SELECTED PROCEEDINGS FROM PANEL II:
THE LAW OF WAR

Dean Haynsworth: This session has the imposing title of “The Law of War.” Moderator Anthony D’Amato of Northwestern University School of Law is the Judd and May Morris Leighton Professor of Law. He is widely published in a number of different fields in the International Law Department and is also an author of one of the leading casebooks with Professor Weston, who is also on the panel, entitled “International Law and World Order.” Professor D’Amato also practices what he preaches in the sense that he has been very active in the human rights field, he has represented several clients and cases before U.S. Courts, and also has appeared before the European Court of Human Rights.

Professor Anthony D’Amato: Bobby Fisher wrote a book about his chess games where he said that some of the most interesting questions in modern chess is not to follow the game as it was actually played but to go into the variations. What could the chess players have done? What kinds of strategic alternatives might they have taken and had they taken those alternatives, what would have been the consequences? Indeed, there is a vast lore of interest if you are a chess fancier to explore those byways and see what might have happened, what kinds of considerations were going into people’s minds.

I thought about that with respect to this panel because while the events that are unfolding in Kuwait have a great intrinsic interest, there may be even more interest to academics sitting in a room such as this contemplating, ‘well what would happen if so and so does this, and what would be the legal consequences if he did that?’ It is this sort of strategic legal planning and thinking which may prepare us in advance for a more intelligent response when certain actual events get triggered just as it would have if the other chess player makes this kind of move ‘what should I do? I will have to think about that before he or she makes that move because it may be too late when the move is made.’ You have to structure your alternatives. The kinds of responses put in place will, in a sense, predetermine the kinds of results that are going to come out.

I think that we have some opportunity now to engage in legal strategic thinking about the alternatives and situations that are brought up with respect to this crisis in Kuwait so that we can get a better
handle on strategic alternatives. I have asked each speaker to speak only for ten minutes initially because I would like to engage them in some debate here on the panel and then throw the session open for your questions too.

Our first speaker, I'll introduce each speaker when his or her turn comes up, our first speaker is Mary Ellen O'Connell. She teaches International Law at Indiana School of Law in Bloomington. She did her undergraduate work at Northwestern, and then received a Master of Science at L.S.E., going on to receive a J.D. from Columbia Law School where she worked with Professors Schachter and Henkin. She then received her L.L.M. (and I am very envious about this) at Cambridge in England. She has engaged in law practice as an associate at Covington & Burling in Washington, D.C. She has published a number of important articles, and teaches International Law, International Business, International Law of Armed Conflicts, and Sales. Her current project is a critique of feminist jurisprudence on law and war which sounds like one of the most interesting titles I have seen in a long time. Let me turn this over to Mary Ellen O'Connell who will talk about the larger use of force questions.

Professor Mary Ellen O'Connell: Well thanks for that introduction, Tony. There is a lot to say and I am going to get right down to it because I am under such time pressure. I want to do what the first speaker did in the last panel, and that is to thank Southern Illinois University School of Law for putting this conference on. I helped with the Ford Foundation Committee that is sponsoring regional conferences and we are delighted that SIU has had the first one and has kicked off our program in such a splendid way. The Ford Foundation thinks that International Law is relevant to other parts of the country besides the East Coast, and the good turn-out of interest that this school has shown in the conference today shows that they are right and hopefully we are going to have funding from them in the future to keep on having programs like this. I am really glad that you are all here, and I thank Professor Frankowski for doing such a great job in getting it going and, of course, my thanks to the Dean of your law school.

In a sense, I am going to pick up where Professor Malloy left off. He talked about the economic leg of what is happening in the crisis in the Middle East and I am going to pick up on the military leg. I am just going to spend my short amount of time setting out what the basic rules are for use of force in the setting of the Gulf crisis. Let me distinguish that from the way force is used. Professor Grunawalt is going to discuss that. I am going to talk more about
the first use of force by Iraq and of the United States’ reaction, and the reaction of our allies. I then want to talk about why we should care about any of these rules concerning the use of force anyway, because I think that that is a question that all international lawyers have to grapple with in the area of armed conflict. Let’s talk first about Iraq and the rules applicable to it; second, the United States and its allies and the rules applicable to us; and finally, to the extent I have any seconds left, why we care about these rules.

First let’s turn to Iraq. It is clear that the relevant document in regard to the legal issues of the Gulf Crisis is the United Nations Charter. In the Charter there is Article 2, paragraph 4 which is probably the most relevant principle for what is going on today. That rule says that, ‘all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any other state.’ It is clear that there is a prima facie case against Iraq which has been violating that rule, but I think we have to ask a few other questions to treat this issue in a lawyerly fashion. First, there is a question of whether Article 2(4), the prohibition on the use of force, is still good law. Second, does it really apply in the context of Kuwait? And third, are there any legal defenses and justifications by Iraq for a violation of that rule — can it defend or justify its actions in some other way?

First, is Article 2(4) still binding law on the States of the international system? It was adopted forty-five years ago and we have seen on-going armed conflict ever since it was adopted. As many of you know, international law is made by the system and the states themselves, through their practice and what they consider to be binding on them as law. Well, if they keep on engaging in armed conflicts, maybe Article 2(4) isn’t good law anymore. A very prominent international lawyer took that view twenty years. Tom Franck at New York University wrote a little article called ‘Who Killed Article 2(4)?’ Since the time that he wrote that, of course, we have had twenty more years of armed conflicts including a number of conflicts that the United States has been involved in. So, is this Article 2(4), which is what President Bush is pointing to when he says that Iraq has used force in violation of international law, is it good law? Hasn’t the U.S. itself and other countries undermined it? In response to Tom Franck, my professor, Lou Henkin, wrote that it is not the uses of force that we have to look at to decide whether 2(4) is good law, but what the states of the system say about 2(4) and not a single state in the international system in 45 years since 2(4) was adopted has ever stood up and said that it doesn’t apply to us. Every state, including the
United States, believes that Article 2, paragraph 4, is good law and does apply to it. We have an authoritative statement that it is still good law from the International Court of Justice in 1986 in a case between Nicaragua and the United States. The Court took Professor Henkin's line of analysis in the exchange of articles with Franck, and it said that it is not the use of force that we look to to find out whether this is still good law and whether the states of the system still believe it is binding on them. We instead look at what their statements are and what their commitment is to the rule, and we find that without doubt it has been reconfirmed and is still good law here in the late eighties. I would say nothing has changed in the last four years since the Court made that authoritative pronouncement in Nicaragua v. United States. So I believe Article 2(4) is still good law and is binding on Iraq.

But what about using force against Kuwait? As I read to you, the rule said you may not use ‘force against the territorial integrity or political independence of any state.' We have all heard, and we have heard from the discussion last evening, and again in the earlier panel, that Iraq believes Kuwait is part of a larger, territorial entity that Iraq justly has a right to control. If Kuwait is part of Iraq, then how can it be using force against the political independence or territorial integrity of another state as required by the rule? This sort of argument has also been heard since the Charter was adopted with regard to Article 2, paragraph 4, and I think we have to reject it decisively. Kuwait had the indicia, at the time it was invaded, of a State. It had a population, a government in effective control, it had boundaries, and entered into international relations. Even more important, it was a member of the United Nations and was recognized by Iraq to be a member of the United Nations. Only states can be members of the United Nations.

This is not to belittle Iraq's concern about what its true boundaries should be. Many states in the world today that have been created through the decolonization process are concerned about where their true, authentic boundaries should be. But we have peaceful methods for resolving those types of questions. Just about a week ago, Chad and Libya submitted a case at the International Court of Justice to determine where their boundaries should be. Last year, Burkina-Faso and Mali also asked the International Court to determine where their boundaries should be. Even Denmark and Norway are currently before the International Court of Justice deciding who has sovereignty over particular islands. The system doesn't say that you don't have to have concerns about where boundaries are. It just says that you can't use
force to determine where they should be. You are going to have to resolve it peacefully. So that is also not a reason to exempt Iraq from the application of Article 2, paragraph 4.

Well, are there any other defenses? If the rule is good law and it applies squarely to the situation in Kuwait and Iraq's invasion, are there any defenses? The Charter has one primary defense, and that's in Article 51. It says that despite Article 2, paragraph 4, and the prohibition on the use of force, a state may use force if it has itself been the victim of an armed attack. So, if you are using force in self-defense, that's okay and you are exempted from the prohibition on force in Article 2(4). Iraq might make an argument which we hear from time to time that in fact it was exercising self-defense. It was seriously worried about its economic viability. The unwillingness of Kuwait to help it out of its economic problems perhaps would undermine its ability to go on as a country. You can imagine this kind of argument being made. Unfortunately for Iraq, as for any defense it might want to base on this point, economic threats will not entitle you to use force against a country that is threatening you. Again, I look to the Nicaragua case (Nicaragua v. United States) and the Court's authoritative statement that you must be the victim of an armed attack before you may yourself use armed force against another country. So economic hardship will not entitle you to use force even if you believe you are exercising it in self-defense. Again, you are going to work out those kinds of problems through peaceful settlement disputes and not through armed force.

