliamentary involvement in decisions pertaining to the deployment of Canadian personnel to areas of international conflict. In Part 5, I divide the history of Canadian parliamentary involvement in matters of war into epochs, namely; the colonial era and Canada’s position during the war of 1914–1918, independent Canada and the war of 1939–1945, the Korean conflict and the U.N. Charter, the first Gulf war of 1991, and finally, the contemporary efforts by the so-called coalition of the willing against Iraq.

With respect to the pre–U.N. Charter era, I argue that Canada’s domestic and international policy reflected the progressive ideals of those committed to outlawing war and promoted constraints on the ability of states to use force in non-defensive circumstances. More importantly, domestic Canadian parliamentary practices in the pre–U.N. Charter era evinced a cautious approach to the use of force or participation by Canada in international conflicts. Thus, the emergence of the United Nations, empowered to secure global peace and security, could be seen as an affirmation of Canadian skepticism towards belligerency and recourse to arms in settling conflicts.  

Regarding the U.N. Charter era, this watershed in the development of international law on use of force impacted Canadian domestic normative order on participation in acts of belligerency. Ultimately, Canada’s original fidelity to the tenets of the U.N. Charter earned it a reputation as an honest broker. However, in the aftermath of Cold War politics, Canada’s membership in the North Atlantic Treaty Organization (NATO) and geographical proximity to and special relationship with the United States of America, places it in an awkward position on matters related to use of force. In navigating this treacherous and

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intricate situation, I argue that if Canada’s multilateralist traditions and commitments to the U.N. Charter are to have meaning, parliamentary and public participation in decisions on when, how, and where Canada participates in non-defensive armed conflicts are indispensable. Ultimately, Canada has to abide by principle rather than expediency. However, with a chronically weak opposition in Parliament and a palpable democratic deficit, it would seem that the legitimacy of Cabinet decisions in matters such as the Iraqi crisis are open to question.

II. IRAQ, THE CONCEPT OF JUST WAR, AND COALITIONS OF THE WILLING

On 2 August 1990, Iraq invaded and purportedly annexed Kuwait. The Security Council met and decided pursuant to Resolutions 660 and 661 (1990) of August 1990, that Iraq was in violation of international law. Consequently, it demanded the immediate and unconditional withdrawal of Iraq from Kuwait. Following Iraq’s refusal to withdraw, the Security Council passed Resolution 678 (1990) of 29 November 1990, authorizing member states to use all necessary means to expel Iraq from Kuwait.

Iraq refused to comply and was forcefully expelled from Kuwait by an alliance of states including Canada. As part of the settlement of the Gulf War, Iraq was required to destroy its programs on weapons of mass destruction made up of nuclear, biological, and chemical weapons. After series of United Nations’ supervised efforts to disarm Iraq, it became evident that Iraq had not fully, accurately, finally and completely disclosed all aspects of its programs to develop weapons of mass destruction and ballistic missiles with a range greater than 150 kilometers. Following disagreements between Iraq and U.N. inspectors, Iraq expelled the United Nations’ inspectors in 1998. The weapons inspections program was to remain in the doldrums for nearly four years.

However, following the terrorist attacks of 11 September 2001, the United States declared a “war on terror” and in his “State of the Union” address in 2002,

20 Historically, Iraq and Kuwait were originally part of the Ottoman Empire. And prior to the rise of the Ottoman Empire itself, and “the Arab conquest of the seventh century, Iraq had been the site of a number of civilizations, including the Sumerian, Babylonian and Assyrian, with Baghdad the capital and centre of arts and learning.” See L.C. Green, “Iraq, the U.N. and the Law” (1991) 29 Alta. L. Rev. 560.


U.S. President George Bush characterized the Iraqi government with Iran and North Korea as members of what he termed “an axis of evil.” Thereafter, the U.S. pressured the U.N. to ensure that Iraq was made to comply with its obligations under numerous Security Council resolutions. The United States also threatened to unilaterally disarm Iraq if it felt that the U.N. was unwilling to do so. After a series of threats by the United States, on 17 September 2002, Iraq accepted another round of U.N. inspections. Consequently, on 8 November 2002, the Security Council passed another resolution affirming Iraq’s obligations under relevant resolutions and asked Iraq to comply with a stricter inspection regime, failing which the U.N. would visit it with severe consequences. In the face of the global divide as to whether states may use force to disarm Iraq if it failed to disarm voluntarily, the question has arisen as to the legitimacy of the threats by the so-called “coalition of the willing” and more particularly whether Canada may legitimately participate in such use of force against Iraq if the coalition attacks Iraq without explicit U.N. authorization and supervision.

The Iraqi situation presents the problematic question of the U.N.'s role in the global rule of law in an age where immense force is concentrated in one superpower, the United States. What is remarkable in the contemporary relationship between powerful and regional bodies and the Security Council is the disturbing trend in which states or regional groups unilaterally decide, when, how, and where “threats to global peace” have materialized and upon making such determinations by themselves, they proceed to impose on themselves the duty of removing such perceived threats to international peace and security. In many instances, particularly with respect to Iraq, ambiguous U.N. authorization has been twisted and submitted to tortuous interpretations to yield unintended results. While some of these crisis situations and the decisions to resort to the use of force have become subjects of ratification or acquiescence by the Security Council, it seems obvious that the emerging trend of unilateral use of force by


"coalitions of the willing" poses severe challenges to traditional and recognized
constraints of domestic and international law on the use of force by states.

More importantly, in situations where the motives for such unilateralist
actions are barely camouflaged self-interest, or are at best unclear and
unconvincing to the global community, there is ample reason for a calm
appraisal of the processes of domestic authorization of Canada’s participation
in such unilateralist forays. Given that the presumption of international law is
that violence should be avoided unless necessary in given situations, and must
be used sparingly and with proper authorization, a national regime which
potentially gives ample power to the Prime Minister to place Canada in conflicts
must be avoided.

For Canada, significant issues of law, democracy, and policy are raised by
this emerging trend. For example, under what circumstances, if any, may Canada
legitimately deploy troops and equipment to conflicts that have no direct
implication for Canadian peace, security, and territorial integrity? Should Canada
engage in “enforcement actions” which are not authorized by the Security
Council? In the face of skepticism in some quarters that the U.S.—led desire for
a “regime change” in Iraq is not truly motivated by a distaste for tyranny or
a profound humanitarian impulse for Iraqis, or to rid Iraq of weapons of mass
destruction, but is instead a desire to “unshackle oil in Iraq” and gain geo-
political advantage in the region, it is necessary to determine whether the
proposed military action by the coalition of the willing is just.

26 Powell: Regime Change The Best Way to Disarm Iraq" Reuters (25 September 2002),
online: Reuters <reuters.com>. According to U.S. Secretary of State Colin Powell, “regime
change is the best way to ensure that Iraq disarmed.”

