

Sir John Chilcot
Iraq Inquiry
35 Great Smith Street
London S1P 3BG

10 September 2010

Dear Sir John,

1. I write in response to the Inquiry's general invitation to international lawyers "to comment on the issues of law arising from the grounds on which the government relied for the legal basis for military action". My comments address two aspects: substance and process.

Substance

2. My views were originally set out in a letter to the Prime Minister dated 7 March 2003, published in *The Guardian* on that date, a copy of which is attached. No subsequent developments, or any new information that has been made public, including in the course of the Inquiry, has caused me to modify those views: there was no legal basis for military action. A detailed articulation is set out in Philippe Sands, *Lawless World* (Penguin, 2006), at Chapters 8 and 12.
3. I have been unable to find support in any academic article in an established United Kingdom legal journal for the view on which the previous British government relied. Distinguished members of the legal community in the United Kingdom have also concluded without ambiguity that the war was unlawful. This view has been set out with clarity and force by Lord Alexander of Weedon (the former Chairman of the Bar Council), in the *Justice/Tom Sargant Annual Memorial Lecture (2003)*, and Lord Bingham (the former Senior Law Lord) in his book *The Rule of Law* (Penguin, 2010, at pages 120-129). Copies are attached. Against this background, and having regard to the views of the Legal Adviser and Deputy Legal Adviser at the Foreign and Commonwealth Office, the substantive

issues do not admit of any difficulty or doubt. Moreover, it cannot reasonably be claimed that there exists a balanced range of views amongst those with legal expertise: the overwhelming preponderance of views is entirely in one direction.

4. The Inquiry will also be aware that an independent Dutch Inquiry has recently concluded – unanimously and without ambiguity – that the war was not justified under international law. The Dutch inquiry Committee was presided by W.J.M. Davids, a distinguished former President of the Dutch Supreme Court, and four of its seven members were lawyers. The Dutch Committee was well-placed to address the substantive legal issues. I note, however, that the composition of this Inquiry includes no members with any legal background.

Process

5. The Inquiry has a significant role to play in restoring public trust in governmental decision-making, including the circumstances in which legal advice was sought, relied upon and presented. These aspects raise important legal issues of process. The legality and transparency of the advice-giving process are fundamental when substantive issues of international law are at stake, especially when, as here, the Government had indicated that it would only take military action if that action complied with international law. There is a great deal that could be written but for the present I will limit this submission to two main areas.
6. The first concerns the issue of *presentation*. The Attorney General expressed his opinion or “views” on numerous occasions, between July 2002 and March 2003. Until the end of that period his written opinions were consistent and clear: see Philippe Sands, ‘A Very British Deceit’, Volume LVII, Number 14, *New York Review of Books*, 30 September 2010, pages 55-56 (copy attached). A first change occurred with the advice of 7 March 2003, apparently the final occasion on which the Attorney General recorded – in writing at least – a formal legal opinion. The thirteen page 7 March 2003 document proceeded on the assumption of no further Security Council resolution, and did not conclude that the war would be lawful: it went no further than indicate that such a view could reasonably be argued. Ten days later, on 17 March 2003, the Attorney General provided a one page written answer to a Parliamentary question, in a document also placed before Cabinet. This document reflected a further change, a completing a 180 degree about turn in a short space of time and in the absence of any new factual or legal developments.
7. It is now clear that the document setting out the answer to a Parliamentary question was an advocacy piece written by committee, setting out the best possible argument for the legality of the war (and a weak one at that). It was not, and did not purport to be, an opinion or an advice (according to the Attorney General it set out his “view”, which is not an established legal term of art). Nevertheless, the Prime Minister treated the document as though it was an opinion: see the resolution moved before the House of Commons on 18 March

2003, referring to the “opinion of the Attorney General” (Hansard, 18 March 2003, Column 760).