Besides Article 51, the primary exception to Article 2(4), we have seen our own government in the last ten years suggest some other important exceptions to the prohibition on the use of force. The United States said in the Panama intervention that we were establishing democracy and that we should be able to use force, regardless of Article 2(4), to establish democracy. I am afraid that that was probably not the case in the Iraqi invasion of Kuwait. Since Iraq was not itself a democracy, it would be a difficult argument for it to make that it was establishing democracy in Kuwait. I don’t think that the United States' argument of democracy is a legitimate one under contemporary international law.

What about humanitarian intervention? The United States said that we invaded Panama because of the humanitarian interests of our own citizens and other people's suffering perhaps from human rights violations. Again, I question whether that is a good justification in contemporary international law, but I certainly don’t think it was a motive for Iraq's invasion of Kuwait. Finally, perhaps a more subtle
argument that Iraq might make, but again one that I don’t think will justify its action, is an old argument based on the theory of reprisal. Reprisal says that if one state takes an action which is a violation of international law, another state may also violate international law in response. So if Kuwait violated a treaty agreement for example, and Iraq counter-invaded and said: ‘Yes, we are doing something that is wrong under international law, but it is in response to this previous violation, so what we are doing is okay.’ I think the argument of reprisal and countermeasures is still good law, but not when you use force. You can’t use forceful reprisals in response.

The law on response in a nutshell is that Kuwait has the right, as I have just explained, under Article 51, to use force itself for purposes of self-defense. Article 51 also says it may have a collective self-defense. So the United States, as I analyze the situation, is on one-hundred percent solid ground in joining with Kuwait and Saudi Arabia in collective self-defense against Iraq. I believe, although I tend to be a peace person myself, that this raises absolutely no legal questions. The United States could, in fact, push Iraq out of Kuwait at any time it wants to, and that would be legitimate under the Charter, with or without Security Council sanction. I will just leave that as a controversial statement and turn to my other colleagues and hope that we’ll have time for discussion later.

D'Amato: Thank you for laying out the basic ground rules. Now for perhaps a more particular look at the military legal situation we are delighted to have Professor Richard Grunawalt who is Director of the Oceans Law and Policy Department in the center for Naval Warfare Studies at the Naval War College. He is a former Stockton Professor of International Law at the Naval War College, who spent 26 years in active service in the United States Navy, retiring with the rank of Captain, so he brings a great deal of that experience with him. He was a graduate of the University of Michigan where he received his undergraduate degree as well as his Law degree. He is the author of a Manual on International Law for Naval and Marine Corps Officers and has had broad experience in the practice of international law in a military context, including serving as special counsel to the Chief of Naval Operations and Staff Judge Advocate to the Commander of the United States Forces in the Pacific. It is my pleasure to turn the floor over to Professor Grunawalt.

Professor Richard J. Grunawalt: First of all I would like to add my thanks to the Society, the University and particularly to Dean Haysworth. He recognized that being a long way from the sea I might
feel uncomfortable, and it was he who arranged the earthquake the other day so I would get the semblance of sea roll. You missed my arrival by a day, Dean, but I appreciate the intent anyway, so thank you. What I am supposed to talk about I guess is some of the legal implications of the actual activities that are occurring in the Persian Gulf. But I need to make a duty disclaimer before I do that, and that is that the views I express are my own. They do not necessarily represent the Naval War College, Department of Navy or the Department of Defense.

I think that all the panelists I have heard thus far tend to be in pretty solid agreement with respect to the nature of what has occurred since the second of August. I think we have seen the Iraqi’s activities as being violative of very fundamental international norms in four distinct areas: Article 2(4) of the U.N. Charter and its proscription against aggressive war (certainly the linchpin of all this); the law of armed conflict, particularly with respect to the Fourth Geneva Convention Relative to Protection of Civilian Persons in Time of War; the rules pertaining to the protection of diplomatic premises and diplomatic personnel in Kuwait; and the failure to comply with mandatory, binding United Nations Security Council resolutions. So there really are four tiers on how we might approach this as far as justification is concerned.

I think it equally clear and by the way I did not find Professor O’Connell’s view at all controversial, the last one anyway that there is certainly an authority for States collectively and individually to take forceful action to respond to the Iraqi circumstances. I thought that we were very privileged to have Professor Malloy’s discussion and description of events this morning, and I thought it was particularly well done. But just to very quickly recap, as you know on the second of August, when Iraq did invade Kuwait, the Kuwaitis made a plea both to the United Nations Security Council and to other nation states, including the United States, for collective defense under Article 51 of the Charter. Shortly thereafter, the Saudi’s did likewise. The point was that within 24 hours, Kuwait had in fact been thoroughly and completely overwhelmed by Iraqi forces. Again, as we have seen earlier, the United Nations condemned that action in Resolution 661, and demanded the immediate and unconditional withdrawal of Iraq. On the sixth of August is when the embargo was installed. I just want to quote a little bit of the language out of Resolution 661 adopted on August 6th. In the preambular language, it says, ‘affirming the inherent right of individual and collective self-defense in response to the armed attack by Iraq against Kuwait.’ The preambular language, even though
the Security Council was acting, as Professor O'Connell pointed out, did not deprive the other Nation States of the world from responding individually or collectively within the self defense rubric of Article 51. Resolution 661 went on to say that it imposed an embargo on basically all commodities and products that were originating in Iraq or in Kuwait, and on the sale or supply to Iraq of any commodities or products including weapons or any other military equipment. As you know, the Security Council did exempt medical supplies and, in "humanitarian circumstances," foodstuffs, from the embargo.

The U.S. naval forces, as you know, were operating in the Persian Gulf, the Gulf of Oman, and the Red Sea during this period of time. It was at that point that we began, in concert with warships of other nations, to institute a maritime quarantine of Iraq to enforce that embargo. I will talk about that in just a minute. By the way, terms are tremendously important. We must be very precise when we are talking about what is occurring over there, what mechanisms are being utilized. We were responding on two bases: one, our inherent right of self-defense, individual and collective, under Article 51 of the Charter, and two, pursuant to and consistent with Resolutions 660 and 661. Therefore, our right to use force, in my view, was clear. On the 25th of August, the Security Council noting its 'grave alarm,' expressed concern at the Iraqi refusal to comply with its dictates. The operative language of Resolution 665 calls upon states deploying maritime forces to the area to use "such measures commensurate to the specific circumstances as may be necessary" — notice how we avoid saying 'use of force' under the authority of the Security Counsel — to halt all inward and outward maritime shipping, to inspect and to verify their cargos and their destinations, to ensure strict implementation of Resolution 661. Clearly, the resolution contemplates a minimum use of force in order to enforce the dictates of the Security Council in 661. Now, where does that leave us, and what are the legal mechanisms that are operative in the gulf?

First of all, talking about terminology, in peace time there is a general concept called 'approach and visit.' In a purely peace time scenario, this is a right that any warship has to approach foreign flag vessel, other than a governmental vessel, on the high seas, and require it to stop and submit to inspection if there exists reasonable suspicion that the particular platform is engaged in slave trade, is involved in piracy, is involved in unauthorized broadcasting, or is in fact of no nationality (in other words is stateless), or although flying a foreign flag, it is in reality of the same nationality as the warship. This is clearly not what things are about in the Persian Gulf. Also, under
international law in time of peace, there are a variety of mechanisms available to nation states to enforce their own national laws at sea. Much of this is premised, of course, upon the zone in which the encounter occurs a violation of national law that occurs in the territorial sea, or an encounter in the contiguous zones with respect to violations which have occurred in the territorial state, or if the violation occurs in an exclusive economic zone and is resource-related. Those are circumstances when a coastal nation does have authority to stop, seize, and bring under its jurisdiction non-governmental foreign flag vessels. The doctrine of hot pursuit applies also all the way out until the offending vessel enters someone else’s territorial sea. Most of these encounters, however, occur with the consent of the flag state of the offending vessel especially in drug interdiction efforts by the Coast Guard. I want to say a word about that. U.S. Coast Guard use of force policy is premised on these jurisdictional bases.

When there is jurisdiction to stop a flag vessel of another state, then what you do is have kind of a graduated response as far as force is concerned. You signal the other party to stop. If the platform continues, you fire warning shots. By the way, in international law, the firing of warning shots is a signal, it is not a use of force per se. It is recognized as a signal. If, however, that signal is ignored, then what is employed is disabling fire and the mechanism is to direct the occupants of the ship, the passengers and crew, forward and to get them away from the area of harm, and then you direct the fire into the rudder or into the engineering spaces of the platform to disable it, to bring it to heel and make it submit to the jurisdiction of the apprehending platform. But, that again is not the legal basis upon which we are proceeding in the Persian Gulf.