27 If democracy and good governance were the basis of American relations, several of its close
allies in the Gulf region and elsewhere would fail the test. None of Saudi Arabia, Kuwait,
Egypt, Pakistan or several other “allies” of the U.S. are models of democracy. Most of the
governments in the industrializing world regarded by America as “allies” torture, kill, and
maim political opponents just as Saddam Hussein reputedly does in Iraq. Virtually all the
charges leveled against Iraq would apply with equal force to Pakistan. Yet, there has been
no call for a “regime change” in those countries. Remarkably, U.S. reasons for deposing
President Saddam Hussein have shifted from his alleged links with al-Qaeda to his obsession
with weapons of mass destruction. See Molly Ivins, “Bush Moves Iraq Goalposts All Over
Field” Fort Worth Star Telegram (22 September 2002) 25.

28 Dan Morgan & David Ottaway, “War Could Unshackle Oil in Iraq” Washington Post (15
September 2002) A1. According to this report, “American and foreign oil companies have
already begun maneuvering for a stake in [Iraq]’s huge proven reserves of 112 billion barrels
of crude oil, the largest in the world outside Saudi Arabia.” Ibid.
III. THE CONCEPT OF JUST WAR, COALITION OF THE WILLING, AND IRAQ

In his *Summa Theologica*, Thomas Aquinas postulated that:

[F]or a war to be just three conditions are necessary. First, the authority of the ruler in whose competence it lies to declare war...secondly, there is a required a just cause: that is those who are attacked for some offence merit such punishment. St. Augustine says,[29] "Those wars are generally defined as just which avenge some wrong, when a nation or a state is to be punished for having failed to make amends for the wrong done, or to restore what has been taken unjustly." Thirdly, there is required the right intention on the part of the belligerents: either of achieving some good object or of avoiding some evil...[However], it can happen that even when war is declared by legitimate authority and there is just cause, it is, nevertheless, made unjust through evil intention. St. Augustine says, "the desire to hurt, the cruelty of vendetta, the stern and implacable spirit, arrogance in victory, the thirst for power, and all that is similar, all these are justly condemned in war."

It is noteworthy that the postulations of Thomas Aquinas and St. Augustine influenced early international law which ultimately imposed the constraining structure and processes of contemporary international law on the use of force. In other words, international law on the use of force is deliberately calibrated to constrain, rather than encourage, the use of force by states. Hence, if the postulations of Thomas Aquinas and St. Augustine are to be used as some form of guidance in measuring existing obligations regarding use of force by states, Canada and indeed the world at large would have serious doubts about the U.S.-led "coalition of the willing."

Although the elimination of weapons of mass destruction is an admirable objective, the hypocrisy behind the project to remove and destroy weapons of mass destruction in Iraq leaves much to be desired. It is significant that the Iraqi appetite for weapons of mass destruction was whetted, abetted, and condoned principally by the U.S. In addition to this appalling policy of hypocrisy, the

29. *Contra Fastum*, c. 420 A.D., Bk. LXXXIII.
30. Thomas Aquinas, *Aquinas: Selected Political Writings*, trans. by J.G. Dawson (Oxford: Basil Blackwell, 1948) at 159. Suarez and Bellarmin added as a fourth condition the *debitus modus*, that is, the war must be fought with the right means.
33. Iraq is known to possess chemical and biological weapons which ironically it obtained with the help and collusion of institutions and corporations in the United Kingdom, United States,
U.S. determination to rid the world of weapons of mass destruction is not even-handed. If justice is about treating like cases alike, it seems unjust that other states with atrocious human rights records and an appetite for nasty weapons have not been treated like Iraq. When the U.S. posture on states similar to Iraq is juxtaposed, the inconsistency becomes indefensible and an insult to common sense. For example, states such as North Korea, Israel, Pakistan, and India are known to have sought to acquire or have already acquired and stockpiled weapons of mass destruction but have not been threatened with unilateral military action by the “coalition of the willing.” It would therefore seem that in relation to the tests of just war, the U.S.-led “coalition of the willing” is, in the words of Senator Robert Byrd of the U.S. Senate, a “product of presidential hubris.” In effect, the martial disposition of the coalition of the willing is a display of might rather than the vindication of international law and justice.

Further, some commentators have wondered why the forceful removal of President Saddam Hussein is more important now than it was in previous years. As Nicholas Kristoff has argued, “there is no evidence that invading Iraq is any more urgent today than it was in, say, 2000.” Allegations that Iraq has links to Germany, etc. According to a recent report, “between 1985 and 1988, the non-profit American Type Culture Collection made 11 shipments to Iraq that included a “‘witches’ brew of pathogens” including anthrax, botulinum toxin and gangrene. All shipments were government approved.” See Paul Wyden, “Will The US Reap What it Has Sown? Byrd Asks” West Virginia Gazette (27 September 2002) 4; Robert Novak, “A Little U.S.-Iraqi History” CNN (9 September 2002). See also, Christopher Dickey & Evan Thomas, “How the US Helped Create Saddam Hussein” Newsweek (23 September 2002) 7. According to this report, “the history of America’s relations with Saddam is one of the sorrier tales in American foreign policy...It is hard to believe that, during most of the 1980s, America knowingly permitted the Iraqi Atomic Energy Commission to import bacterial cultures that might be used to build biological weapons. But it happened. Through years of tacit and overt support, the West helped create the Saddam of today, giving him time to build deadly arsenals and dominate his people. American officials have known that Saddam was a psychopath ever since he became the country’s de facto ruler in the early 1970s.” Ibid. Maureen Dowd, “Why? Because We Can” New York Times (29 September 2002) 29. Senator Robert Byrd, “Rush To War Ignores U.S. Constitution” Speech on the Floor of Congress (3 October 2002).

al-Qaeda remain unsubstantiated. There have been attempts to explain this on the grounds of alleged Iraqi links to the terrorist acts of 11 September 2001. Yet, no evidence or proof has been tendered to prove such links. Indeed, the Taliban regime in Afghanistan was known to have been created and sustained by the Pakistani government. The Taliban regime sheltered Osama bin-Laden’s al-Qaeda group. Yet Pakistan is an “ally” of U.S. in the war on terrorism. In addition, there are doubts about whether proponents of unilateral military action against Iraq have any clear program of action to deal with the aftermath of removing the tyrannical regime of Saddam Hussein. More worrisome is the perception, fuelled by recent undiplomatic remarks by President Bush, that the desire for a regime change in Iraq is predicated on personal vendetta. According to the U.S. President, Saddam Hussein is “the guy that tried to kill my dad.”

Furthermore, there is a school of thought which believes that recent emphasis on regime change in Iraq by the Bush Administration is a diversion from the pressing issues of domestic governance in the United States. Speaking for this school, Paul Krugman argued in a recent op-ed piece in the New York Times that, in the end, 19th century imperialism was a diversion. It is hard not to suspect that the Bush doctrine is also a diversion—a diversion from the real issues of dysfunctional security agencies, a sinking economy, a devastated budget and a tattered relationship with our allies.

participated in many major studies of Iraq’s capabilities, the White House report was a “glorified press release that doesn’t come close to the information the U.S. government made available on Soviet military power when we were trying to explain the Cold War.” Ibid. See also Alan Freeman, “Iraq Dossier Gets Cool Reception” Globe & Mail (25 September 2002).