8. In this way, Parliament, the Cabinet and the public were misled. The Cabinet was not provided with a copy of the 7 March 2003 document (in apparent breach of the Ministerial Code of Conduct): members only received the one page 17 March 2003 document. The evidence before the Inquiry establishes that even at that late date the Attorney General believed the legal arguments to be finely balanced, but the one pager did not reflect that. Contemporaneous evidence before the Inquiry shows that the Attorney General was talked out of his desire to make that view known to the Cabinet (see *Note of 17 March 2003 from Simon Macdonald (FCO) about a meeting between Foreign Secretary Jack Straw and the Attorney General on 13 March 2003*). The Cabinet was entitled to know whether the Attorney’s view was that the war would be lawful, or only that a reasonable case could be made. It was misleading to present the answer to the Parliamentary question as though it was an opinion, and to do so on the basis that such opinion was clear and unambiguous, without caveat or reservation. The approach taken has had the unhappy consequence of undermining public confidence in the independence and integrity of the office of Attorney General.
9. A second matter concerns the issue of *timing*. In matters as grave as the use of military force it is particularly important that legal advice be provided as early as possible. Paragraph 21 of the *Ministerial Code of Conduct (2001 version)* requires that the Attorney General be consulted “in good time before the Government is committed to critical decisions involving legal considerations”. In the case of Iraq such advice could and should have been given following the adoption of resolution 1441, and that advice should have been the basis for the policy decisions and actions then adopted by the Prime Minister and the Government. This did not happen. By seeking final advice (or a “view”) so late in the day, the Prime Minister placed the Attorney General in a situation in which he would be – or would be seen to be – subject to extraneous political pressures. This too has damaged perceptions as to the independence of the office of Attorney-General. This is especially problematic in circumstances where no persuasive reason has been offered for the Attorney’s abrupt and complete change of position. Recently declassified documents setting out the Attorney’s earlier written expressions only serve to further undermine the credibility of the reasons offered.
10. The issue of timing is also relevant to the relationship between legal advice, on the one hand, and policy and decision, on the other. It is self-evident that government policy and related actions should be fixed around the existing law, and not the other way round. Yet it seems that in this case the law (or legal advice) was fixed around the policy as determined by the Prime Minister without taking account of legal advice. This is illustrated, for example, by the events of 30/31 January 2003, which are of crucial significance. On 30 January 2003 the Attorney General advised the Prime Minister that resolution 1441 did not justify the use of force, and that a further determination by the Security Council was

necessary. Sir David Manning described this as "Clear advice from [the] Attorney on the need for further Resolution". The very next day, on 31 January 2003, the Prime Minister met with President Bush and was told by him that military action would begin in March with or without a further resolution. Sir David Manning, who was present, recorded the Prime Minister's reaction (in a five page memorandum dated 31 January 2003, still classified). The memorandum records the Prime Minister as telling the President that he was "solidly" with him, and makes clear that although the Prime Minister thought a further Security Council determination was desirable it was not necessary. The Prime Minister's unequivocal support for the view taken by the President was not informed, it seems, by the clear legal advice he had been given.

11. By addressing these matters of process – and in particular by making recommendations to promote the independence of the office of Attorney General and the importance of timeliness and presentational accuracy in relation to legal advice - the Inquiry can make a significant contribution to the restoration of public trust in governmental decision-making. This would also emphasise the importance of respect for the rule of law, on which the United Kingdom has a useful role to play at a time of considerable challenges at the international level.
12. I would be pleased to provide such further assistance as might assist the Inquiry, on these or related matters.

Yours sincerely

A handwritten signature in dark ink, reading "Philip J. Sunde". The signature is written in a cursive style. Below the signature is a small horizontal line.

War would be illegal

The Guardian, Friday 7 March 2003 10.31 GMT

A [larger](#) | [smaller](#)

We are teachers of international law. On the basis of the information publicly available, there is no justification under international law for the use of military force against Iraq. The UN charter outlaws the use of force with only two exceptions: individual or collective self-defence in response to an armed attack and action authorised by the security council as a collective response to a threat to the peace, breach of the peace or act of aggression. There are currently no grounds for a claim to use such force in self-defence. The doctrine of pre-emptive self-defence against an attack that might arise at some hypothetical future time has no basis in international law. Neither security council resolution 1441 nor any prior resolution authorises the proposed use of force in the present circumstances.

Before military action can lawfully be undertaken against Iraq, the security council must have indicated its clearly expressed assent. It has not yet done so. A vetoed resolution could provide no such assent. The prime minister's assertion that in certain circumstances a veto becomes "unreasonable" and may be disregarded has no basis in international law. The UK has used its security council veto on 32 occasions since 1945. Any attempt to disregard these votes on the ground that they were "unreasonable" would have been deplored as an unacceptable infringement of the UK's right to exercise a veto under UN charter article 27.

A decision to undertake military action in Iraq without proper security council authorisation will seriously undermine the international rule of law. Of course, even with that authorisation, serious questions would remain. A lawful war is not necessarily a just, prudent or humanitarian war.