In time of armed conflict, when we have belligerent warships at sea which are taking interdictive-type actions with respect to merchant platforms, the legal basis is premised on the belligerent’s right to interdict the flow of commerce to or from his enemy, including commerce flowing in enemy or in neutral bottoms. The least intrusive and the most historically sound methodology of doing that is the doctrine of visit and search which provides for stopping a foreign flag vessel or a neutral vessel on the high seas to determine whether it is truly neutral or it is enemy, what it is carrying, and where it is bound. Of course, that merchant platform has the obligation to submit to visit and search. If it fails to do so, it lays itself open for possible destruction, minimum force again being brought to bear to require it to come to heel. If contraband is found aboard, then the platform is directed into a belligerent port where a prize proceeding would ensue.
The next mechanism that is very fundamental in the law of naval warfare for doing this kind of thing is that of naval blockade. This is the concept that is directed against enemy-controlled ports and harbors as opposed to chancing interception at sea. Its purpose is to deny the enemy any use of shipping, whether of its own or of neutral flag. The traditional rules of blockade are that it has to be established by a level of government that is quite high an on-scene officer in command can not establish a valid blockade. There must be notification to the international community. It must be effective in the sense that there must be some danger associated with any attempt to breach the blockade. It must be impartial so far as its application is concerned, and cannot be to close off a neutral country from maritime commerce. Once you have breached a blockade or have attempted to breach a blockade, it lays the violating platform open to inspection. Again, there is no blockade in effect in Iraq. We haven’t gone that far. Under Article 42 of the Charter, it certainly contemplates that blockade may be one of the forceful measures that the Security Council may choose to invoke. They have not done so.

What we have going on out there right now folks is a maritime quarantine, similar to the Cuban quarantine situation. It is not an enforcement of a blockade. Consequently, we are very careful to say that U.S. Warships are in the process of intercepting these platforms and if they are carrying offending cargo, we turn them away. They are not subject to capture nor are they subject to destruction. We’re turning them away. As a matter of fact, in the last incident that happened yesterday, the U.S.S. ELMER MONTGOMERY operating in the Red Sea, signalled an Iraqi tanker to stop and submit to inspection. The tanker refused to do so. The ELMER MONTGOMERY used the maritime signal and shot across the Iraqi tanker's bow to get her attention. It got her attention. She came to a halt. She was boarded, inspected, determined not to be carrying anything. She was empty and she was allowed to proceed on toward Iraq. So this is not a blockade situation.

D'Amato: Burns Weston, Professor of Law at Iowa, who has also taught for two years at the Naval War College (so we have quite a Naval representation on the panel), is a graduate of Oberlin College in 1956, and got his L.L.B and his J.S.D. at Yale Law School where he studied under Professor Myres McDougal. Burns is the senior author of a coursebook of which I am the very junior author, called "International Law and World Order," which is in its second edition now. It is problem-oriented, and, I think an exciting set of teaching materials. He has written about human rights in the world community.
He has done important, early work in claims resolution matters in trade. But recently, he has turned his attention to perhaps the most important global issue facing us which is nuclear deterrence. He has recently published a book, "Alternative Security: Living Without Nuclear Deterrence." His article in the McGill Law Journal [28 McGill L.J. 542 (1983)] I think is a major contribution to our thinking about the way international law applies to nuclear weapons. He is a dear friend, and I am delighted that he is here to talk about these issues.

Professor Burns H. Weston: Thanks, Tony. Like everyone else, I want to pay my respects to our hosts. I feel like a guest but someone hostage to the common law principle — now established — that one must say thank you. But I say thank you with pleasure and complete volition.

I think we need to be very careful when we are talking about this particular crisis. In a manner reminiscent of what Mike Malloy said this morning, we don’t have all the facts. It is a very fluid situation. It is very hard to come to firm judgments about anything at this particular point in time and I am very nervous about anybody who says ‘always’ and ‘never’ or that ‘it is very clear.’ Things are very murky at the moment. I think we also have to think very carefully, particularly those of us who are Westerners, about sitting in judgment about a crisis that involves a very different culture than our own. I know that it is very difficult for somebody like me to even contemplate what it means to understand ‘the Arab mind.’ But to the extent that there is such a beast out there, I think it behooves us (most of us I suspect not being able to speak or read Arabic, most of us not knowing very much about Islam, if anything at all, and most of us probably not even having travelled to the Middle East) to take some very, very, serious caution about how we approach discussion relative to a culture that is significantly and distinctly different from our own.

Of course, we can exaggerate our differences, too. I am reminded of a story when Jimmy Carter was trying to negotiate the Camp David accords and was out jogging one morning, and came across a camel driver. He went up to the camel driver and said, ‘excuse me sir, can you tell me what time it is?’ And the camel driver looked at him, then looked down underneath his camel and says it is ten after seven. Well Jimmy Carter was utterly amazed by this and he said, ‘well, excuse me kind sir, how is it that you are able — I am trying to understand Arab culture — how is it you are able to look under the belly of this camel and tell the time?’ And the camel driver looked down again and said, pointing, ‘see that clock over there . . .?’ So I think we can exaggerate also the differences and a part of the point
that Mary Ellen O’Connell and Professor Grunawalt have been making is that there some common rules to which Iraq and other Arab countries are a party, just as we are, and that is why it is possible to talk about an international legal system; that is why it is possible to talk about a world community, fractionalized though it may be.

Let me say quickly, in addition to some of the things that Mary Ellen O’Connell pointed to suggesting Iraq’s violation of those rules, in addition to 2(4) [referring to U.N. Charter art. 2, ¶ 4] and other prohibitions on the use of force to which Mary Ellen O’Connell referred, one can point to the 1945 Pact of the League of Arab States. Article 5 of which says essentially the same thing. Iraq violated all of these prohibitions. We can also talk about Iraq’s violation of conventional and customary international law with respect to the treatment of foreign diplomats and embassies. We can talk about Iraq’s violation of customary and conventional international law with respect to the treatment of foreigners generally, particularly with respect to foreigners in occupied territory, the use of civilians as hostages and shields, notwithstanding the Japanese experience of World War II; deportation; death penalty threats for the harboring of foreigners; and so on and so forth. Needless to say too, Iraq could be condemned were it to decide to resort to the use of chemical weapons in this international conflict because it is a Party, among other things, to the 1925 Geneva Protocol which prohibits the use of such weapons.

On the other side, I think it is fair to say that up to now and for the most part, the United States has behaved lawfully, and indeed, all the countries with which the United States is currently aligned under the aegis of the United Nations have for the most part behaved lawfully. It is indeed this legality, I think, on the part of those states associated with the United Nations effort here that is in large part responsible not only for President Bush’s high degree, perhaps unprecedented degree, of popularity here at home, but for the success of his foreign policy. I guess what I am trying to say here is that I want to make a pitch for the proposition that a lawful foreign policy helps to build consensus. When you do not have lawful foreign policies, you get ‘dissensus’, and to abide by the law and adhere to the law is, in my judgment, a fundamental and indeed indispensable ingredient of a truly enlightened foreign policy.

But all this said, I want to express a few words of I don’t know if the word is ‘dissent’ but at least they are words of caution. I have some concerns about some of the things we are doing, and I also think we ought to acknowledge some of the areas where there are some genuine potentials for possible dispute.
First of all, when one talks about what we lawyers refer to as jus ad bellum, that aspect of the law that relates to the prohibitions on use of force in the conduct of foreign policy, I don’t think that enough serious attention has been given to the issue of the massiveness of the U.S. build-up, particularly the United States build-up of military force in Saudi Arabia. It has been said on several occasions, last night and again today, that this build-up has been thoroughly and entirely justified. Well, I think that there are some questions that need to be asked about whether or not there was indeed an Iraqi threat of aggression upon Saudi Arabia that would warrant the large degree of military opposition that we have mounted since then. One has to ask also about the extent to which this large build-up of military force has in fact cornered Saddam Hussein in a way that prevents him from maneuvering diplomatically to find a graceful way out of an extraordinarily complex and extraordinarily difficult situation. Which leads me to another point. This confrontational approach that the United States, and by virtue of the United States, the United Nations, has been pursuing, has not paid sufficient attention to the possibility of other solutions that don’t necessarily involve Western conceptions of conflict resolution. Just as an example, a former student of mine walks into my office a couple of weeks ago, a student, a Westerner, who has been studying Islamic culture and so forth. He wanted to send to various Arab embassies in Washington, namely, a sermon of judgment based upon the Korenic Law that would be a way of passing judgment by Arabs upon Saddam Hussein for what he had done that would provide for a ‘face-saving’ way out of this particular crisis. Now I don’t know that that is necessarily the solution. I do know that a number of Arab embassies were very interested in this in fact, they have invited him to Washington where he is currently making the rounds talking to people about his proposals.

I have the sense that there are solutions out there of a more peaceful, and less confrontational sort; that frankly the Western World, through the United Nations, with the leadership of the United States, has not been pursuing as adequately as it might.