There are new reports that terrorists group operating in Pakistan have mounted a resurgent wave of activities. See John Lancaster & Kamran Khan, “Extremist Groups Renew Activity in Pakistan—Support of Kashmir Militants is at Odds with War on Terrorism” Washington Post (8 February 2003) A1.


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Finally, on this point, there are considerable scholarly doubts regarding the legality of claims to a “forcible enforcement of the inspection regime.” This is largely because the original Security Council Resolution, 1154, regarding the weapons inspection regime did not authorize unilateral use of force. Indeed, later resolutions on the same subject matter did not provide for the use of force to compel disarmament. Moreover, scholarly opinion on the legality of implied authorizations of the use of force is opposed to the idea that ambiguous Security Council resolutions should be construed liberally to justify unilateral use of force. A fundamental objective of the U.N. Charter is to “save succeeding generations from the scourge of war,” so resolutions of the U.N. should be read in a manner consistent with this objective. In sum, any unilateral use of force against Iraq by the “coalition of the willing” will fail the tests for just war.

IV. CROWN PREROGATIVE AND JUDICIAL REVIEW OF CANADA’S PARTICIPATION IN INTERNATIONAL CONFLICTS

Originally, the position of the common law was that the royal prerogative was immune from judicial review. In Canada, the right to declare war is a prerogative of the Crown. Dicey describes prerogative as the “residue of discretionary or arbitrary authority, which at any given time is left in the hands of the crown.” The term “Crown” in the juridical sense refers in a collective sense to all the persons and institutions of the state who lawfully act in the name of the Queen. In other words, the word “Crown” is synonymous with the less grandiose term “government.” However, judicial deference to Crown prerogative has yielded to a regime of measured judicial review. Hence, in modern times, the prerogative of the Crown is not a boundless power. As Professor Hogg has pointed out, “the prerogative of the Crown is a branch of the common law, because it is the decisions of the courts which have determined its existence and extent.”

43 Jules Lobel & Michael Ratner, infra note 142.
44 Charter, supra note 1, Preamble.
47 Patrick Monahan, Constitutional Law (Concord: Irwin Law, 1997) at 62.
Although the scope and extent of the Crown prerogative has been somewhat limited by the courts and by some statutory provisions, there seems to be an unresolved question as to whether the Crown’s prerogative to declare war and make peace on behalf of the state is in modern times subject to judicial review. In the celebrated GCHQ case, the House of Lords, per Roskill L.J., placed the “defence of the realm” among those categories which “at present advised I do not think could properly be made the subject of judicial review.” Clearly, in England the law is settled that matters of foreign policy including decisions by the Crown on participation in acts of belligerency are not justiciable. Indeed, the British government is not even legally obliged to give reasons for its decisions on such matters that pertain to foreign policy and the courts in England do not have the authority to rule on the true meaning and effects of obligations applying only at the level of international law.

It would seem that the position in Canada is somewhat unclear. Legislative developments such as the National Defence Act and the War Measures Act (when it was still in effect), which encroach on Crown prerogative in matters regarding defence of the realm, have potentially extended the reach of judicial review. It is now settled law in Canada that where an exercise of Crown

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54 Ibid. at 418.
58 Gibran Van Ert, supra note 18 at 93.
61 As Professor Monahan observes, “the courts have held that where a prerogative power has been regulated or defined by statute, the statute in effect displaces the prerogative and the Crown must act on the basis of the statutorily defined power.” Monahan, supra note 47 at 63. See A.G. v. De Keyser’s Hotel Ltd., [1920] A.C. 508 (H.L.). Monahan, ibid. Given that

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prerogative breaches written laws, the courts will not shirk from the duty of reviewing the Crown prerogative in issue. Canadian courts in *Air Canada v. British Columbia*, 62 *Schmidt v. The Queen*, 63 *United States of America v. Cotroni*, 64 and *United States of America v. Burns*, 65 have displayed an unmistakable willingness to subject Crown prerogative to judicial review, particularly where rights protected by written laws are alleged to have been violated by the exercise of Crown prerogative.

However, none of the cases mentioned above deals squarely with the justiciability 66 of executive decisions on Canadian participation in use of force in international relations. To the best of my knowledge, the only case which may be of some relevance is the Supreme Court decision in *Operation Dismantle v. The Queen*. 67 The appellants alleged that the decision of the federal Cabinet to allow the United States to test cruise missiles in Canadian airspace violated their rights as enshrined in s. 7 of the *Charter of Rights and Freedoms*. 68 The majority of the Court dismissed the action on the grounds that the alleged increased threat of nuclear war supposedly inherent in the tests was predicated on speculative hypothesis. However, the Court was clear that foreign policy decisions of the government made by the Cabinet are justiciable where such decisions are alleged to infringe the rights of Canadians or persons resident in Canada.

The reasoning of the Court is somewhat difficult to follow. The plurality of the Court indicated that judicial restraint from review of such decisions is premised on the theory that proof of facts in support of justiciability of such claims would be almost impossible. In the words of the majority of the Court:

>[S]ince the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal

the provisions of the *Emergencies Act* relate to issues of domestic integrity, security and territorial integrity of Canada, I will avoid further analysis of this legislation and its possible implications for the subject under analysis.

66 In the United States, the issue of justiciability of “political” questions is often vexed. See *Coleman v. Miller*, 307 U.S. 433 (1939).
67 *Operation Dismantle, supra* note 51.
link between the decision of the Canadian government to permit the testing of the cruise [missiles] and the results that the appellants allege could never be proven.\textsuperscript{69}

These comments reflect the view of Lord Radcliffe in \textit{Chandler v. D.P.P.}\textsuperscript{70} regarding the ability of the courts to review the complex host of factors which come into play when a parliamentary cabinet decides on participation in international conflicts. However, Wilson J. anchored her decision on the propriety of judicial review rather than the fictional inability of the courts to review such Cabinet decisions. In her words:

\begin{quote}
[I]f we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to “second guess” the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the \textit{Charter} to do so.\textsuperscript{71}
\end{quote}

It would therefore seem that a Cabinet decision placing Canada in a state of international conflict is not justiciable \textit{per se}, but may be judicially scrutinized where there is evidence to support the claim that the Cabinet decision has infringed the rights of Canadians in circumstances that are not demonstrably justifiable in a free and democratic society. In sum, the Crown prerogative on matters of war remains intact, albeit with some modicum of judicial inroads.

Be that as it may, assuming there is no explicit authority in support of judicial review of Crown’s prerogative to place Canada in active belligerency or to engage in enforcement actions authorized by the U.N., Crown prerogative in such matters is politically constrained by parliamentary practices and democratic norms. Although these practices do not have the juridical character of customary law as their equivalents in international law, they embody accepted codes of conduct impacting on the legitimacy of such decisions. Consequently, Crown prerogative, at least in the political sphere, is not a blank cheque. Theoretically, democracy and parliamentary practices are designed to curb executive rascality and impetuosity, particularly in matters as grave as the use of force in international relations.