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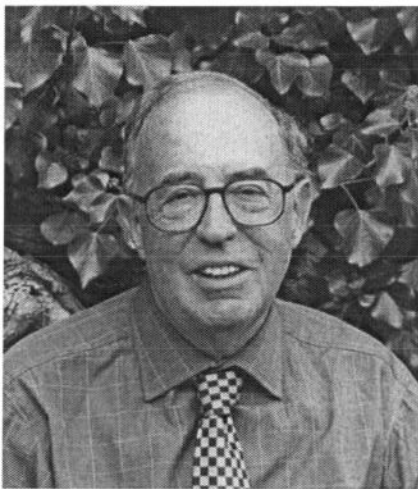
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Iraq: the pax Americana and the law Lord Alexander of Weedon QC



This paper is an extended version of the JUSTICE Tom Sargent annual memorial lecture given by Lord Alexander at the Law Society on 14 October 2003. It was originally published in the *JUSTICE Journal* in May 2004.

Lord Alexander was chair of JUSTICE Council from 1990 until just a few weeks before he died on 6 November 2005. He was the prime mover behind the transformation of the organisation in the mid-1990s.

Acclaimed by Lord Denning as the 'best advocate of his generation', Lord Alexander went on to become chairman of the Bar Council and NatWest Bank.

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Foreword

It is with enormous pleasure that, with the assistance of his former chambers at 3-4 South Square, we reprint the lecture on the Iraq War by Lord Alexander of Weedon QC (whom I, along with most who knew him, persist in thinking of more simply as Bob).

Rereading the transcript brings back to me how impressed I was at the time to see someone who was a significant public figure, a great advocate, a subtle politician and a learned man deploy all his skills to craft this lecture. He took considerable care – he was preparing it, off and on, for almost six months. And behind it all was his motivation: outrage at what he saw as the sheer speciousness of the arguments advanced in favour of a deeply illegal act. It hit two powerful levers for him: his deep, visceral commitment to the rule of law and, more personally, his memory as a student of earlier anger at the UK's invasion of Suez – an occasion when the US played a creditable role in stopping military adventurism in its tracks.

The result is a classic of its kind, an intellectual demolition job of the highest order – level in its tone, devastating in its analysis. The prose reads beautifully: no surprise that, as an advocate, the author could charm the birds out of the trees. And, if you want erudition, read his footnotes. This is not something that could ever be dismissed as a rant and certainly not as anti-American. It is the written lecture as legal rapier.

Bob was the chair of JUSTICE's Council for 14 years until a few weeks before his untimely death. The lecture was part of his legacy to us. He originally gave it as the JUSTICE Tom Sargant memorial annual lecture in 2003 and we published in the inaugural edition of the *JUSTICE Journal* in 2004. I was the third Director with whom he worked – the others were Leah Levin, who helped to entice him to the post, and later, Anne Owers. To each of us, and to JUSTICE as a whole, he was a tower of strength, an immense source of guidance and an extremely good fundraiser. We republish his lecture as part of our 50th anniversary celebrations and we will be hard pressed to raise in the accompanying appeal anything like the sums that he did for our 40th. At JUSTICE, we owe him an immense debt. And, for this lecture alone, so do you.

Roger Smith

Director of JUSTICE
October 2007

Introduction

In March 2003 the United States and our own country invaded the sovereign state of Iraq to secure regime change with the aim of eliminating weapons of mass destruction.¹ This novel action had been preceded by a notable political debate, despite the official opposition giving full support to the government. But the legal debate played a much lesser part. The Attorney General gave his view, which chimed in with that of the Foreign Office, that the invasion was legal.² The great majority of those public international lawyers who expressed a view did not agree.³ But the wider debate largely turned on conflicting views of the morality and wisdom of waging war. International law, if not exactly a sideshow, was pushed into the background. Nor has any court passed judgment on the legality of the war.⁴ Courts in the United States and the United Kingdom have declined applications to date. In the United States the issue falls firmly within the 'political question' exception to what is traditionally justiciable.⁵ In this country the courts have also historically deferred to the government in its conduct under its prerogative powers of foreign policy.⁶ Nor could there be any challenge to this act of war in the International Court of Justice.⁷

¹ 'Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict commenced at a time of our choosing.' President George W Bush, Address to the Nation, 17 March 2003.

² The Attorney General Lord Goldsmith QC's parliamentary written answer to Baroness Ramsay of Cartvale, HL Debates col WA1, 17 March 2003. Foreign Office legal advice published to the Foreign Affairs Committee, 17 March 2003.