I would also add a couple of other points. That is, that the way we consider the issue of the treatment of refugees was almost with complete disregard of the plight of these people, and the obligations of the international legal order to require a humane treatment of these people seems to be going by the wayside, not being talked about in any serious fashion. The question of humanitarian food, aid and medical assistance is something that is a little bit more complex because Iraq is not a party to the 1977 First Protocol which requires that there
be this kind of assistance in cases of crises and in an emergency of this type; therefore, we must look to Security Council Resolution 661 for guidance and see it as essentially binding upon the rules relating to humanitarian and medical assistance and aid under this particular circumstance, which essentially says that we leave it up to the Security Council to make the twin judgments of when are the circumstances when such aid is appropriate, and how much and in what way that aid should be distributed. But we are not giving serious enough attention, in my view, to the way people are being affected, or the people who will be affected, by the possibility of an outbreak of war. There is an incredible momentum building up. People are using words like 'inevitable,' 'it's in the cards,' 'it's in the stars,' 'this is going to happen,' and we are beginning to accept this inevitability of conflict. I am reminded of a Chinese lesson that defines fate as something that is shaped half by expectation and half by inattention. I think to a large degree, there is this kind of expectation that it is inevitable that we are going to have this conflict, and our inattention to alternative ways to resolve this crisis in dealing with international law and relations as I am fond of saying, as if people mattered, not just as if states mattered I think is deficient in the current crisis.

We have to recognize, of course, that there are some very, very fundamental principles at stake: the principle of non-aggression; the principle of territorial sovereignty; you might say the principles, the key archetypal principles, of stateism in the present world order. But so are also some other things very much at stake: human life, the potential devastation of the world economy, incredible amounts of suffering. I mean we need to engage in a certain amount of role reversing when we think about these things and imagine if it was our children, our streets, our schools, our homes that were being devastated. Would we be so eager to punish Saddam Hussein by an all-out attack if need be on Iraq? These are questions that we need to take very, very seriously. The Iraqi invasion of Kuwait, as some people have suggested, is kind of the Arab world's collapsing of the Berlin Wall.

Everything has changed in the Middle East at this point. I agree with that, and we need to adapt to it. We need to be recognizing that the positions we are taking now are precedents for future actions in what are likely to be the archetypal kinds of wars: regional wars over resources, over oil, over water, especially in the Middle East, over influences that are now being allowed to vent their spleen in a way they did not when the Cold War was having its heyday. But we need to learn, somehow or another, to give peaceful means of dispute resolution their chance. I am not persuaded that we are doing that
It means that we have to be more conscious and sensitive to Arab, Pan-Arab populism. It means we have to find and insist upon an equitable and just solution to the Palestinian and Israeli crisis. But we do not have to accept the fate of inevitability. We have to recognize that reality is never fixed. We have to believe in human capacity to bring about change.

I guess what I am trying to say is that with all the storehouse of wisdom we have is locked up in our libraries, all over the world, about how to do these things, we haven't succeeded very well. In the words of a very well-known poet-anthropologist Loren Eiseley in his famous little book called "The Immense Journey," what the world needs now is really not more brains. What the world needs now is a gentler, a more tolerant people than fought for us against the tiger, the ice, and the bear.

D'Amato: Thank you. We have had very nice initial presentations. I would like to now have some conversation among the panelists for a while before we throw it open to discussion, because that was the reason for asking each person to be very short in their initial statements. I think Mary Ellen has a question she would like to ask Burns.

O'Connell: I am very frustrated by Burns' comments. Of course, I agree with everything you said. People should matter, not states. The only reason states exist is because they are useful organizations so that people can lead their lives in the most fulfilling way. But how do you make states use peaceful settlement? You are saying the United States is not being peaceful enough in its approach to how to resolve this conflict. Of course we have to be sensitive to the other cultures that we are encountering. Of course we have to be sensitive to the refugees and do all these things. But frankly, Saddam Hussein did not use the means of peaceful settlement of disputes that were available to him. He violated all the things you are now saying the United States should be doing. So now we are in the position where one person has run roughshod over the U.N. Charter, over using the ICJ [International Court of Justice], over using peaceful settlement of disputes. He is the one whose armies have killed people, who has created the refugee situation. Now we are in this terrible problem of trying to push everything back so that the next dispute will be settled peacefully. I am afraid that I have come to the conclusion that unless we were to use a very strong response to what Saddam Hussein did, then the next time someone wants to use force, they will think there was no cost to pay.

Frankly, I think we have responded rather peacefully to what has happened. We have not used force yet in response. We are holding
the line in Saudi Arabia. Mike Malloy told us about the economic embargo. I think this is great. This is a peaceful means in response to what has happened, but it is imposing a cost. I hope the United States itself will learn that next time there will be a cost. That was my question to Ved Nanda. I just wanted to say this in response to Burns — what are we supposed to do to get Saddam Hussein to abide by what you have just set out as a prescription for the future unless we impose a cost on him now?

D'Amato: Let me pile on to that one so that Burns can answer both of us. I would say that I would be dissatisfied if at this point Saddam Hussein pulls out of Kuwait, goes back to Iraq, and keeps all the gold he has stolen and everything else. I don't even think that we should allow that. So the diplomatic solution is one I don't even accept if it existed.

Weston: Let me make it very clear that I am not in agreement with Saddam Hussein. I think he's a goon! He is an international outlaw. There is no question about that. Anybody who is going to spew chemicals on his own minority population doesn't deserve a great deal of respect from anyone. I am also very aware that we are in a very precarious situation that if the United Nations does not pull off what it has set out to do here, we may have a situation, perhaps not completely analogous to, but certainly similar to the failure of the League of Nations to stop Italy's march into Abyssinia which brought ultimately the collapse of the League of Nations.

I realize the stakes are very, very high. What I guess I am trying to say is that I think that the U.S. agenda is not as pure as it has been proposed and the way we tend to be talking about. We are not there mainly to defend the principle of territorial sovereignty. We are not there because we are concerned about the principles of Article 2(4). We are there because of oil, and if oil were not present, Kuwait would be just a blip on our screen. We wouldn't even be thinking about it. We are not there really to preserve the collective security system of the United Nations. I am not even sure we are there only for oil. I think that we are very scared about Saddam Hussein ultimately having nuclear weapons, a very legitimate fear, albeit one somewhat hypocritical coming from a country that hasn't gotten rid of its own.

I think the real long-term motivation of the United States at the present moment, using the convenience of the United Nations at the present time in this seeming agreement about the need to stop Saddam Hussein, has to do with long-term plans about regional hegemonialism,
establishing a beachhead. The Pacific Rim today is essentially a zone of peace. Europe is a zone of peace. It is going to be South Asia, the Middle East and Africa that are going to be our primary concerns. It seems to me that what we are looking to is a long-term presence in the Middle East to protect the so-called vital interests of the United States.

What I am trying to suggest here is not that we shouldn’t resist on matters of principle. I am not saying that we shouldn’t stand up to Saddam Hussein or that we should let him get away with it. What I am asking is, can we not try to exhaust every conceivable persuasive strategy that is known to us (and maybe at this point unknown to us because we have not yet really explored the labyrinthian possibilities of an Arab solution) that will allow a resolution of this crisis in a way that will not only perhaps ultimately bring Saddam Hussein to the bar of justice in an Nuremberg-type trial where he will be judged for crimes against states and for crimes against humanity, but in a way that also will prevent the death and destruction of so many people.

We are talking about people, folks. That is what I am concerned about. We are talking about human beings like you and me. I wouldn’t want to die, and I thank God my son is just about a year too old to be brought into a draft that might well come into place in about a year from now. I have not forgotten the Vietnam experience and how it just drove our society apart. One cannot be too sanguine about the impact that actual hostilities here would have upon the world economy, certainly on our own. That is a powerful, powerful concern.

D’Amato: Burns, I appreciate that. Perhaps we could get Professor Grunawalt’s comments on that.

Grunawalt: Well, I would like to dissociate myself from the views that come from my left here [referring to Prof. Weston]. First of all, I guess I can sum up Burns’ view. I gather what you are telling me, Burns, is that if we must have war, let’s have it be a nice war. I suggest to you that a war, by any trappings is, by its nature, a very blunt instrument of the highest measure. It is one that ought not to be used unless there is no other viable recourse.

Weston: But that’s the point, have we exhausted all viable recourses?

Grunawalt: The issue here is then what is the best and most immediate, and I guess the most humane, way to end this violence to the whole fabric of international legal order. As we speak, as we’re sitting here talking about and wondering about whether there are diplomatic solutions we haven’t thought about, there are people who are being raped; they are being pillaged; they are dying. I mean in Kuwait, right
now. We have a country under siege that is under extreme and brutal savagery at this point in time. How long are we going to let that go on? That becomes the question.

I want to also disassociate myself with the assertion that if it were not for Kuwait having oil, we would have no problem and it would not even be a blip on our screen. I disagree with that. I disagree with that entirely. As a matter of fact, it is my view that if it were not for the complication of oil in the Iraq-Kuwait equation, I think our actions would have been more immediate and more direct than they are now.

D'Amato: Since I am sitting on the extreme right wing, I would like to disassociate myself from the following remarks. I would like to say, in opposition to Burns Weston, I think that from a humanitarian standpoint it is correct to put that many troops in the field because one of the criticisms I had about our Panama engagement is that we had too few troops go in, resulting in considerable loss of life. Many of our troops fired in apparent self-defense against civilians there because they were relatively sparse in that country. We sent some 24,000 troops in there. I don't think it was nearly enough. If we had sent 240,000 in, there might have been far, far fewer casualties. Therefore, I think if you send in a force, Burns, that is anything less than what the United States is sending to Saudi Arabia, you might encourage an armed conflict that would lead to far more loss of life than would occur by sending in an overwhelming force. I wish we could be overwhelming. Given the number of Iraqis under arms, that may not be possible in an infantry kind of war, but I'd like to be so overwhelming that there is just very, very little need to resort to violence. My values are the same as yours. I just see things differently.

