

1992

## ADDRESS: THE 1991 OTTO L. WALTER DISTINGUISHED INTERNATIONAL FELLOW PROGRAM

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### Recommended Citation

Pickering, Thomas R. (1992) "ADDRESS: THE 1991 OTTO L. WALTER DISTINGUISHED INTERNATIONAL FELLOW PROGRAM," *NYLS Journal of International and Comparative Law*. Vol. 13 : No. 1 , Article 4. Available at: [https://digitalcommons.nyls.edu/journal\\_of\\_international\\_and\\_comparative\\_law/vol13/iss1/4](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol13/iss1/4)

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**ADDRESS BY AMBASSADOR THOMAS R.  
PICKERING AT THE 1991 OTTO L. WALTER  
DISTINGUISHED INTERNATIONAL  
FELLOW PROGRAM\***

I am pleased to address the New York Law School community in its centenary year because it gives me a chance to acknowledge the contributions of other distinguished graduates and former faculty members, a group that includes former President Woodrow Wilson, Supreme Court Justices Charles Evans and John Marshall Harlan, and many others.

Your invitation to share my thoughts on the United Nations and international law from a law school podium is appealing from a professional perspective. As United States Ambassador to the United Nations at a time of profound global change, I am struck by the significance of these changes for international jurisprudence.

In a very short space of time—a time still measurable in months—the end of the Cold War has suddenly conferred upon international law practitioners and theorists a wealth of opportunity and a weight of responsibility rarely known in history. What is made of this opportunity will depend upon the government's actions, the citizen's choices, and the creativity and resourcefulness of those who study, teach, or practice international law.

The reason the present-time is so decisive is that the ideological chasm, which divided the world for a better part of the century, has closed. While this chasm was open, it confined international law to matters within the West but rarely between the East and West. This chasm also stunted the development of law, limiting relevance to large areas of interstate relations. The end of the Cold War makes me think of international law as Rip Van Winkle waking from a long sleep to discover himself the owner of a vast estate. He is initially exhilarated but then realizes how much work must be done.

Of course, the analogy is imperfect: international law has steadily developed through the twentieth century. Its potential domain, however,

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\* United States Permanent Representative to the United Nations, speaking at The New York Law School.

is now far greater than few would have suspected two or three years ago. Similar to Rip Van Winkle's fields, many of the rules developed for international behavior have laid dormant and might now be given life—some other rules may be in need of improvement or revision.

This afternoon I want to explore one example from each group. First, I will look at the United Nations' role in international security because that is a long dormant area of the Charter. I will then examine some areas of human rights and humanitarian action—an area that seems to be close to improving or where improvements are now within reach.

## I.

The end of the Cold War removed the international political system's central and dominating principle—the East-West dispute. In a speech delivered by President Bush, he outlined his vision of a new ordering framework:

The New World Order does not mean surrendering our sovereignty or forfeiting our interests. It really describes a responsibility imposed by our successes. It refers to new ways of working with other nations to deter aggression and to achieve stability, to achieve prosperity and, above all, to achieve peace. It springs from hopes for a world based on a shared commitment to a set of principles that undergird our relations—peaceful settlement of disputes, solidarity against oppression, reduced and controlled arsenals, and just treatment of peoples.

What are the security implications of a transition from the Cold War to the kind of new order the President has described? If one looks at United States post-Cold War security interests through a United Nations optic, one way to describe the view is to picture two adjacent circles separated by a rather permeable border. In the first circle put the core United Nations' security interests:

- protection against direct attack;
- protection of U.S. citizens abroad;
- aid and support of allies;
- maintenance of unmolested international communication and commerce;
- assurance of access to vital resources;

- insulation of essential interests from the effects of foreign wars—such as the tanker escorts late in the Iran-Iraq War; and so on.

In the second circle, put the broad goals, values, and principles:

- the rule of law;
- non-aggression and the pacific settlement of disputes;
- respect for sovereignty;
- defense of human rights;
- control of armaments;
- curbs on nuclear proliferation;
- and, in general, a disciplined, cooperative approach to common security.