³ Prof Ulf Bernitz, Dr Nicolas Espejo-Yaksic, Agnes Hurwitz, Prof Vaughan Lowe, Dr Ben Saul, Dr Katja Ziegler (University of Oxford), Prof James Crawford, Dr Susan Marks, Dr Roger O'Keefe (University of Cambridge), Prof Christine Chinkin, Dr Gerry Simpson, Deborah Cass (London School of Economics), Dr Matthew Craven (School of Oriental and African Studies), Prof Philippe Sands, Ralph Wilde (University College London), Prof Pierre-Marie Dupuy (University of Paris), *Guardian*, 7 March 2003. Leading academics who supported the war included Prof Christopher Greenwood QC (London School of Economics), *Guardian*, 28 March 2003, and Dr Ruth Wedgwood (Yale Law School), *Financial Times*, 13 March 2003.

⁴ In *R (CND) v Prime Minister and Secretaries of State* [2002] EWHC 2777, [2003] ACD 36 the Campaign for Nuclear Disarmament (CND) brought an application in the High Court for an advisory declaration as to whether the UK government would be acting in breach of international law if it went to war with Iraq on the basis of Resolution 1441 alone. The applicants argued that an advisory declaration was necessary to ensure that the defendants had not misdirected themselves in law on the question as to whether a further resolution was necessary. They reasoned that the prohibition on the use of force was a peremptory norm of customary international law and, as such, also a part of UK law and therefore within the common law jurisdiction of the court. They argued that, as the case raised a pure question of law and did not require a consideration of policy by the court, the matter was justiciable. The High Court expressly declined to adjudicate the matter. In the US case of *Doe v Bush* No 03-1266 (1st Cir, 13 March 2003) a group of plaintiffs, including four anonymous US soldiers and six members of the House of Representatives, challenged the authority of the President and the Defence Secretary to wage war on Iraq, absent a clear declaration of war by the US Congress. The court dismissed the suit under the doctrine of ripeness, holding that it was too soon to consider the issue as the war had not yet commenced.

⁵ *Colegrove v Green* 66 S Ct 1198. Under the 'political question doctrine' courts will not decide questions that have either been constitutionally committed to another branch of government, or that are inherently incapable of judicial resolution. Matters of foreign policy are almost always non-justiciable under this doctrine (*Baker v Carr* 32 S Ct 691). However, the political question doctrine is notoriously difficult and courts have not always taken the same approach on the justiciability of war powers. Compare *Berk v Laird*, 429 F 2d 302, 306 (2nd Cir, 1970) and *Dellums v Bush*, 752 F Supp at 1150 with *Holtzman v Schlesinger*, 484 F 2d 1307, 1309-11 (2nd Cir, 1973) and *Ange v Bush*, 752 F Supp at 512.

⁶ *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374. There are some traditionally non-justiciable areas that are now considered by the courts. These include the power to issue a passport (*R v Secretary of State for Foreign and Commonwealth Affairs ex p Everett* [1989] 1 QB 811) and the prerogative of mercy (*R v Secretary of State for the Home Department ex p Bentley* [1994] QB 349). Furthermore, the development of the public law doctrine of legitimate expectations now permits a limited consideration of the exercise of a discretion to exercise a prerogative power, such as the provision of diplomatic and consular assistance to British nationals abroad (*R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76). However, the extent to which courts will consider matters of national security continues to be very limited and great weight is given to the views of the executive (*Home Office v Rehman* [2001] 3 WLR 877, per Lord Steyn at 889). Foreign policy matters and the deployment of the armed forces are not justiciable at all (*R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*; *R (CND) v Prime Minister and Secretaries of State*, n4 above).

⁷ As the ICJ can only adjudicate cases in which the parties have a sufficient legal interest (*Ethiopia and Liberia v South Africa* (South West Africa Case), Second Phase (1966) ICJ Reports 6), Iraq is the only state with locus standi to bring such a case. Iraq never signed the optional clause acceding to the compulsory jurisdiction of the ICJ and in any case has no

Yet there has surely been no more important or far-reaching issue of law for many years.

The very importance of the issue makes the topic especially daunting. All the more so as I, as a common lawyer, do not pretend to any specialist expertise in international law. The issue is also clouded by the various and often shifting justifications that have been given for the armed invasion. This means that the legal analysis has to range widely, if it is to confront all the variously stated reasons for going to war.