O'Connell: If we are going to be personal about this, may I just add the personal note that I agree with Tony. I have a brother who is in the Reserves in a combat unit and I hope that if he is called to Saudi Arabia, and it looks like his turn might come at the rate things are going, that it will be a very short time, if we have to use force. But, I don't want to disassociate myself too far from what Burns is saying. I think what his basic underlying theme was is that let's stop talking about 'wars inevitable.'

I think there are a lot of other solutions that we do have to look for; but what I object to is taking Saddam Hussein off the hot seat about who is to blame here. He is to blame for what is happening. Now let's think of a solution that doesn't necessarily involve the resort to the loss of life, including a lot of family members of those here
and my own. I would like to see the United States moving toward a multilateral force. To begin with, let’s spread this out. Let’s not make it a U.S.-controlled situation. I think we have to share it. I think most multilateral approaches are going to be the solution to this kind of conflict in the future, in part just because of the United States’ ability to pay for these things. We are under terrible economic pressure. I think when you spread out the thinking process, you get a wider point of view, and you have less concerns of the kind that Burns is raising, whether one country has its own self-interest so greatly at stake that its motives are no longer pure. So I think a multilateral approach is the right one. I would like to see us start handing off some of the military and economic responsibility to a wider group of countries. But until the United States actually announces that we are going to take control of Kuwait, and keep the oil for ourselves, I think we are acting pretty responsibly right now.

I don’t think that we are going quite as far as Burns suggests that we are, in terms of being merely self-interested. That would be our narrowest self-interest. I don’t see anything like that. I think we are responding to the call of our allies, Saudi Arabia and Kuwait, to help defend them, and I think to defend the Charter and to get a more peaceful world in the future, we had to do this.

D’Amato: I would like to ask Professor Grunawalt whether you think that it is easy to say let’s have a multilateral force. Might there not be the kinds of complications involved that could lead to a worse situation?

Grunawalt: Of course. Operation Desert Shield is premised on the combined use of arms, and we have been trying very hard to get others involved in the process; but if we are talking about combined control arrangements, combined rules of actual engagement, it’s a little bit more sticky and difficult as to whether or not this country is willing to put your son in a dangerous situation under the command, control and direction of an officer other than of the United States and the U.S. military structure. Those are difficult questions. That is the problem of the Military Committee structure within the United Nations Security Council apparatus, and one that we will have to work out overtime. These problems can be worked out, don’t get me wrong. I just want to make the point that these are not easy questions with respect to command and control.

Those of you who have had operational military experience I think may understand what I’m talking about. These are very, very delicate, most difficult issues. I do want to agree with the rest of the
panel that most certainly we need to continue pressing very hard to make this as broad an effort and, in this day and age, as multilateral an effort as we can. The cooperation that we have been able to work out with the other nations in a maritime international dimension within the Gulf, both during the Iran-Iraq conflict and now in the current situation, has been rather remarkable. Not much has been said about it but it’s been very close, effective, and rather remarkable.

D’Amato: Professor Grunawalt, let me ask you a question that you didn’t get to in your presentation. I don’t know whether you intended to. As to international law regarding the use of human shields, we obviously are going to think twice before we blow up some of Hussein’s infrastructure if we know that there Americans there who we are going to be accused of deliberately killing by that process. Yet, instinctively, we feel that the use of human shields is a clear violation of the laws of war. Can you give us any of the thinking of people like yourself with respect to that proposition?

Grunawalt: Well, obviously this is not a new phenomenon. This has been one that we have had to confront every time that we have had an armed conflict. There is always that problem. What does the other fellow do with people under his control, including prisoners of war and others? From a practical apparatus, we would approach this as we do other considerations with respect to civilian casualties. That under the law of armed conflict, it is understood that because war is such a blunt instrument war is not nice; there is going to be incidental injury. There is going to be collateral damage. But under the law, it is understood that those things will occur. But you always have a responsibility to minimize incidental injuries and collateral damage to the degree which you can. It is a proportionality test. Now that’s the same kind of test, from a legal premise anyway, that we must apply to the use of civilians as shields. We ought not to strike a target where the loss of civilian casualties outweighs the military benefit of striking that target in the first place. That is the fundamental precept of the law of targeting. However, because they are your own people, it ratchets up the dilemma that you face. But if you were to succumb to that kind of a tactic, there is no end to it. We must get out of this notion that this is something new. We have been confronted with this problem before. We have always been confronted with this problem. It is inherent when you are dealing with a belligerency. What is going to happen when innocents are paraded in the protection of target areas unlawfully? It is always a dilemma.

Weston: I would imagine that if we had to go in and innocent people were deliberately put there as human shields and they died, even if
one of them died, that would be a war crime against Hussein that should result in his death penalty if a Nuremberg trial would be set up. In that respect, he has gone for broke. If a war breaks out, he is personally on the line.

Grunewalt: I have a question of Mary Ellen and Burns. The question about the culpability of the man, Saddam Hussein, is clear. I certainly agree. Let's have a Nuremberg trial. Let's try that sucker. The trick is getting a hold of him. On the other side of the equation, do you, my colleagues, subscribe to the elimination, physical elimination, of Saddam Hussein now, by using force.

D'Amato: That's a difficult question. How would you answer that, Mary Ellen and Burns?

Weston: I am not a pacifist. I am not somebody who says you should never use force, and I don't believe that force and law are inconsistent with one another. Indeed, law doesn't exist without the use of force in most occasions, even in our own domestic society. What I am saying is, that I think the United States has over the years exhibited a propensity to resort to military confrontational techniques, and that in this particular instance, the potential for horror and devastation that will reverberate world-wide is so enormous, that we have got to stop this sort of at least rhetorical march, if not practical march, toward the inevitability of war. We have to spend a heck of a lot less time focusing upon those kinds of strategies that may not work in the end, and focus on those strategies that have at least the potential for bringing about a solution to this crisis that don't require resort to the use of force.

As for Saddam Hussein himself, I am almost ashamed to say what I am about to say, but I would like very much to hire the Israelis to go in and grab him.

O'Connell: I'll answer too. I am persuaded by many of the comments that Burns has made in terms of what would make the dispute end most peacefully. Maybe that means keeping Saddam Hussein there to negotiate with. But I am probably more persuaded by the position the United States and its allies took during the Second World War, that yes, we do support the assassination of Hitler, if somebody could have gotten him, to end the war more quickly that was the right policy. I think that during the course of our conflict, which we now have the right to engage in with Iraq to defend Kuwait and Saudi Arabia, that that would be a legitimate target of our attack. But the question I have about the trial and whether or not we try Saddam Hussein if we were to get him, rather than assassinating him. I am
not sure that capital punishment is any longer permissible under international law, and would hope that capital punishment is not permissible. A life sentence for Saddam Hussein for what he has done would be just. Are we going to offer up George Bush for trial for invading Panama? And Ronald Reagan for Grenada? I think we have got a serious question there.

D'Amato: I am glad you raised that.

O'Connell: I think it is a terrible issue for the United States to deal with. We had a discussion about this on the earlier panel.

D'Amato: Mary Ellen, you raised a question this morning. Let's imagine this is a legal debate and we have some precedents. We have the U.S. invading Grenada. Then we have the U.S. invading Panama. Now we are on the brink of having the U.S. invade Kuwait and Iraq. Somebody might ask, as Professor O'Connell asked this morning, can we ever do another Panamanian or Grenadian style action after the position we have now taken in Iraq? In other words, are those precedents now contradicted by our present situation? Or, and you know the other alternative if I were debating the other side of this question, I would say, quite the contrary. I think we have been 100% consistent. I want to try to justify that from my perspective and then open it up to obvious attack on the left.

First of all, the United States, in both the Grenadian and Panamanian operations, made it clear from the very beginning, that we have no territorial ambitions in those countries. It was totally unlike when Saddam Hussein went into Iraq to annex Kuwait. We said this is a limited operation. Number two, it turned out to be a limited operation. Number three, we were excising, removing a government that was acting in violations of the human rights of the people of the Grenada and Panama. I think we did them a favor. I think this was the appropriate thing to do. I am talking now in very 'Wilsonian' terms this is what Woodrow Wilson would have done and we are harking back to that. But I think he was right with respect to the fact that governments have a monopoly of power in their own territory. They act extremely the way Noriega did, or the way the hoods did who shot their way into the government of Grenada. They are going to impose their own will by the use of a monopoly of physical violence against their subjects. If anybody in this world exists who can go in and stop that process, they should do it.

I say the United States, and have said this in print, has a moral obligation to intervene in humanitarian situations when the intervention would not be disproportionate to the costs involved in intervening.
Obviously, you don’t want to blow up a country in order to save it. But if you can do what we did in Panama and Grenada, then I say we should do it or anyone should do it, or certainly the U.N. should do it. Now, when we look at this situation in Kuwait, I say we should do it or anyone should do it, or the U.N. should do it. I think that is exactly what is happening. We have taken the leadership position. We have gone in and we have stood up and what we have said is that you can count on us. We are consistent. We are there. And we are going to repel this naked aggression, and we are going to restore the people of Kuwait to their own territory and drive out Saddam Hussein.