This afternoon I will explore the United Nations' role in strengthening and enforcing these principles.

## II.

The U.N. Security Council's role in the shaping and legitimizing of the response to Iraqi aggression has raised expectations, hence political pressures, for a comparable council role in other crises, such as those in Haiti, Yugoslavia, and Liberia. The ratifiers of the U.N. Charter never intended the Security Council to be the United Nations only full-time court of first resort. Indeed, article 52 and chapter VII of the Charter explicitly mandate regional efforts to resolve or redress threats to peace and security before resort to the United Nations. A regional constructive engagement, arising from shared regional, political, and cultural interests, potentially permits a wider scope of action. The future will surely bring crises that are not regionally containable nor totally resolvable, despite the best efforts of regional actors. At that point, the Security Council can be turned to as a necessary and legitimate next step. The council can also expand on regional efforts when required; for example, internationalizing a regional trade embargo.

With the exception of the Korean war and the Iraq-Kuwait crisis, the subject of United Nations authorized enforcement actions is an unwritten text. The writing of that text is not made any easier by the fact that the threats with which we deal fit awkwardly into an imaginable United Nations-based structure. The United Nations will not—however strengthened—easily embrace the potentially wide security missions of the

future. Therefore, we should look to the United Nations to deliver only a part of the solution. The scope of the United Nations' role may depend on its ability to develop two key elements of any new approach to security: legitimacy and flexibility.

As a starting point, we need to understand what constitutes "legitimacy" for intervention by force. For the United States and its allies, Resolution 678, which authorized "all necessary means" to secure Iraq's immediate and unconditional withdrawal from Kuwait, was close to an ideal formulation. The Resolution granted United Nations authority for the use of force without undue restriction on the manner, extent, or terms for its cessation—both important military and political considerations for the successful conduct of operations. It was understood that the coalition would strive to achieve withdrawal from Kuwait by observing certain norms and restraints. Full observation of the rules of war and employment of conventional weapons were the implicit parts of the authority granted to the coalition by the Resolution.

Not surprisingly, the open-ended character of these arrangements gave discomfort to many other United Nations members. The Security-General has commented that while the war against Iraq was made legitimate by the Security Council, it was not a United Nations victory since that could have resulted only from hostilities controlled and directed by the United Nations. One need not share Security General de Cuellar's view to appreciate his point that the most iron-clad legal justification may not buy us that more evanescent political commodity: legitimacy.

Although the allied actions in Iraq shared near universal international support, the licensing of a few countries to use force in the council's name enables detractors to argue that the action is the project of a few governments thereby unrepresentative of the world community. For military actions comparable in scale to Operation Desert Storm, any significant degree of United States direction and control over combat operations could have imposed serious constraints. Council cohesion, however, which was nurtured by the Iraq experience, may extend to other issues. If this proves true, there may be pressure for enhancing the Security Council's role in future peace enforcement.

One way the Charter may maintain peace is by the application of article 43. Paragraph 1 of article 43 requests member states to

[u]ndertake to make available to the Security Council, on its call, and in accordance with a special agreement or agreements, armed forces assistance and facilities, includ-

ing rights of passage, necessary for the purpose of maintaining peace and security.<sup>1</sup>

A vital question about article 43 is what kind of command arrangements it implies. In my view, article 43 agreements are compatible with their signatories' exercise of wide military latitude when those agreements are invoked. In this sense, the agreement might be less a format for direct council control than an expression of its general capacity to enforce decisions and hence a means of deterrence.