The absence of explicit constitutional constraints on the Crown prerogative to declare war is derived from Canada’s constitutional heritage (inherited from

\textsuperscript{69} \textit{Ibid.} at 452.
\textsuperscript{70} \textit{Chandler, supra} note 49.
\textsuperscript{71} \textit{Operation Dismantle, supra} note 51 at 472.
British constitutional conventions) whereby "political leaders could be trusted to exercise power in a restrained and responsible fashion." The reverse could be said to be the case in the U.S. where laws are designed to curb executive propensity for war. In the U.S., it is arguable that the separation of powers is stricter and thus the courts are institutionally leery of second-guessing the competence of Congress to declare war and make peace.

The trusting relationship in Canada is probably reciprocal and is ostensibly founded on the Kantian notion that a parliamentary regime with the restraints of democratic and responsible governance would be less likely to use force in international relations unless there are clear, justifiable and compelling circumstances to warrant such momentous decisions. The theory is that only an irresponsible government would disregard informed public opinion or parliamentary participation when formulating decisions regarding deployment of Canadians to war. If such a government were to be so reckless, there would probably be a heavy political price to pay for such folly.

However, with mounting evidence of increased power in the hands of the Canadian Prime Minister vis-à-vis an impotent and fractious opposition in the Canadian political system, it is doubtful whether Canada's imprudent trust in executive good faith on such an extraordinary matter as the use of force in international relations is not unduly naive and long overdue for a rethink. Although the decision to use force in international relations may in some circumstances become a potential subject of judicial review, the importance of

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72 Monahan, supra note 47 at 17.
73 Louis Henkin, "Is There a 'Political Question' Doctrine?" (1976) 85 Yale L.J. 597.
74 Martin Redish, "Abstention, Separation of Powers, and The Limits of the Judicial Function" (1984) 94 Yale L.J. 71; Fritz Scharpf, "Judicial Review and The Political Question: A Functional Analysis" (1966) 75 Yale L.J. 517; Melville Weston, "Political Questions" (1925) 38 Harv. L. Rev. 296. The issue of justiciability of the so-called "political questions" other than war has met with mixed results in the United States. See e.g. Baker v. Carr, 369 U.S. 186 (1962). The presence of clear constitutional restraints on executive forays into belligerency has not necessarily stopped the government of the United States from participating in wars without express Congressional declaration of war. America last declared war in the Second World War but has since engaged in conflicts as in Vietnam.
75 Some commentators have made legitimate observations to the effect that Canada is witnessing an increase of power in the hands of the Prime Minister and a "decay of Parliament." See Wes Pue, "The Chretien Legacy" Parkland Post (4 December 2001) 1. At a recent public function at the University of British Columbia, the Member of Parliament for Vancouver-Quadra, Stephen Owen, argued that caucus discussions are open, animated, and effective.
popular participation in parliamentary debates on issues of when, how, and
where Canada uses force in international relations seems to be in the realm of
political legitimacy rather than juridical validity. Needless to say, to ensure that
Canada is not needlessly plunged into conflicts, a crucial factor is a vibrant,
responsive, and alert Parliament. It therefore follows that in examining the
probative value to be attached to the processes which yield Canada’s decisions
to play a role in international conflicts, regard must be had to certain factors
including the quality of the debate in Parliament, the power of the caucus, the
potency of the opposition parties, and the extent to which members of the public
appreciate the nature of sacrifices which belligerency inevitably imposes on the
state. It is now apposite to evaluate the normative significance of Canadian
parliamentary practices regarding the use of force in international relations since
1914 to the present date.

V. INTERNATIONAL CONFLICTS, CANADIAN POLITICAL
PRACTICES, AND IMPLICATIONS FOR GLOBAL LEGAL AND
SECURITY ORDER

A. Canada and the War of 1914–1918

In 1914, Canada was a colony of the United Kingdom. This historical factor
heavily influenced the political legitimacy of the circumstances in which Canada
participated in that war. It is therefore not surprising that the political processes
preceding Canadian participation in the war of 1914–1918 seemed to be a poor
rehash of parliamentary developments and events in the U.K. Accordingly, like
other British colonies, Canada joined the war on 4 August 1914, the same day
as the U.K. It is significant that the colonial government in Canada took certain
steps to legitimate, at least in the court of public opinion, Canada’s participation
in that war.

First, on 4 August 1914, the Canadian government “issued an order in council
indicating that Canada was at war with Germany.” What is interesting here is
that although Parliament was not sitting at the time when war broke out between
Great Britain and Germany, Parliament was reconvened on 18 August 1914. It
was on that day that after hearing the Governor General’s speech in the Senate,
the Canadian government issued an order-in-council proclaiming that Canada

Decision to Participate” (Ottawa: Canada Communication Group, 1992).
77 Ibid. at 3.
was at war and created war-related measures.\textsuperscript{78} Second, the decision to go to war was debated in Parliament and in a normative sense, it is correct to say that there was popular input to the government’s ultimate decision to join the conflict on the side of Great Britain. It would therefore seem that these measures conferred legitimacy on Canada’s participation in the war of 1914–1918.

Shortly after the war of 1914–1918, there was a heightened global movement towards arbitration of disputes and possibly the outlawing of war.\textsuperscript{79} Greater emphasis was placed on the former, and thus a decision as to whether to engage in war was to be predicated on a failure of honest and serious attempts at pacific settlement of disputes. This understanding was reflected in the Pact of the League of Nations. The significant aspect of the normative thrust of the League of Nations was that war was forbidden if the conflict had not been first submitted to arbitral jurisdiction and judicial settlement or to the examination of the Council created by the League.\textsuperscript{80} On the whole, it may be argued that the “legal principles of the League of Nations were extended in the direction of outlawing war.”\textsuperscript{81} It is equally interesting that the United States of America was one of the greatest proponents of constraining the legal abilities of states to wage war, particularly wars of aggression.\textsuperscript{82} Thus, the Protocol of Geneva of 1923 and the Pact of Locarno represented attempts by some states during this era to constrain states from resorting to war. These agreements did not, however, prevent the Graeco–Bulgarian conflict but they influenced the Kellogg–Briand Pact of 27 August 1928, which outlawed all aggressive wars.\textsuperscript{83}

Canada was a signatory to the Kellogg–Briand Pact. In addition to the juridical milestone created by the Pact, its moral import was no less significant. It criminalized states which engaged in aggressive warfare and disallowed war as a means of national policy. Implicit in this normative shift is that war is

\textsuperscript{78} House of Commons, Debates (19 August 1914).
\textsuperscript{79} For an account of this epochal development in international law, see Hans Wehberg, \textit{The Outlawry of War} (Washington: Carnegie Endowment, 1951).
\textsuperscript{80} Article 12(1), \textit{League of Nations}, 225 Can. T.S. 188 (1919); Wehberg, \textit{ibid.} at 9.
\textsuperscript{81} Wehberg, \textit{ibid.} at 14.
\textsuperscript{82} The high noon of U.S. efforts in this regard is undoubtedly the Kellogg–Briand Pact for world peace. This pact arose from the exchange of notes between United States Secretary of State Kellogg and his French counterpart Monsieur Briand. See (1928) 22 Am. J. Intal L. 356.
permissible if undertaken as part of an international sanction against a recalcitrant state. However, the decision as to whether or not a war of sanction was necessary was solely within the competence of the international community. Given the presumptions of the Kellogg-Briand Pact against war, such decisions were to be undertaken with the greatest solemnity and due process both at the domestic and international levels.84

B. Canada and the War of 1939–1945

It was under the legal climate detailed above that Canada and the rest of the world faced the challenges of the Second World War.85 By 1939, when the Second World War broke out, Canada was an independent state. However, formal political independence from Great Britain hardly severed or diminished existing economic, cultural and diplomatic ties between Great Britain and Canada. It was therefore natural that Canada would have strong sympathies with Great Britain when the latter declared war on Germany on 3 September 1939 after Germany had invaded Poland on 1 September 1939. It is hardly debatable that Canada’s preference to join the war a few days after Great Britain was calculated to create the impression that Canada was an independent political entity and no longer tied to Great Britain.86 Consequently, Canada allowed ten days to elapse before jumping into the fray.