This is what we have been doing all along. I don’t see any inconsistency. I would argue that when you have a case and there are two precedents in your jurisdiction, both sides have to accept those precedents. You can’t say, ‘well they are not a precedent.’ I have to accept the fact that Grenada and Panama are like two precedential cases, and now we are talking about Kuwait. I don’t deny that they are precedents. What I deny is the way we have interpreted them. I am trying to say that the interpretation of those precedents is consistent with what we are doing now, and my colleagues say that no, there is an inconsistency, or that the precedents will have to be overruled after the Iraqi situation. I think that stakes out a position, and now I think Professor O’Connell has all the right in the world to jump in and say I’m wrong.

O’Connell: You’re wrong. Panama and Grenada have been overruled. The United States tried to carve out an exception to Article 2, paragraph 4 in invading both Grenada and Panama. We had democratic interests at stake. The world never went along with us. We were criticized. It is true that there were some mitigating circumstances. So if we had all three gentlemen who perpetrated violations of Article 2(4) in the last ten years on trial before us, well there would be a lot more gentlemen than those and even one or two gentlewomen; but if we had Reagan, Bush and Saddam Hussein on trial, I would give Reagan and Bush a lesser sentence. Because obviously the degree of war crimes that are being committed now by Saddam Hussein are far more serious. The United States was in violation of Article 2(4) in invading Panama. There is no exception for humanitarian intervention or for establishing democracy. Maybe we had somewhat better motives because we didn’t try to annex those countries. But five hundred or more people died. We don’t even have the count yet from Panama. Seventy-three people died in Grenada.
To me, I have serious questions about why we went in, and, talking about pure motives, etc., I think we violated the Charter because in both cases, our Presidents were in need of foreign victories. President Bush jumped in the polls. We all remember. Why didn't we try to handle that dispute peacefully? Why did we go in and kill hundreds of people to take Noriega out? It wasn't our responsibility to change the government of Panama, just as it is not the responsibility of Iraq to change the government of Kuwait. That's for the people of the country to decide themselves.

I hate to be in this position because I am supporting a position which I think supports what the United States is now doing. I would like to think of this as a reformed country and we are seeing how beneficial it is to stick with the Charter and to bring our allies with us. That is why we are getting an effective embargo. That is why we are not going to face the same kind of a program that we faced over in Panama and Grenada in the Middle East. This should be our precedent. Let's go with this one for the future and say we are sorry about the past; that we are going to end that kind of unilateral behavior. I like what we are doing now. I think it is the way of the future. I hope it won't come to war. But I like being fourth square with the United Nations Charter.

D'Amato: Mary Ellen, even though you say I'm wrong, I applaud your elegance.

Weston: I agree with Mary Ellen. I think that you are wrong. It is not just the United Nations Charter that we violated with respect to Grenada and Panama. We violated the OAS [Organization of American States] Charter, and we have a violated a whole number of other very solemn commitments we have made under the inter-American security system: the Bogota Charter, the Rio Charter, and so forth. There have been a whole number of treaty obligations that the United States acted in complete disregard to of in both of those operations.

Tony, essentially the bottom line of your argument is that if the United States makes the judgment that a government it doesn't particularly like should not be in power, that we have the right unilaterally to act as the policeman of the world and go out and do something about it. I simply don't buy into that, not if you are living in the post-1945 U.N. Charter era which is a commitment to the maintenance of international peace and security through the United Nations, and that's what makes the current operation so extraordinarily popular. Mary Ellen is absolutely right.
The reason, and I think this is a point I made in my opening remarks, the reason why the United States, and particularly President Bush, is enjoying such popularity today is because really, for the first time in a long time, the United States is acting entirely consistently from a law point of view with its legal commitments under the Charter and under other international legal prescriptions relative to the use of force. As a result of that, he is able to build a consensus, not a descensus, except from, of course, Iraq; but he is able to build a consensus giving him an unprecedented popularity in the United States as far as U.S. Presidents go, this far into the term of their office, and a really unprecedented popularity for the United States in the conduct of its foreign policy. It is the legality of what we are doing that makes it so universally popular. It is the illegality of what we did in Grenada and Panama that earned us unanimous condemnation in the Organization of American States for what we did in Panama, and condemnation in the United Nations, as well as in the OAS, for what we did in Grenada.

D'Amato: After a good second eloquent statement, I need help, Jack.

Grunawalt: They're both wrong. I think that I would like to go back to something Mary Ellen said right at the outset. She made the point that Article 2(4) of the Charter is not dead. I most sincerely want to embrace that view. I think that is obviously the whole premise of any hope for a developing world order. It is my view, however, that one cannot examine Article 2(4) in isolation.

The United Nations Charter is a collective security agreement. That is what it is for. Article 2(4) is premised on collective security mechanisms of the Charter working, in other words, the inherent right of nation states to resort to force to protect their fundamental interests. What the Charter contemplates is that the member nations vest in the Security Council the responsibility to act on their behalf if there is in fact a need to act with respect to the use of force. As we know, the apparatus has not been able to function effectively because there has not been commonality of view. There has not been consensus among the permanent members of the Council as to what course of action should be taken. Therefore, individual Nation-States are necessarily forced back into the inherent right of self-defense as not created by, but reflected in, Article 51 of the Charter. I would maintain that the actions we have taken in the past have been consistent with the general structure of the United Nations Charter.

The idea that, as an example, territorial integrity is the sine qua non of a world order structure is simply not valid. There are times,
obviously, when that must give way to other higher and more pressing demands. But you have to read the document in its entirety. I cannot say and will not subscribe to the view that there is a moral equivalency, or a legal equivalency, in our actions in Grenada and Panama with what took place in Afghanistan or in Kuwait, because this is not the case. I think you have to stay away from parsing sentences, for heaven's sakes, and look at what is this all about? What is the U.N. structure for? Did our actions advance or did it detract from the development of some kind of form of viable world order structure.

D’Amato: I would like to say that as I listened to the last few remarks, it struck me that Professor O’Connell and Professor Weston have a very legalistic view of the situation. I would call that, from a jurisprudential standpoint, a “word bound” view. They say ‘what are the words of the Charter?’ ‘Is anybody violating these words, etc.? ’ On the other hand, Professor Grunawalt is saying we can’t look at Article 2(4) in a vacuum. We have to take into account the structure and purpose of the United Nations. That is a more expansive view.

But I want to take an even more expansive view than that. That is, I think, that law words do not even count at all. I think that what counts in this world, and what counts in our lives, is morality. What are the moral imperatives of the situation not, what do the words of the Charter mean? The words of the Charter were called into being on top of an ocean of moral understandings. I mean the moral understanding in 1945 was that naked aggression of the Hitler-type was absolutely immoral. That was what Nuremberg was all about; that was what the Kellogg-Briand Pact was all about. Those words, Article 2(4), didn’t suddenly invent the notion of the non-use of force for extra-territorial aggrandizement. They simply captured a portion of the morality that the whole Charter was built upon. If we’re going to ignore that entire moral understructure and focus on words, I think we are fooling ourselves.

What is really going on here? It seems to me that there are dictators out there in this world. They’re crazy, self-centered murderers, and if we can stop them, or if the U.N. can stop them, we should. If you look at it from a moral standpoint, you can draw a very clear distinction between Afghanistan and Grenada, or between Kuwait and Grenada or Panama. I mean the United States is acting, I think, in a moral fashion, and that’s why I called it Woodrowsonian. It seems to me that that is what is decisive in life. You can find a legal rationale for it. But the important thing is to act morally with respect to our fellow human beings around the world. I think that
from a human rights standpoint I would argue that that is what we are doing in the Gulf.

I am very glad to be in the United States as a citizen right now. Back in the Vietnam days, I thought we were on the wrong side. I argued some of those cases against the United States. I got into a lot of trouble with my colleagues, with everybody else, with the U.S. government because I thought that we were not doing the right thing in Vietnam. But I certainly think we have been doing the right thing in the recent past, and I think it is because we're not taking and should not be taking a narrow, legalistic, 'word bound' view of these matters. We should rather look at it from a point of view of responsibility. When Professor O'Connell says 'we're not responsible for the people in Panama,' I utterly disagree. They are our neighbors just as much as anyone else. We are responsible. We are morally responsible.

O'Connell: We're responsible not to shoot them. I didn't say we weren't morally responsible. I agree with human rights. I just think we should allow them the human right to determine their own way of government.

D'Amato: What if they can't? What if they are imprisoned the minute they speak up?

O'Connell: Then we are not going to big brother and come in and do it for them.

D'Amato: Okay, there's where we disagree. I think we should be their big brother.

Weston: I know that you have the right, in a way, to have the last shot since you're the moderator, but just let me say one thing. If after everything I have said today, you can call me 'word bound,' you haven't heard a thing I have said, and that makes me despair even more.