Delegated enforcement is explicitly anticipated in the U.N. Charter, most relevantly in articles 48 and 53. Article 48 empowers the council to determine which members shall conduct the action required to carry out its decisions "for the maintenance of international peace and security."<sup>2</sup> Article 53 permits the council to utilize "regional arrangements or agencies for enforcement action under its authority."<sup>3</sup>

Notwithstanding the legality of delegated enforcement, the council may now play a more active role in command and control. Chapter VII of the U.N. Charter, particularly articles 42, 46, and 47, provides vehicles for direct council involvement in the command and control functions. Any move in this direction, however, will raise concerns among troop contributors. For example, Chapter VII's emphasis on the role of the Military Staff Committee is especially problematic: no state whose troops are engaged in hostilities is likely to allow a group to which it does not belong direct or control its troops, especially if that group's members have not also contributed troops.

There may be ways of partially employing articles 42 and 47 while inoculating them against their most intrusive potential; these may be worth exploring particularly in the context of small-scale or low-intensity conflict. We may also wish to explore arrangements whereby peace enforcers could report regularly to the council itself or a sub-group of the council. This type of consultative link could be a helpful tool for preserving consensus, while not altering command relationships.

One of the questions our security community will need to consider is how command and operational interaction of the forces might be employed to give effect to a Security Council decision. The development of this policy requires a balancing between the need to avoid over-identification of a few countries and the exigencies of the unity of

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1. U.N. CHARTER art. 43, ¶ 1.

2. *Id.* art. 48.

3. *Id.* art. 53.

command, rapid deployment, coordinated movements, and so on. In the future, if the United Nations authorized uses of force require more integrated combat operations than were typical of Operation Desert Storm, we need good answers to many unanalyzed military and political questions about non-NATO coalition warfare.

You may be interested to know that in 1946 and 1947 the permanent members of the Security Council held lengthy negotiations to produce a model article 43 agreement, that is, an agreement by which a member state would supply forces to the United Nations. I recently had the opportunity to read a review of these discussions prepared by David Scheffer of the Carnegie Endowment. Let me cite a few of his findings for you:

### Force Strength

The overall strength of the United Nations' force would be small; its moral weight and potential would be great. It would be limited in size to enable it to take prompt action. The Security Council could change the overall strength of the force by entering into additional special agreements with member states.

### Contributing Countries

The Permanent Five initially would contribute the major portion of the troops. The United States, France, Britain, and China (the Nationalist government) agreed that contributions would be comparable to each nation's capabilities. The Soviet Union insisted on equality of contributions.

### Contributions Other than Forces

Contributions by members may not necessarily be represented by armed forces. Members could fulfill their obligations by furnishing "assistance, and facilities, including rights of passage."<sup>4</sup>

### Decision to Deploy

Armed forces would be deployed only on the decision of the Security Council and only for the period necessary to fulfill tasks

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4. *Id.* art. 43(1).

envisaged by article 42. The United Nations force should be deployed in time to forestall or to suppress a breach of the peace or act of aggression.

### Decision to Withdraw

The United States, France, Britain, and China agreed that the United Nations' force would be withdrawn as quickly as possible and that a deadline would be established by the Security Council. The Soviet Union believed, however, that the United Nations' force must be withdrawn within thirty to ninety days after the article 42 measures are fulfilled, unless the Security Council decides otherwise. The Soviets also argued that the forces must be withdrawn from "rights of passage" territories within thirty days.

### Readiness

The degree of readiness of the national contingents would be established in the respective special agreements. The contingents must be able to start action "in good time."

### Forces Location

The permanent members, except the Soviet Union, agreed on a wide distribution of forces throughout the world so that the Security Council could take prompt action in any part of the world. They also agreed that the Security Council should be notified before the displacement of these forces.

### Command and Control

The Permanent Five agreed that the designated national contingents would remain under the control of the member governments until the Security Council activated them for United Nations service. It was insisted that the "control" be exercised by the Security Council, not the Military Staff Committee. The Military Staff Committee would be responsible for the "strategic direction" of the United Nations' force. The actual command of the national contingents, however, would be exercised by commanders appointed by the respective member governments. The national contingents would retain their national character and would be subject to the discipline and regulations in their national armed forces.