What is significant for the purposes of my analysis in this article is the domestic political process which culminated in the exercise of Crown prerogative to declare war on Germany. A few facts are crucial in my analysis. First, when the war started in Europe, Parliament was not in session. Indeed, Parliament was not scheduled to resume before 2 October 1939, but owing to the emergency, Parliament was summoned on 7 September 1939. Great Britain had already been at war with Germany since 3 September 1939. After the Governor General read the Speech from the Throne, parliamentary debates on the war were held from 8–10 September 1939.87 Both chambers of Parliament debated and approved the motion for a formal declaration of war on Germany.88 What is very significant here is that parliamentary debate preceded the order-in-council

87 House of Commons, Debates (9 September 1939).
88 House of Commons, Debates (11 September 1939).
declaring war. This procedure was also followed when war was declared on Italy in 1940.\textsuperscript{89} It is thus correct to assert that from 1939 to 1940, Canada followed a pattern of debate in Parliament before using force in its international relations.

However, this pattern of parliamentary debate prior to Canadian engagement in armed conflicts was broken in the course of a subsequent increase of belligerent states in that conflict and Canada's use of force against Japan, Hungary, Romania, and Finland — countries which had aligned with Germany in the Second World War. With particular reference to Japan, Parliament had been adjourned since 14 November 1941 and was not scheduled to resume sitting until 21 January 1942. In the interval, on 7 December 1941, Japan bombed Pearl Harbour. Although there was a special sitting of the two chambers, it was not for the purposes of debating any war resolution on Japan but to hear an "address to the Canadian Parliament by the British Prime Minister, Winston Churchill."\textsuperscript{90} Parliament resumed sitting on the date scheduled, 21 January 1942, and discussed a proclamation of war on Japan dated 8 December 1941. The proclamation purported that Canada had been at war with Japan as of 7 December 1941. For the first time in Canadian constitutional history, the country was engaged in conflict without prior parliamentary debate and approval.\textsuperscript{91}

Similar proclamations which had been back-dated to 7 December 1941 were made with respect to Hungary, Romania and Finland, who all had joined the axis coalition. This untidy procedure was justified by Prime Minister Mackenzie King with the argument that belligerency with Hungary, Romania, and Finland were "all part of the same war."\textsuperscript{92} Remarkably, records of parliamentary debates on this issue support the position of the Prime Minister as none of the opposition parties questioned the normative import of the precedent set by Prime Minister Mackenzie King. Given that there were subsequent ratifications of the declarations of war against Germany's allies, there is little doubt that the declarations of war on these allies of Japan and Germany would have been quickly approved if they had been tabled before Parliament prior to the actual engagement of hostilities.

As Rossignol observes, "Canadian public opinion accepted that Canada had no choice but to maintain its war effort against the continued aggression of

\begin{footnotes}
\item[89] House of Commons, Debates (10 June 1940).
\item[90] Rossignol, supra note 76 at 5.
\item[91] House of Commons, Debates (21 January 1942).
\end{footnotes}
Germany, Japan, and Italy and their allies.”

Even the pacifist Cooperative Commonwealth Federation (CCF) party which had maintained its opposition to Canadian participation in the war yielded ground on this issue. Speaking for the CCF party in Parliament on 10 June 1940, M.J. Coldwell observed that “this war is none of our seeking; it is thrust upon us. And we have no option it seems to me, but to accept the challenge and to go forward to ultimate victory.”

However, some Canadians, particularly Professor Frank Scott, were appalled at the government’s politics in respect of prior parliamentary debate and approval of Canada’s use of force in international relations. In a letter to Prime Minister Mackenzie King in 1939, Scott complained that “a group of individuals took so many steps to place Canada in a state of active belligerency before Parliament met ... you very greatly limited Canadian freedom of action to decide what course to follow.”

In reply to Scott’s quarrels with the politics of Canadian participation in some aspects of the war without prior parliamentary approval, some commentators like Michel Rossignol have argued that Scott probably misread Canadian public opinion on the issue. According to Rossignol,

While Professor Scott thought that Parliament had been ignored, other Canadians would have been angered by any government delay in rallying to Britain’s side as soon as war broke out. In other words, there were opposing views on the importance of Parliament’s role in the process. The government, by insisting on reconvening Parliament before actually declaring war, had asserted Parliament’s importance in the political process, and this was generally accepted by Canadians.

It seems that Rossignol has misconceived the kernel of Scott’s argument. Scott’s grouse is with the procedure rather than presumptions about whether the public would have ultimately approved Canada’s use of force. In any event, the Canadian public owe no gratitude to the government for tabling such weighty issues for parliamentary discussion. The decision to use force in international relations is the most important decision and given that it is the public that bears the financial and emotional costs of such decisions, the government is obliged to engage with public input. Second, although the Canadian government, acting under extreme emergency, may place Canada in an active state of belligerency without prior parliamentary approval, there is doubt whether Canada’s wars against Finland, Japan, Romania, and Hungary fell into this category. If
Parliament had the time and patience to sit down and listen to Prime Minister Churchill, what stopped it from engaging in the more important task of debating Canada’s proposed wars against Finland, Romania, and Hungary? More importantly, Rossignol’s arguments seem to ignore the symbolic value of parliamentary participation in such momentous decisions as the use of force by the state. Even if the outcome of such parliamentary process is a foregone conclusion, due process and legitimate governance require fidelity to such conventions.

Apart from public participation in the deliberations on use of force by Canada in its foreign relations, the significant aspect of an insistence on conventions and symbolic deliberation is that it validates the undoubted centrality of Parliament in the political-cum-legal process whereby Canada uses force in its international relations. However, this obligation must be balanced with the need to maintain executive flexibility in times of great emergency. The Cabinet can make certain decisions, especially those of a military nature where speed and security are factors, before consulting Parliament. Surely, it cannot be argued that Canadian troops in the trenches of Europe, shot at by enemy troops, should not act in self-defence merely because Parliament in Ottawa had not yet debated and approved an extension of the conflict to those new enemy states.