Grunawalt: I would also like to disassociate myself a little bit from Tony. At the War Naval College, one of the things we thoroughly enjoyed doing with our student body is our annual symposium on international law. Among other things we discuss the Charter and Professor Alberto Coll and I used to have some dandy arguments. He advances the continuing vitality of the concept of the 'just war' doctrine which drives me absolutely bonkers because in my view, we must continue to carry out our actions and try to justify them as best we can within the four corners of the Charter.

I happen to find more room in the Charter for the use of force than Mary Ellen or Burns finds; but I will not depart from the four
corners of the Charter. With the 'just war' doctrine, I think perhaps in some respects there is a capability to go beyond the Charter on these things on a higher moral plane. As long as it's somebody like Tony who is calling the shots, well that's fine. But that is an awfully slippery slope. I worry about that coming back to haunt us when someone else is making those determinations. Once again, by the way, I don't think there is an iota of difference with respect to the fundamental values of any of the four people who are sitting up here staring at you. That's not what this is all about. I hope that's coming across.

D'Amato: I think that's right. You see, I think 'the four corners of the document' is a very metaphysical statement. Those four corners could stretch across the universe, or they could stretch across a piece of paper. I think the only way you get a handle on that is to look at the underlying moral considerations. But these are getting into deep problems of interpretation, and I do think we should have some questions from the floor.

Professor McAfee - Southern Illinois School of Law: The potential reach of Article 51, just as a sample, I am wondering how each of the panel would react to President Carter's actions in attempting to rescue the hostages in Iran. Did that violate the U.N. Charter, or was that within its scope of self defense? What would be the difference between that action and the justification we offered for Panama?

D'Amato: You know you are opening up a huge question of interpretation. Another thing, what are the four corners of Article 51? Is it an inherent self defense that is inherent in the sense that it wipes out everything else in the Charter? Or is the word inherent to be considered in the context of the Charter?

Weston: There is at least a quick partial response to the question that Professor McAfee raises and that is that the principle of proportionality applies to Article 51 just as it applies to any other use of force. What President Carter did in the abortive effort to rescue the hostages in Tehran in the Iranian desert was entirely proportional to, at least in my judgment, the crisis that he was facing. I also think that much of what we have done in the current crisis is within Article 51, albeit that I have some very serious concerns. As I have said, I hope it is clear, I don't think that anything we have done so far is unlawful.

What I am concerned about is whether it is wise, and whether we have done some things that may end up coming back to haunt us from a policy point of view. So I think that as to Article 51, proportionality is the basic response to Professor McAfee's question.
I think we would probably find very common agreement, wouldn’t we, even across this spectrum.

Grunawalt: I also have noted in discussions that often we find we think we are debating the law. We’re not. We’re debating the facts. I think we need to bear that in mind. Your perception of what the United States did in Panama is necessarily different from the perception of the person sitting next to you. We have a different view based on our own personal experience and on how we gain our information. A different view of the world as it might exist. I just want to make that point. I think there are multiple legal arguments that support our actions in both of those cases. We were not necessarily limited to Article 51. There were other invitations and other kinds of justifications that were available to us and that we tried to bring forward.

D’Amato: Well, Professor Grunawalt, that’s true. We all see the world differently, but we see it through our concepts, and sometimes these are legal concepts. So, debating the legal concepts can give you a different window on the facts, and to that extent, I think this can be a productive exercise.

Professor Hayward [Professor Emeritus - SIUC]: I am a Minister and Professor of Religious Studies, and I want to uphold the law against morality. I think the law exists to protect us from excessive moralism. There is no one so dangerous as a moralist who thinks God is on his side, and no one so dangerous as a good Christian just off his knees. Therefore, the one like motif that I have seen in all the discussions this morning and today that is hopeful is the fact that international law through the United Nations may save us from the excesses to which we have stooped so far. I think it is quite right that the reason Bush has as much support for his activity as he does is because he has plugged it in so quickly to the United Nations. But one thing that is holding back this country from a more adequate support of the entire operation, as I see it, is the suspicion that Bush would not have gone in were it not for oil and the need for political clout because he rattled the sabre and waved the flag. I cannot think but this is true. I don’t want it to be true, but I am afraid it is. I would like to ask the panel to rebut Mr. Weston’s observation about oil. I don’t believe for a minute Bush would have gone in there if it weren’t for oil.

D’Amato: Let me first say that I am just as opposed to excessive moralism as I imagine you are. I’m not talking about excessive moralism. I am talking about the kind of situation where you have a guy like Noriega if someone objected to his rule, they disappeared,
or were tortured. It is pretty plain what is going on in that kind of country and you don’t need to be excessively moralistic about it. I think we’re talking about bedrock moralism. But with respect to your other question, Burns do you want to respond?

Weston: I don’t know that I am the one to respond to the question. I think that the question is directed at the two of you.

D’Amato: I think that it was well said last night. It is not that there is an oil motive, per se. The more important worry is that a guy like Saddam Hussein could wind up with such immense riches that he would get from the Kuwaitian situation that he could build nuclear weapons. He could build chemical weapons. He already has the fifth largest army in the world. If you pour that much riches into a maniac like him, and let him get away with it, you are in an incredibly dangerous world situation, and it is to prevent that kind of aggrandizement that we are in there, not to protect the price of oil; but oil has a lot to do with it in the respect that he is, after all, seizing an immense amount of wealth which he is not entitled to and that we do not want him to have.

Professor Frankowska (Southern Illinois School of Law): I would like to draw upon what Burns said about the need for looking for peaceful measures rather than let ourselves be the prisoners of this predicament of thinking that war is inevitable; and just to be more practical what is to be done? I am thinking about two measures that so far have not been executed. Number one, expelling Iraq from the United Nations, the Arab League of Nations, and any other international organization. The other thing, is to sever diplomatic and consular relations. I know what the League of Nations experience was with expelling, for instance, the Soviet Union for their aggression against Finland. A few months later they invaded and eventually annexed three Baltic Republics and it may not be necessarily the best way to go. Nevertheless, I would like to hear your comments on the possibility of putting Iraq in total isolation as a measure similar to what we did for instance to suppress the Ian Smith regime in Rhodesia.

Weston: I am very hesitant about any proposal to break off diplomatic relations or to boot people out of the United Nations for precisely the reason that those modalities are part of what helps people talk instead of fight. I’m not sure that doing something like that isn’t cutting off their nose that will spite the face of peaceful solution. On balance, I think it’s not a useful approach because it would just be one more obstacle in the way of trying to communicate effectively with the Iraqis and others who may be sympathetic to them.
When I am talking about searching for other means of trying to resolve a dispute, other than the battlefield solution, I am not saying that we should not deploy force. I’m not saying we shouldn’t threaten force. I’m not saying a lot of those kinds of things. I think we have to bring him, Hussein, to a point where we are going to make him realize that the stakes are very high; but I rather have the sense that the United States has been discouraging efforts on the part of Arab leaders, like King Hussein, Yassir Arafat, and others, who have been trying to find some way to get to Hussein’s conscience in an Arab context. In fact, the United States, if I read the New York Times correctly, has flatly discouraged and rejected efforts on the part of King Hussein to try to bring about any kind of accommodation. I just don’t think this is the appropriate way to proceed. I think we need to admit that there is far greater room for Arab initiatives because Arabs will better understand Arabs than Westerners will understand Arabs. This is my judgment. Maybe that’s a silly judgment, but that’s an off-the-top-of-the-head judgment.

D’Amato: Burns, how can you know about Hussein’s conscience when you have a situation where, for eight years, he was being financed in large part by the Kuwaitis who gave him this money voluntarily, and then, as a kind of thank-you, he invades them and takes them over. This guy doesn’t have a conscience.

Weston: I’m not saying that he has a conscience in that sense. To appeal to reason, are you going to say that he is unreasonable? I don’t think he’s irrational. I think the man has a very logical, deliberate game plan. What I’m saying also is not relying upon the elite groups of Kuwait or Saudi Arabia who don’t want to have anything to do with Hussein at all because he countermands their alleged vital interests, but rather, to talk to people in the Arab world who do have his ear.

Grunawalt: I would like to just make a comment. I had the privilege of being at a function similar to this where we had a guest from Kuwait as one of our panelist. We got into this question and people were talking about this solution or that solution. He made the remarkable statement, ‘we’re talking about the compromise of Kuwait sovereignty.’ The big boys are going to watch out and decide how we are going to divvy up this little country. That’s not what’s at issue here and if we want to really be true to our convictions in this matter, I would suggest to you that we have to be very careful about doing that. We’re talking about the existence of a sovereign state. Again, I just have to disagree with you. I know that we share the same hope.
that was the initial part of your expression. I happen to be more positive in my view of what I think we would do in a similar situation absent the economic imperative.

Having said that, we have gone fifty-seven days since the aggression began. We have withheld the use of force in those fifty-seven days. We have used diplomatic means; we have used economic means; we have used political means; we have used military means, in the sense of putting in force to deter Saddam from any kind of incursion against Saudi Arabia and hopefully to facilitate his removal. I don’t think our action to date has been at all at odds with the suggestion that Burns is trying to raise, that we ought to examine other means. That’s what the devil we’ve been doing for the last fifty-seven days. But how long can that go on?