### Overall Command

China, the Soviet Union, and the United States agreed that there should be an overall commander appointed by the Security Council on the advice of the Military Staff Committee to coordinate decision making. France and Britain argued, however, for the appointment of a supreme commander who would have the power to control all United Nations' forces.

### III.

These remarks have primarily concerned United Nations action in cases of already open conflict, but another very important area of increased United Nations activity is conflict avoidance. In the communique of the London Summit this summer, the G7 leaders committed themselves to securing the basis for United Nations preventive diplomacy. To fulfill this goal the institution will need to shift to a higher gear. The following are some useful steps to further a preventative diplomacy policy:

- informal information sharing among member states, so that the Secretary-General remains fully informed of existing or potential situations that could lead to international friction (this is now occurring within the context of Resolution 687's Iraqi WMD inspection program);
- requiring disputants or potential disputants to keep the Secretary-General fully informed of all pertinent facts;
- supporting the enhanced use of special representatives in good offices and quiet diplomacy missions to help resolve issues that may lead to conflict;
- making use of individual states or small groups of states to assist with the diplomacy of dispute resolution;
- finally, making use of United Nations' forces as a means of forestalling conflict before hostilities occur by deploying forces to the borders of a threatened state.

## IV.

Regarding peace-keeping, the United Nations is in a major growth phase. The United Nations has undertaken more missions in the last three years than in its first forty-three.

The scope and variety of functions has grown as well. It is time to strengthen the organizational structure of United Nations' peace-keeping planning and management in order to keep up with the heavy workload. It is also time to organize long-term peacekeeping financing. Within the United States, it might be worthwhile to consider creating a substantial peace-keeping account in the Department of Defense budget.

## V.

One phenomenon apparent to even a casual observer of the world today is the increasingly local character of conflict. In fact, probably most conflicts today are conflicts within states, not between them. In the post-Desert Storm period, it is therefore worthwhile to remind ourselves that threats to regional stability after the Cold War largely and essentially are shaped by parochial concerns of an ethnic, religious political, economic, and social character.

A daily dilemma facing the Security Council is that while the rule of law and the role of order are more comfortably complementary after the Cold War, they are not equivalent. International law has little positive to say about the responsibilities of other states in the event of coups and anarchy or bloodshed within a neighbor's borders. In fact the rule of law would permit, though it is unpleasant to ponder, a state convulsed by extraordinarily destructive, but utterly legal, internal conflict. Lebanon, through most of the 1970s and 1980s, and Yugoslavia today, are sobering reminders of this reality.

This dilemma is not helped by the fact that the common law of states and the covenants and treaties agreed among them permit competing and conflicting claims. This is nowhere more evident than when the international community is forced to choose between the rights of states and the rights of peoples.

Our continuing experience with Iraq illustrates the tension. When, in November, 1990, the Security Council adopted Resolution 678 authorizing action to expel Iraq from Kuwait, the Resolution's legal basis was the U.N. Charter prohibition in article 2, paragraph 4 on the threat or use of force against another state. When persecuted Iraqi Kurds fled into Turkey and Iran five months later, the Security Council majority made a very different finding. It reasoned, in Resolution 688, that the massive flight

of the Kurds presented a threat to international peace and security sufficient to override the principle of non-intervention in the affairs of another state, a principle protected by another provision (paragraph 7) of the same article.

For those who may not be familiar with Resolution 688 it is worth reviewing its major terms.

- First, it found that the repression of the Kurdish civilian population constituted a threat to peace and security in the region and pointedly reminded Iraq of the Security Council's responsibility for the maintenance of peace and security.
- Second, it demanded that Iraq immediately end such repression.
- Third, it insisted that Iraq permit immediate access by international humanitarian efforts in Iraq and to address the needs of refugees and displaced persons.
- Fourth, it requested the Secretary-General to pursue his humanitarian efforts in Iraq and to address the needs of refugees and displaced persons.
- Fifth, it appealed to all member states and all humanitarian organizations to contribute to these humanitarian efforts.
- Lastly, it demanded Iraqi cooperation with these ends.