C. The U.N. Charter, Canada and the Korean Crisis

The end of the Second World War ushered in a new era of international norms, particularly on the threat or use of force in international relations. Only two exceptions were created by the Charter of the United Nations permitting the use of force by states, namely, actions in self-defence and enforcement actions authorized by the Security Council. Canada is a member of the United Nations and a signatory to the Charter and is therefore bound by the provisions of it. On self-defence, article 51 of the Charter provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security.

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97 Charter, supra note 1 at art. 51.
98 Ibid.
Article 51 thus preserves the rights of states under customary international law to act in self-defence whether individually or collectively. Although there are two parallel regimes on self-defence, the U.N. Charter has the fundamental objective of substituting state unilateral actions with a deliberative international machinery. In effect, article 51 provisions must be read within the context of the Charter’s objective to curtail the relatively liberal regime of self-defence under customary international law. This argument is supported by the fact that having regard to the prevailing circumstances under which the Charter was negotiated, drawn, and agreed to by member states and its raison d’être, there is a discernible disposition against the use of force by states in their dealings with one another. Indeed, article 2(4) of the Charter expressly reinforces this teleological disposition.

Furthermore, articles 25 and 28 of the Charter confirm this view as both provisions seek to confer a monopoly of the use of force in international law on the Security Council. In other words, the object of the Charter is to constrain states in their ability to have recourse to force in the resolution of disputes. International law does not recognize anticipatory self-defence, or the doctrine of “first strike” recently propounded by President George Bush. The Security Council has never authorized use of force on potential or non-imminent threats of violence. In fact, the International Military Tribunal sitting at Nuremberg emphatically rejected Germany’s argument that they were compelled to attack Norway in order to prevent an Allied invasion. Defensive use of force is therefore only permissible on the occurrence of an armed attack.

103 Article 3, paragraph (g) of the “Definition of Aggression” annexed to General Assembly Resolution 3314 XXIX defines “armed attack” as, in addition to sending regular forces across an international border, “[T]he sending by or on behalf of a state of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to” armed attack if carried out by regular forces.
The second category of permissible use of force in resolving international disputes is enforcement actions authorized by the Security Council. Although the Security Council, for unjustifiable reasons, failed to act or was tardy in responding to crises in Rwanda, Zaire, Sierra Leone, Liberia, and Kosovo, there is no doubt that it is the only international organ vested with the responsibility of determining the existence of threats to international peace and removing them through the mechanism of chapter 7 of the U.N. Charter. This juridical and political fact derives from the principle of taking “effective collective measures for the prevention and removal of threats to the peace.”

Although the phrase “threat to international peace” is not defined in the Charter, the only organ in the world capable of making that determination as provided in chapter 5 of the U.N. Charter is the Security Council. As provided in article 39 of the Charter: “[T]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

The Charter also makes provisions for the mechanism by which such crucial functions may be exercised. While article 7 of the Charter establishes the Security Council, articles 23 and 24 state the responsibility of the Council. Article 24 provides that the members of the United Nations “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” The power to maintain international peace is not to be exercised capriciously. Article 24(2) thus provides that “in discharging those duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” To reinforce the supremacy of the Security Council in the maintenance of international peace, the determination of what constitutes a threat to international peace and security is the sole responsibility of the Council. In removing threats

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107 Charter, supra note 1 at art. 39 [emphasis added].
108 Ibid. at art. 24(1).
to international peace by enforcement actions, the Security Council may utilize the services of regional organizations. As provided in article 53, "[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." From the foregoing, it is clear that no enforcement action may be taken by any organization or state without the authority of the Security Council. To assess the legitimacy of Canada's participation in "enforcement actions," two levels of analysis are required. The first is to determine whether the enforcement action in question has been authorized by the Security Council and the second is whether the domestic processes leading to Canadian participation in such enforcement actions are legitimate. In determining the first, it is imperative to define enforcement actions.¹¹⁰

The editors of the *European Commentary on the Charter of the United Nations* have argued that by virtue of the travaux préparatoires of the *Charter*, all measures under chapter 8 of the *Charter*, without exception, are enforcement measures. A different school of thought defines enforcement actions as the use of military force and mandatory sanctions excluding purely defensive actions.¹¹¹ It would seem that enforcement actions relate to those actions (excluding defensive acts) which ultimately require military coercion or force for their effect.¹¹²

Further, in examining the legitimacy of Canada's participation in enforcement actions after the entry into effect of the U.N. *Charter*, it has to be borne in mind that the long ideological struggle between the defunct "Soviet Union and the United States [and their respective allies] defined much of each

¹⁰ *Charter*, supra note 1 at art. 53 [emphasis added].
¹¹¹ Michael Akehurst, "Enforcement Action By Regional Agencies With Special Reference To The Organization of American States" (1967) 7 Brit. Y.B. Intal L. 175.
¹¹² In 1960, there was an unsuccessful attempt by President Trujillo of the Dominican Republic to assassinate President Betancourt of Venezuela. The member states of the OAS acting under arts. 6 and 8 of the Rio Treaty agreed to impose sanctions on the Dominican Republic and a break of diplomatic relations with it. At the Security Council, the Soviet Delegate argued that the OAS action amounted to an enforcement action requiring the prior authorization of the Security Council. UN Doc.s/4491 (9 September 1960). Compare with the Cuban Quarantine of 1962, U.S. Dept. of State, (1962) Bulletin xlvii at 15; UN Doc S/PV.992-8 (1962).
nation’s view of the legality of threatening or using military force in international relations.”

In the wake of the end of the Cold War, it follows that interpretations of legitimate use of force would contain less ideological rhetoric than before. Another factor which has an impact on the legitimacy of Canada’s participation in enforcement actions is her membership in certain military organizations, such as NATO. The cumulative impact of these momentous factors is that Canada’s reputation as an honest broker is often strained. An evaluation of Canada’s role in the Korean Crisis and the Gulf War helps to understand the difficulty Canada often faces in walking the tight-rope.

On 25 June 1950, North Korea invaded South Korea. Due to the propitious absence of the Soviet representative on the Security Council, the Council passed a resolution authorizing member states of the U.N. to assist South Korea in dealing with North Korean aggression and to restore peace on the Korean peninsula. The Security Council resolution was brought to the attention of Parliament by the Secretary of State for External Affairs, Lester B. Pearson. In the course of parliamentary debates on the nature of Canada’s participation in the Korean conflict, Prime Minister St. Laurent strongly argued that

any participation by Canada in carrying out [the Security Council Resolution]—and I wish to emphasize this strongly—would not be participation in war against any state. It would be our part in collective police action under the control and authority of the United Nations for the purpose of restoring peace to the area where an aggression has occurred as determined under the Charter of the United Nations by the Security Council, which decision has been accepted by us.