Dean Haynsworth (Southern Illinois School of Law): I have two questions. First at what point is force justified? Secondly, would a preemptive strike that is designed with the possibility that it might kill a 100,000 people or more, but is designed to get Hussein, would that be legal under present laws?

D’Amato: I think that actually tucked into that question was what the Army general who got from was saying — that we would bomb Baghdad and maybe Professor Grunawalt would like to answer.

Grunawalt: First of all, in defense of all my Army colleagues, that was an air force officer. As for the first question, at what point and time was force justified? That point and time occurred on the second of August, now it’s just a question of not legally when does the point and time arrive, but politically. I don’t think we have had any real disagreement among us that the legal event is present and has been present for quite some time.

Weston: If the question is whether it is appropriate to attack Iraq in order to get them out of Kuwait, I think the answer would be that if all measures of peaceful settlement, genuinely all matters of peaceful settlement, have been exhausted and have achieved nothing, that it would be, as long as it is within and under the auspices of the United Nations and not a unilateral measure by the United States. Under these circumstances, it would be permissible to attack Iraq. But the question is what kind of an attack? I suspect Tony might agree with me on this.

To the extent that one can talk about surgical strikes if that is even militarily feasible, Israelis have proved it possible, I don’t know whether we could, but if you could have a surgical strike against key military installations, against chemical weapon plants, and things like
that, obviously you would involve some loss of life, but there would not be, for an example, an attack on Baghdad the way Henry Kissinger has been talking about. I think that would be permissible.

As regards to the preemptive use of force, there is precedent for that again, in this instance, Israel being the leading casemaker as it were but it is a highly debatable proposition. If there is a threat from the Iraqi side that is imminent, that is likely to occur very quickly, that is going to be potentially devastating to the UN forces, then I would say that a preemptive strike would be permissible. But, I don’t think you can answer this question in the abstract. You have to look at the particular context and if you were to do this without a genuine, as we say casus belli, a genuine provocation that would warrant the preemptive attack, it would then be very hazardous, legally.

D’Amato: Professor Grunawalt.

Grunawalt: First of all, I think the use of the word preemptive is not even available to the U.S. With preemption, you’re talking about something we would have wanted to do on the first day of August. Preemption has come and gone. This is not a preemptive circumstance. This is a response circumstance and not a preemptive one. Secondly, I don’t believe that the United States is limited with respect to its authority under the law to respond today, if we chose to do so, by using forceful measures in response to our collective security commitments with respect to Kuwait. Whether you are talking about strikes in Kuwait or strikes into Iraq.

With respect to surgical strikes, I want to come back to the point that when we use weapons, folks get hurt and oftentimes they are the folks that are not intended to get hurt. The Israelis have a lot of sophisticated equipment, no question about that, and they have some very skilled operators. So do we. But any notion that there is a surgical nature to those strikes that Israel has carried out in the past, is really a misunderstanding of the facts. We have great capability. I want to disassociate myself from the recent remarks we heard from Professor Nanda this morning who kind of questioned that. We have great capability. But please don’t get it in your minds that we have some magic G-whiz, whiz bang, Buck Rogers kind of device that goes sailing around and only hurts bad guys. Those things just do not exist.

D’Amato: By surgical strike though, I think a better way of saying it is that you should not deliberately target areas where there is a disproportionate number of civilians. That’s the gist of the Hague regulations.

Grunawalt: We have great capability to avoid that kind of application
of force because we do have weapons which can be targeted discriminately and we can lessen greatly the incidental injury and collateral damage that ordinarily ensues from less sophisticated weapons.

Professor Brian Mattis (Southern Illinois School of Law): At the end of World War II, one of the arguments for using the atomic bomb was that it was going to save lives, that it would save the civilian population of Japan. It would save military lives that would be used in the invasion. Since that time the doctrine of mutually assured destruction has a sort of precluded the use of nuclear weapons. But now we are facing the situation where we have the bomb and the other side doesn’t. If you are convinced that it will save lives in the net equation, is it justifiable to use a nuclear weapon.

Weston: Absolutely not.

Grunawalt: Maybe. Let me comment. Certainly not to target a civilian population as such. We cannot countenance the Hiroshima or Nagasaki bombing or the fire bombings at Tokyo or Munich or Coventry. Hopefully, we have learned something out of the carnage of World War II. Now, that doesn’t necessarily mean though that nuclear weapons are unlawful per se. There are tactical nuclear weapons in various arsenals that theoretically, anyway, could be employed in a limited context. The problem with that is letting the genie out of the bottle.

My own gut feeling is that I hope we would not use that. I don’t think there is a legal prohibition upon using nuclear weapons in that sort of context of course one can’t target population centers and certainly it would not fall outside the parameters of collateral damage/incidental injuries.

D’Amato: Burns, you’ve admitted that in your article on nuclear weapons. At the end of your article you said that there was a possibility, under certain circumstances, to actually use nuclear weapons.

Weston: Only in the most rare, isolated circumstances, but not in standard typical strategic doctrines/policies practiced by the United States and Soviet Union. I invite you to look at that article in July McGill Law Review 1983 [28 McGill L.J. 542 (1983)].

But let me also add one more additional comment of an historical sort. There has been a lot evidence by historians since the dropping of the bombs at Hiroshima or Nagasaki which by the way there were three planned, only two were dropped that those bombs were not necessary to bring Japan to its heels. That in fact, the Japanese general staff was ready to surrender anyway and that this was a strategic move designed primarily to show a demonstration of force against the
Soviet Union which was in the process of moving into the easternmost regions of its country on the Pacific Rim. So there were other reasons than simply the rhetoric that we heard out of Washington on trying to save lives, particularly the lives of U.S. soldiers. There were other reasons involved.

Question from audience: There was a date thrown out, Nov. 6, and I think we danced around this all day. But this nice little war we have almost going on has taken the S&L's off the front page. It has taken almost all the budget and specials off the front pages and left them to PBS to discuss, and I think there is a lot of this is that is not as unplanned as we would like to think. For example, we were rehearsing war down in the Texas desert, and we have been in the California desert. It just seems to me, and I would like a reaction to this, can we really say this isn't a big brush fire in order to build a good turn out for an election in order to get the people's mind off the horrible domestic problems?

D'Amato: I think it's always important to be cynical and skeptical. I think that's part of our abilities as rational human beings to look at what we are being told in the media and saying 'maybe there is some design behind this.' I believe that the invasion of Kuwait was probably just as much a surprise to Bush as the Falkland War was to Margaret Thatcher. That was wonderful for her prestige. I mean it did wonders for her, but did she go out and plan it? I doubt it. The thing is that we have contingency plans going on all the time for all kinds of surprises. Yet, I'm fairly sure that this thing took us pretty much by surprise and that we reacted in kind of a gut way, and that a lot of other people are now beginning to react. Why didn't the Europeans react a lot sooner? I don't know. I think they are taking longer to think about it.

Grunawalt: If you recall during the Carter Administration, the creation of the rapid deployment joint task force has since then evolved into the Central Command. The whole premise of that was some scenario in which there would be a necessity of putting forces on the ground in the Persian Gulf. At that time our focus was essentially on the Iranians and/or the Soviets. The name of the players have changed a little bit but we have been worried about that kind of a scenario. The pre-positioning of a ship force, all those kinds of things, were designed to support that kind of an effort. Certainly there were exercises in the desert. That's nothing new. There was nothing I was able to perceive that anybody was cranking up in expectation of some sort of event. I don't think that's true.
D'Amato: Thank you. We are almost at the end but I would like Professor Weston to hit home for us.

Weston: No, I just want to respond to the question raised. I'm not quite as cynical as you are. I think I intend to agree more with what my colleagues have just said. That this was not something that was planned from the outset. In fact, there is plenty of evidence and a lot of reason to question why the U.S. was not more prepared for what happened. Our intelligence was very faulty about Saddam Hussein's planned evasion of Kuwait. We didn't take it seriously. I do believe, and here is where my cynicism does come in, that it has been very convenient for the Bush Administration to have this conflict. It has certainly eliminated the 'wimp factor'. It certainly pays off a lot of political debts in Houston. It does remove a lot of very controversial things from the front page. You are correct about that. I'm cynical enough also to believe, and I meant this not completely tongue and cheek, but you asked how much longer do we have to continue these peaceful measures. I really do believe that once elections are held in this country, that we will probably see a very rapid shift in policy. That's why I'm sort of looking at the second week in November. That's when I expect that we will begin to see efforts at finding provocations to engage in warfare exercises.

D'Amato: My more pessimistic guess is that it's going to happen soon; but you know, everybody is entitled to call his own shot. In any event I know I learned a lot from this panel. I learned to think about things a little differently and I hope that you did too. I think that we had a very lively panel. We owe our debt of gratitude to Mary Ellen O'Connell, who had to leave a few minutes early. She certainly scored some points as did the other players here. We probably will go away a little bit clearer about our disagreements, but after all, we've had disagreements going back for I don't know how long. For his expertise, Professor Grunawalt was most welcome here. I hope you enjoyed it as much as I did, and thank you Maria [Professor Frankowska] for putting this symposium together.