The principles underlying international law are not recognisably different to those that exist in all civilised legal systems. They seek to foster liberty, promote equality of participation, and to set boundaries to the pursuit of self-interest. As with any system of law there are restraints and sanctions to protect the community, including the use of force as a last resort.

In achieving these objectives in international law it is obviously necessary in particular to restrain the actions of the most powerful nations. The founding fathers of the United States knew, and indeed relied upon, their reading of Emer de Vattel, writing in the middle of the eighteenth century, that in international law:

*Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.*⁸

Thus, it is not surprising that the underlying purposes of international law are to ensure equal treatment and, where appropriate, to protect the weak against the strong just as our own national systems of law seek to do domestically. This was particularly significant in the case of the UN Charter which was negotiated against a background of the ruthless and unjustified invasion of smaller states by Germany, Japan and the Soviet Union. Not surprisingly, respect for sovereignty and constraints on the unilateral use of armed force were uppermost in the minds of the founders.

I wish briefly to touch on a threshold argument that some who describe themselves as practical realists would advance. What, they would say, is the point of traversing old ground? The war in Iraq, so bravely and searingly chronicled by intrepid journalists and able political commentators, now lies in the past. It may have inflicted heart-rending casualties but at least it was short. The Iraqis should think themselves fortunate that the indisputably vile regime of Saddam Hussein was at last driven from power. In time there will be an Iraqi government to replace the outgoing regime and to introduce democracy to that country; the country may be unstable now, but we have to see it through. So what is the point of raking over the embers?

Such appeals to so-called reality command a swift and simple riposte. International law, like the common law, is founded upon precedent. A bad precedent should not be allowed to stand. This US-led action was aimed at nullifying a rogue state. But the United States have identified other rogue states as being part of what they regard as 'the axis of evil'. These states were identified as

independent government with sufficient standing to bring a case. Furthermore, the US revoked their signature to the optional clause in 1986. The UK is the only relevant state that is a current signatory to the optional clause.

⁸ Emer de Vattel, *Le Droit des Gens* (Leiden, 1758) translated in *The Law of Nations* (Washington, Carnegie Institution Washington, 1916), p7, as quoted in Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (Stanford, Stanford University Press, 1970), p134.

North Korea and Iran by President Bush in his 'State of the Union' speech in 2002.⁹ Moreover, the United States have since identified Syria, Cuba and Libya as being a threat.¹⁰ So it becomes especially important now to weigh up whether the precedent is sound. In turn this engages the larger geo-political question of the extent to which the United Nations and other international institutions such as the European Union can act as a check on the hegemony of the United States.

The United States and multilateralism

I do not use the word 'hegemony', or as a former French Foreign Secretary would say 'hyper-puissance', in a pejorative sense.¹¹ We all owe a remarkable debt, which it is right in time of widespread criticism of the United States we should acknowledge, to the commitment of that remarkable country to a pursuit of world order and peace. This is particularly so since the end of the Second World War.

In marked contrast to the isolationism that followed the First World War, the United States played a visionary role in creating the institutions forged at the end of the Second World War. Let us recall some of their greatest contributions. The Bretton Woods agreement with the creation of the International Monetary Fund and the World Bank, and above all the commitment of President Roosevelt to the creation of the United Nations. The drive with which his widow, Eleanor, as the first US ambassador to the United Nations, shaped the Declaration of Human Rights, which in turn was the inspiration for our own great European Convention on Human Rights. The vision of General Marshall in financing the reconstruction of a Europe broken and bankrupted by war, so creating the framework from which far-sighted leaders of France and Germany could seek a historic reconciliation through binding economic ties. The preservation through NATO of the security of Europe against the ambitions of the former Soviet Union. Far-flung conflicts to restrain perceived aggression, such as in Korea or, more misguidedly, in Vietnam. The retaking of Kuwait from the invasion by Saddam just over a decade ago.

In all this, the United States were obviously acting out of enlightened self-interest, but laced with a strong element of idealism. Some of their views and actions were not always palatable to our country. They encouraged the dismantling of our remaining empire, and undermined our unlawful and disreputable Suez adventure. In all these actions they were, generally, a standard-bearer for democracy and the rule of law. These ideals have prevailed in countries as distant from each other as Spain, Portugal and the former Soviet Union and its satellites. Thomas Jefferson's 'Empire of Liberty' stretches more widely than ever before.