Although the terms reflect Iraq's unique position as a country subject to the enforcement provision of Chapter VII of the U.N. Charter, they also reveal a new willingness to act in the face of massive humanitarian provocation.

The writ for international humanitarian action, either stated or implied in these provision, was extraordinary and unprecedented. The United Nations and Iraq drew up a Memorandum of Understanding, which provided for the current widespread presence of most relief personnel in the country today. The passage of this resolution and Iraq's status as a country subject to mandatory enforcement actions under Chapter VII

opened a legal space for the coalition to provide relief and support for the Kurds.

Notwithstanding the humanitarian issue, Resolution 688 was very difficult to negotiate. More recently, stiff resistance to forceful resolutions has begun in Haiti and Yugoslavia. This leads me to two conclusions:

- First, work must be done before the Security Council is ready to serve regularly as a global crisis manager; this would require a clear and predictable consensus on how and to what extent it should address threats to international security arising from internal situations within states. Unfortunately, no such consensus yet exists.
- Second, as a consequence we must remain open as the U.N. Charter provides to alternative regional and even unilateral tools to serve the "order" as well as the "law and justice" agendas.

In a sense this way of thinking about security leads us back to first principles. Part of the "work" ahead for the international community is the toilsome task of nurturing an international society of common values to inform and vitalize the orderly world. Civil order in the United States benefits from the absorptive power of shared values and a common culture, that dulls many of our differences and lessens rivalries.

The absence of an international parallel culture, although tolerable during the Cold War, is now a source of frustration. While the collapse of communism has eliminated the major global clash of values, it has had an opposite effect on nationalist, tribal, religious, economic, and ethnic conflicts that threaten to reenergize North-South economic discord.

Due to the lack of an international community, we are unlikely to see the rapid elaboration of international law to provide external guarantees for minority rights, democratically elected governments, or hungry people caught in a civil war. A significant number of United Nations members do not see such values as leading to order, but subversive of it, or at least subversive of an order based on firm doctrines of state sovereignty and non-intervention. I believe that often the reason is not a Third World antipathy to such principles, but instead a suspicion that a Trojan Horse of western involvement by United Nations member-states may interfere.

Such reservations do not mean that we must give up hope for stronger protections for human rights or humanitarian concerns. On the

contrary, a combination of pragmatism and vision is required to develop a rapidly evolving global security system. The accomplishment of this aim should be achieved through the use of established United Nations organs; however, if this avenue is blocked, a pragmatic approach means reaching outside the United Nations though still within the U.N. Charter, to employ other forums or tools. Finally, we need to have the vision to see, and the will to use, new opportunities to fill the gap between the heavy demands of a just and orderly world and the modest means of current international law.

As a first step, leaders of developed industrial democracies should realize that they are not the only people who recognize that a just world requires respect for human rights, democracy, fundamental freedoms, and international humanitarian responsibility.

For example, the Universal Declaration of Human Rights, which is at the center of the global human rights movement, has universal cultural roots. Although its creation was led by Eleanor Roosevelt, the drafters included a Uruguayan, Chilean, Panamanian, Chinese vice chairman, and Lebanese rapporteur. Of course, the American Bill of Rights, the French Rights of Man, and the English Magna Carta are well known influences. Some far less recognized influences to the Declaration's international stature are the Declaration's non-western influences, including Chinese ethics and Hindu philosophy. Although Egypt was the only African nation involved in the initial promulgation, because most African nations' trustee or colonial status prevented it, a remarkable number of African constitutions today affirm adherence to the Declaration's principles.

I am also happy to report that respect for democracy is not unique to the industrial democracies. For example, in a meeting in Santiago, Chile last winter, the Organization of American States ("OAS") adopted a legal instrument authorizing strong action, including the use of diplomatic and economic sanctions, to reverse coups against democratically-elected governments. The United Nations, of course, lacks a comparable instrument, but surprisingly, so do the Conference on Security and Cooperation in Europe's Paris Charter ("CSCE"), the European Community's Rome Treaty, the Western European Union's Charter, and even NATO. In fact, the OAS and General Assembly resolutions on Haiti have provided the impetus for the embargo and the wide international campaign to restore the legitimate, democratically elected government.