From the foregoing, it is clear that both the Prime Minister and Parliament were clear that if Canada were to participate in the operation in the Korean peninsula, it was doing so as part of the collective police action under the auspices of the Security Council rather than as a belligerent act orchestrated by a group of states acting outside the authority of the Security Council. More importantly, there was a definite commitment on the part of the Prime Minister to submit the question of Canada’s participation in the enforcement action to parliamentary debate. According to Prime Minister St. Laurent, “If the situation in Korea or elsewhere, after prorogation [of Parliament], should deteriorate and action by Canada beyond that which I have indicated should be considered, Parliament will

114 House of Commons, Debates (30 June 1950) at 4459 [emphasis added].
immediately be summoned to give the new situation consideration.” Although Parliament did not “pass a motion specifically dealing with Canadian participation in U.N. police action in Korea,” the desirability of Canadian participation in the enforcement action was raised in Parliament on 26 and 30 June 1950, and on 29 August 1950. Clearly, notwithstanding the added layer of the U.N. regime to the law on use of force by states, the Canadian political process made room for debate on whether Canada ought to participate in the Korean conflict. It is equally arguable, as already pointed out by Rossignol, that by passing the Defence Appropriation Act (which was tied to the expenses in the Korean conflict), Parliament impliedly authorized Canada’s participation in U.N. enforcement action against North Korea. Although the legality of U.N. action in Korea or the U.N. condonation of the action is a matter of debate in some circles, it is arguable that the Korean conflict established the principle that Canada can be involved in a collective police action against a state as authorized by the U.N. without such military action being construed as unlawful.

As already noted, two major contributions by the U.N. Charter to the jurisprudence of international law on the threat or use of force are (1) the collective use of force to deal with threats to peace and aggression, and (2) the renunciation of the use of force by governments and its replacement with the peaceful resolution of disputes. These two tenets require that states accept the limits imposed by law, even when their instincts and self-interests suggest otherwise. These principles further elevate multilateralism to an end in itself, not a mere tactic to be used or dumped at the whim of national interests. It would amount to a restatement of the obvious to say that the Canadian attitude to the threat or the use of force has been heavily influenced by these two pillars of international law. Through a tradition of domestic debate prior to or immediately after the use of force, Canada has deferred to the authority of the

115 Ibid.
116 Rossignol, supra note 76 at 8.
118 House of Commons, Debates (8 September 1950) at 495.
119 According to some scholars such as Hans Arnold, the activities in Korea were not a U.N. war but a war of Western states condoned by the UN. See Hans Arnold, “The Gulf Crisis and The United Nations” (1991) 42 Aussenpolitik 68.
121 But see Madeleine Albright, “The United States and the United Nations: Confrontation or Consensus?” (1995) 61 Vital Speeches of the Day 354, arguing that multilateralism is a means, not an end.
122 Lobel & Ratner, infra note 142.

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Security Council as the ultimate supervisor and executor in matters related to non-defensive use or threat of use of force in international relations.\textsuperscript{123}

However, certain circumstances and developments such as Cold War politics, Canadian proximity to the U.S., plus Canadian membership in NATO often combine to stretch Canadian reluctance to act only within the strict letters of the U.N. \textit{Charter} on matters regarding unilateral or non-defensive use of force.\textsuperscript{124} It can hardly be doubted that Canada's other obligations to members of NATO have impacted and will continue to impact on Canadian responses to military threats or the temptation to use force outside the regime of the United Nations.\textsuperscript{125} Regardless of the seductions of power, Canada should refuse to participate in any non-defensive military operation by NATO or the so-called coalition of the willing where such military operations are unauthorized by the Security Council.

D. The Gulf War, Canada, and the Legitimacy of the Security Council

For many decades, the Korean conflict remained the solitary instance wherein the U.N. authorized or at least condoned a collective police action against a belligerent state. Therefore, when on 2 August 1990, Iraqi tanks rolled into Kuwait and Iraq purportedly annexed it, there was global apprehension that Iraq had put the U.N. machinery to a severe test. As indicated in the preceding pages, the U.N. responded by asking Iraq to withdraw from Kuwait. Following Iraq's refusal to withdraw, sanctions were imposed and the Security Council ultimately authorized member-states to assist Kuwait in repulsing the Iraqi aggression. The sanctions imposed on Iraq required military forces for their implementation and Canada, a leading proponent of support for enforcement actions, did not have any problems with the resolutions on Iraq.

Given that the enforcement action to remove Iraq from Kuwait (and no more) was sanctioned by the U.N., there was no need for a declaration of war against

\textsuperscript{123} As Rossignol has argued, "Canada has always strongly supported the United Nations and championed collective action to ensure international peace." Rossignol, \textit{supra} note 76 at 13.

\textsuperscript{124} For a fuller discussion of this issue, see \textit{The New NATO and the Evolution of Peacekeeping: Implications for Canada}, Report of the Senate Standing Committee on Foreign Affairs, Seventh Report (April 2000).

\textsuperscript{125} There is no problem under the U.N. Charter with NATO members undertaking non-Article 5 operations in respect of self-defence. There is a problem when NATO engages in military operations of a non-defensive character. Only the U.N. Security Council has the authority to permit such actions.
Iraq. But there was need for a parliamentary debate of the issues. In addition, it was within the powers of the Governor-in-Council, without recalling Parliament, to authorize other actions taken by Canada in pursuance of the resolutions made by the Security Council. Moreover, since 1992, the United Nations Act\(^{126}\) and Special Economic Measures Act\(^{127}\) made it easier for Parliament to adopt and enforce emergency\(^{128}\) measures without being recalled. The determination of whether or not an emergency exists is the responsibility of Parliament. The troubling question here is whether these two legislative provisions have avoided domestic parliamentary debate and Canadian public participation in military activities.

In my view, even when such military measures have been authorized by the Security Council, it would be desirable that the Canadian populace have a place in the debates leading to the deployment of Canadian personnel to zones of international conflict. These concerns arise because it is becoming increasingly obvious that decisions of the Security Council on use of force may reflect narrow geo-political-cum-economic interests of powerful veto-bearing members of the Council rather than entrenched global interests or Canadian values. In other words, aside from the undoubted legal powers of the Security Council to authorize enforcement actions, Canada should play a progressive role on the issue of global legitimate governance, particularly with respect to the Security Council.\(^{129}\)

In the aftermath of the terrorist attacks on the United States on 11 September 2001 and the emergence of new forms of threats to international peace and security, the institutional and juridical capacity of the Security Council to terminate wars, eliminate threats to peace, and institute a regime of global governance has been seriously questioned. This situation is further complicated by an increasingly uni-polar world determined to exploit multilateralism in cynical ways. As multilateralism shrinks to a unilateralist display of economic and military might, Canada is placed in the invidious position of adhering to the letter and spirit of the U.N. Charter while taking extreme care to ensure that it


\(^{128}\) The Act defines emergency as “war, invasion, riot, or insurrection, real or apprehended.”


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does not jeopardize its enormous economic, cultural, and security ties with the U.S.

