

**EDWARD MCWHINNEY, *THE SEPTEMBER 11 TERRORIST ATTACKS AND THE INVASION OF IRAQ IN CONTEMPORARY LAW: OPINIONS ON THE EMERGING NEW WORLD ORDER SYSTEM* (LEIDEN: MARTINUS NIJHOFF PUBLISHERS, 2004).**

*By Patil Tutunjian\**

While the use of force is prohibited by the *United Nations Charter*, there are nevertheless several ways to justify and thus “legalize” armed action, namely via a Security Council resolution, or the alternative route of a *Uniting for Peace Resolution* adopted by the UN General Assembly<sup>1</sup>. Both were sidestepped in the case of the US-led invasion of Iraq. In this collection of previously published opinions, Edward McWhinney offers a detailed analysis of international law and the events that followed the September 11 attacks leading up to the invasion of Iraq. The work is at once a deconstruction of the “legal” claims advanced by the US to invade Iraq, namely the doctrine of preemptive strike, and a defense of the premise that armed action without UN backing is ultimately unjust.

A professor of International and Constitutional Law, an occasional member of the Permanent Court of Arbitration, and occasional member of Parliament and Parliamentary secretary (Foreign Affairs), Dr. McWhinney is a prominent figure in the international law scene. As a member and former president (1999-2001) of the Institut de droit international, he clearly aligns himself with the position stated in the “Bruges Declaration on the use of force”<sup>2</sup>, drafted by the institute on the 2<sup>nd</sup> of September 2003, that the use of force is unjustified without UN backing. Dr. McWhinney was also a member and Special Advisor of the Canadian delegation to the UN General Assembly in the early 1980s.

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<sup>1</sup> *Uniting For Peace*, GA Res. 377(V), UN GAOR, 5<sup>th</sup> Sess.,(1950), online: UN Documentation Centre <<http://www.un.org/documents/resga.htm>>. The resolution was adopted and first invoked in 1950 in face of an impasse in the Security Council during the Korean crisis. It states that, in the event that the Security Council is unable to fulfill its obligations in maintaining international peace, the General Assembly can take up the matter.

<sup>2</sup> Institute of International Law, “Bruges Declaration on the Use of Force” in *Yearbook of the Institute of International Law 2004*, vol. 71, part 2 (Paris: Editions A. Pedone, 2004) at 285 [“Bruges Declaration”]. The “Bruges Declaration” is also reproduced in the Appendix of Edward McWhinney, *The September 11 Terrorist Attacks and the Invasion of Iraq in Contemporary International Law; Opinions on the Emerging New World Order System* (Lieden: Martinus Nijhoff, 2004).

The book is broken down into three successive time periods, which represent the chronology of events. In the first phase, McWhinney examines international terrorism and the recent anti-terrorist conventions drawn up to deal with terrorist attacks. In doing so, McWhinney also sets up the primary distinction between the US-led collective armed intervention in Afghanistan and the US-led invasion of Iraq. Whereas military intervention in Afghanistan was, at least on the surface, born out of a terrorist attack that quite obviously violated the anti-terrorism conventions that make up the body of customary international law and was thus backed by UN Security Council resolutions, the invasion of Iraq was based on claims that were never backed by such a resolution.

The second phase focuses on the “rogue states” suspected of sponsoring terrorism, and the action taken against them in the form of direct, pre-emptive military action. In what is perhaps the most interesting part of the book, the author analyses and then deconstructs the claims advanced by the Bush administration to justify the invasion of Iraq. Drawing from the “Bruges Declaration”<sup>3</sup> and Chapter VII of the *United Nations Charter*, McWhinney emphasizes that there is no absolute right to preemptive strike. Doing so in the name of self-defense is only possible within the limits set by article 51 of the *Charter*. McWhinney emphasizes the importance of UN backing and inaugurates his opinion on multilateral/unilateral action by examining the legal basis of past events, namely the Cuban missile Crisis, the 1<sup>st</sup> Gulf War and the NATO’s armed intervention in Kosovo. With these comparisons, McWhinney demonstrates the way in which the Security Council was used in certain situations and yet completely overridden in others.

In the third, post-invasion phase, the legal issues surrounding the US’ preemptive, unilateral, military action in Iraq are examined in more detail. The author revisits the example of NATO’s intervention in Kosovo as the precedent to the invasion of Iraq. Much like the recent US-led invasion of Iraq, NATO began dropping bombs without getting any legal authority from the Security Council. McWhinney cites the failures of the NATO mission starting with its illegality and thus illegitimacy, as one of the primary reasons why France, Germany and Canada refused to support the US invasion of Iraq without any UN backing. McWhinney also points out that the US failed to get Security Council backing because the facts and the pretexts used by the Bush

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<sup>3</sup> *Ibid.*

administration (weapons of mass destruction, terrorist sponsorship, etc.) were ultimately not corroborated by the UN's own fact-finding team. The author lightly touches upon the question of belligerent occupation, pointing out that the lack of legal authority to justify the invasion by default left the US and UK to deal with a *de facto* occupation. In closing, McWhinney offers a succinct examination of the legal lessons learnt from September 11 and the invasion of Iraq.

With events in Iraq far from resolved, the legality of the war and the occupation remain disputable. McWhinney succeeds, to some extent, in giving some closure to the debate. Although the writing style is at times verbose, McWhinney manages to both entertain and inform with a good mix of examining what is legal in theory and what is actually done (or not done) in practice. The most interesting aspect of McWhinney's approach is the retrospective structure of drawing upon historical events. In this way, McWhinney offers not only firmer backing to his arguments against the legality of the invasion of Iraq but he also sheds light on past events, thus reminding us that history repeats itself. McWhinney says a lot in just a couple of pages but if one is to read in between the lines, the work is ultimately a defense of the United Nations as the "unimpeachable source of legal authority".<sup>4</sup>

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<sup>4</sup> McWhinney, *supra* note 2 at 24.