The supposedly axiomatic nature of third world feeling toward non-intervention often varies from country to country, as attested by widespread Arab support for Resolution 687 and current United Nations'

efforts to ensure Iraq's nuclear disarmament. Indeed, the most dramatic indictment of the doctrine did not come from one of Saddam Hussein's victims or neighbors, but from Godfrey Binaisa, successor to Idi Amin. Reproaching the members of the General Assembly on September 29, 1979, Binaisa said:

In light of the clear commitment set out in the Charter, our people naturally looked to the United Nations for solidarity and support in their struggle. For eight years they cried out in the wilderness for help; unfortunately their cries seemed to have fallen on deaf ears [as the Amin regime] continued with impunity to commit genocide against our people.

Somehow it is thought to be bad taste or contrary to diplomatic etiquette to raise matters of violations of human rights by member states within the forums of the United Nations.

I must add the following examples to those just cited: the roots of the Universal Declaration, the Organization of American States Santiago Declaration, the reproach of President Binaisa, and the remarkable salute that personal freedom and democracy received from developing countries in speech after speech in this year's General Debate. In many parts of the world, actions support such rhetoric. The positions foster the United Nations more aggressive pursuit of policies and processes affording greater protection for human rights and humanitarian principles. Let me close by offering a few examples of what I have in mind:

- In recent years, the official and private relief community has developed a number of principles on humanitarian access whose observation by host countries directly affects the lives of afflicted groups. These include such things as right of access, respect for relief corridors, permission for cross-border operations, and so on. While some General Assembly resolutions have supported such ideas on occasion, it would be useful to examine whether they could be given a stronger normative form.

- In the area of fundamental freedoms, U.S. ratification of the Covenant of Civil and Political Rights would be important internationally. Given the very large number of signatories to the Covenant and the relevance of its

democratic and pluralistic protections to so many countries now convulsed by internal change, early Senate consent would greatly enhance its standing.

- Similarly, Congressional consent of the Convention against Torture is expected shortly. Ratification of the Convention will also strengthen its international force.

- There are also new possibilities for improving human rights monitoring. In this regard, a worthy model for the United Nations to emulate is the Human Dimension Mechanism, the remarkable recent achievement for the European Conference on Security and Cooperation. The CSCE mechanism sets out a sequence of steps by which CSCE members can call a fellow member to account for apparent violations.

- At the U.N. Human Rights Commission, two ways to improve monitoring would be the expansion and strengthening of the country raporteur system and the streamlining of the Commission's now lengthy and complex mechanism for examining accumulated individual complaints.

- The Commission could also improve its ability to give prompt attention to egregious abuses by simply giving itself the capacity for emergency inter-sessional meetings to consider especially important and urgent problems.

- A policy not yet adopted, but worth exploring, is the possibility of applying sanctions to massive human rights violators.

## VII.

I want to end my formal remarks here and leave a generous amount of time for your questions. Before I do, however, I hope you will forgive me for closing these thoughts with a baseball metaphor, one brought to mind by the frustrating career of the Minnesota Twins, storybook winners of this year's World Series.

For a moment, think of history as one long ball game. There are two clubs. One team bats for the rule of law, and the other for the law

of the jungle. After more losing seasons than anyone can remember, the rule of law guys are on a streak. The hardcore faithful fans are patting themselves on the back, and even wise guy cynics are coming to the park. Everyone is amazed and hopeful.

In a sense that is the state of international law. After a forty-five year run, the Cold War is over. Many of the suppressed norms and practices of international law can now be made to work.

If this remarkable turn toward global cooperation is to remain, we will need to refine old concepts, add new ones, and extend their frontiers.

Thank you.