E. Canada, Coalitions of the Willing and Global Legal Order

Perhaps no other international issue has exposed the Canadian quandary about this matter than the current determination by the U.S. to assemble a "coalition of the willing" against Iraq. In the circumstances, the seductions of expediency may trump a principled rejection of any unilateralist non-defensive action by any such coalition of the willing against Iraq. As indicated earlier, the realpolitik of the Security Council is that the five permanent members of the Council do not always act in the best interests of humanity. Sometimes, they are propelled by national self-interest. In determining what role Canada should play in the case of Iraq, it must be acknowledged that the Iraqi crisis is difficult but not imponderable. Saddam Hussein, the "butcher of Baghdad" is a well-known psychopath and a murderous thug. His pathological disdain for the rule of law and his love for raw cruelty are well-known, and have been notorious since 1979. However, the Canadian response to the Iraqi crisis should not lose sight of the hypocrisy and double standards in its current revulsion over Hussein.¹³⁰ These pragmatic considerations ought to be fully ventilated in Parliament and in public forums to enable Canadians to appreciate the nuances of the issues and to offer informed input regarding Canada’s role in any contemplated enforcement actions.

First, those who today insist that there must be a “regime change” in Iraq and vow that Iraq’s weapons of mass destruction must be destroyed, were the same institutions and persons who helped create and sustain the monstrosity which Iraq has become.¹³¹ Hussein was encouraged and appeased by his current


¹³¹ It is remarkable that twenty years ago, precisely on 20 December 1983, U.S. Secretary of Defence Donald Rumsfeld was in Baghdad as an envoy of President Reagan. At that time, Secretary Rumsfeld said he was happy to be in Baghdad and was delighted to convey President Reagan's greetings to President Saddam Hussein. Again, at the material time, it was known in intelligence and diplomatic circles that President Hussein was trying to build nuclear weapons and acquire other weapons of mass destruction such as biological and chemical weapons. The Israel government had already bombed Iraq’s nuclear reactor at Osirak. Yet, the Reagan administration, fearing that the clerics of Tehran would overrun Middle Eastern oilfields, supported or at least condoned Iraq’s quest for illegal weapons. In addition to providing generous supplies of arms, the United States knowingly permitted the Iraqi Atomic Energy Commission to import bacterial cultures that might be used to produce
enemies while he murdered and destroyed and broke a series of international norms on weapons of mass destruction. Clearly, but for his misadventure in Kuwait, the Security Council members, especially the U.S., would have continued to turn a blind eye to the egregious crimes of the Iraqi regime.132

These tragic incidents which summarize the cynicism, double standards, and perhaps illegitimacy of the Security Council133 in relation to global politics and economics compel Canada to be skeptical about assumptions that every dubious claim to enforcement action ostensibly authorized by the Security Council or promoted by an indignant “coalition of the willing” is ipso facto a higher calling to maintain global peace. As Professor Michael Reisman aptly pointed out, international law is subjected to ridicule when ruthless and self-serving powerful states embrace “the butchers of Tiananmen and the butcher of Hama so that the United Nations can repel the butcher of Baghdad.”134 The litany of unprincipled, cynical, and expedient exploitation of circumstances by powerful states requires a critical appraisal of Canada’s role in the global legal and security order. As rightly pointed out by Professor Obiora Okafor, the greatest threat to global stability and peace is not in “the failure to invade [Iraq] but in the hedonistic conception of the function of law in the global systems.”135

From the foregoing, it seems clear that although Canada is obliged to comply with Security Council resolutions authorizing enforcement actions, it should also strive to scrutinize the motives and intentions of the permanent members of the Security Council lest it sheepishly follow the Council in lending credibility to an illegitimate use of force. It is hardly debatable that the best way to ensure legitimate participation in U.N. enforcement actions is to subject any decision

to send Canadian troops to any international conflicts, particularly those thickly enmeshed in power politics and the economic self-interests of members of the Security Council, to rigorous parliamentary and public debate. Even where such decisions have been debated in Parliament, Canada must constantly review and assess the fairness and legitimacy of Security Council resolutions on the use of force. Circumstances change and it would be naive to expect that U.N. resolutions apparently authorizing the use of force in a particular set of circumstances would remain just and legitimate under a changed set of circumstances. If Canada is to promote the cause of legitimate global governance and the termination of wars,\textsuperscript{136} it must remain vigilant and cautious.

Canadian vigilance cannot be guaranteed unless Parliament is a potent and vibrant institution for the articulation of public concerns and interests. In this context, the chronic impotence of both the ruling party caucus and opposition parties in Parliament give reason for concern. As Professor Wes Pue recently pointed out, Canadian democracy is increasingly becoming dysfunctional. With an electoral system designed to distort voter preferences, the development of \textit{de facto} one-party government, the ascendancy of the Prime Minister and massive concentration of power in one person’s control, and the decline of Parliament and caucus,\textsuperscript{137} an effective parliamentary role in the decision to engage in U.N. enforcement actions is practically non-existent. A reappraisal of these shortcomings in Canadian democracy would not only reinforce the rights of the public through their elected representatives to have their input considered, but would also afford a needed measure of legitimacy and responsiveness in how and when Canada may engage in enforcement actions.\textsuperscript{138}

\textbf{VI. CONCLUSION}

This article has argued that Canadian democratic practices as evidenced in both pre–U.N. \textit{Charter} and post–U.N. \textit{Charter} regimes support the view that Canada cannot lawfully participate in unilateral military actions outside the scope of U.N. authorization. Canadian political-cum-legal custom seems to suggest that Canada has hardly participated in an international conflict without parliamentary debate, approval and/or ratification. In other words, Canadian


participation in international conflicts, particularly those multilateral interventions authorized by the Security Council, is often a function of parliamentary approval. The question raised by this practice or convention is whether it is a legal obligation on the part of the government. The short answer is that it is primarily a political obligation with implications for governmental legitimacy.

These questions are significant because Parliament has a role in “approving the process of placing military personnel on active service.” More importantly, Parliament has an undeniable role in reviewing the government’s decision concerning Canadian participation in the use of force in international relations. Therefore, the question of Canadian participation cannot be a function of executive discretion. The current case of Iraq gives cause for a sober reappraisal of the need to re-institute public and parliamentary debate in the Canadian polity before Canada participates in military actions or even continues to participate in military actions at the instigation of powerful states with illegitimate or narrow interests to serve.

Furthermore, I have argued that even in the face of Security Council authorization, Canadian participation in use of force ought to be equally grounded in domestic parliamentary justification. A fortiori, Canada may not lawfully participate in “coalitions of the willing” where such coalitions operate outside the prior authorization of the Security Council and are inconsistent with informed public opinion. More importantly, in cases where a purported U.N. authorization on collective enforcement is ambiguous and potentially liable to be construed in such a way as to facilitate and encourage the use of force, Canada ought to adopt an approach which construes international law as a constraint on the use of force rather than a facilitator or catalyst for militaristic responses. Authorizing resolutions may be deliberately ambiguous because they are often the product of compromises. The least expansive construction should be placed on such authorizations if the Charter’s presumptions against resorting to armed conflicts are to be maintained. In a global legal and security order gradually moving away from the norms of non-use of military force to the evolution of new norms on the collective use of force, Canada is well placed to

140 Rossignol, supra note 76 at 15.

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make significant contributions. An important component of this evolution is an articulate and potent Parliament representing informed Canadians. In the absence of any evidence that Iraq is about to attack a state, the battle-cry by the “coalition of the willing” premised on a “first-strike” doctrine is a perversion of international law which Canada must resist through proper multilateral channels.