It is perhaps no accident that in these 60 years of remarkable achievement the United States were committed to the principles of multilateralism. During the Cold War the concept of the preservation of 'the West' against the Soviet Union demanded a close-knit engagement with Europe. But there were always currents of thought in the United States that instinctively shied away from an institutional approach and believed that the United States should pursue more

⁹ 'States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world.' President George W Bush, State of the Union speech before Congress, 29 January 2002.

¹⁰ 'In addition to Libya and Syria, there is a threat coming ... [from] Cuba.' US Under Secretary of State John Bolton, 'Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction', Remarks to the Heritage Foundation, Washington DC, 6 May 2002.

¹¹ Robert Kagan, *Paradise and Power: America and Europe in the New World Order* (London, Atlantic, 2003), p43.

closely defined national interest.¹² The end of the Cold War, and with it much of the justification for multilateralism, gave impetus to these views. The refusal to ratify the Kyoto Convention on the environment, or to participate in the International Criminal Court, and indeed the withdrawal from the Anti-Ballistic Missile Treaty are all illustrations.¹³ The United States now feel freer of constraint to act in what they consider to be their own best interests regardless of the views of other countries. They see themselves, too, and rightly so, having in many ways wider responsibilities than any other country for upholding order whether in Asia or in the Middle East. These are not responsibilities that Europe can fulfil. The United States have continued to commit more than three per cent of their GDP to defence notwithstanding the end of the Cold War, whereas Europe, in pursuing the peace dividend, has allowed its defence spending to fall below two per cent. The US military budget is about double that of the other NATO countries put together.¹⁴ On this basis the disparity of power will grow.

All this is brilliantly brought out in a short and remarkable book by Robert Kagan called *Paradise and Power*.¹⁵ He points out cogently that the differing perspectives of Europe and the United States reflect the military weakness of Europe as compared with the power of the United States. For the weaker Europe negotiation, diplomacy and international law are the only ways in which its aims can be achieved. As he puts it: 'For Europeans the U.N. Security Council is a substitute for the power they lack'.¹⁶ By contrast for the United States it is a potential restraint on their clear ability to act alone to preserve their national interest.

This dichotomy, which the events leading up to the Iraq war so graphically highlighted, means that some wring their hands and ask whether anything can be done to build checks and restraints on the United States. But this seems far from easy. *The Economist* has recently pointed out that the American population is growing faster and getting younger whilst the European population declines and steadily ages.¹⁷ The economic consequences of this obviously favour the United States. *The Economist* has summarised it in these terms: 'The long-term logic of demography seems likely to entrench America's power and to widen existing transatlantic rifts', providing a gloomy 'contrast between youthful, exuberant, multi-coloured America and ageing, decrepit, inward-looking Europe'. All of which means that we have to rely on the acceptability of evolving international law together with the underlying liberal democratic values of the United States for a check on neo-conservative, supremacist tendencies. There is, too, a growing realisation within the United States that they cannot, and do not want to, undertake the task of policing the world alone. In practical terms, the difficulties inherent in the long-term occupation of a country highlight the need to engage other states and multilateral institutions. The cost of war is much higher if pursued unilaterally, as are the costs of reconstruction.¹⁸ The need for wider participation

¹² eg, 'The U.N. has become a trap. Let's go it alone.' US Senator Robert Taft, quoted by Rep James B Utt, *Congressional Record House*, 15 January 1962.

¹³ The US are a signatory to the Kyoto Protocol to the UN Framework Convention on Climate Change (1997) but have never ratified it. The US signature to the Rome Statute of the International Criminal Court (1998) was formally renounced on 6 May 2002, and the US formally withdrew from the Anti-Ballistic Missile Treaty (1972) on 13 December 2001.

¹⁴ '[The US] spends 3% of its GDP on its armed forces, France and Britain around 2.5%, Germany just 1.6%.' 'Undermining NATO?', *The Economist*, 1 May 2003.

¹⁵ Kagan, n11 above.

¹⁶ *ibid*, p40.

¹⁷ 'Half a billion Americans?', *The Economist*, 22 August 2002.

¹⁸ The overall military cost of Iraq, on the assumption of a four-year occupation, has been estimated at \$150 billion. Reconstruction costs are more uncertain but could rise to the same figure. This cost would be more greatly shared if there

in peace-keeping and the value of UN involvement is now belatedly being realised.

The basis for the invasion of Iraq

How do the rival arguments for the invasion of Iraq stand up? This demands particularly close analysis. In part, as already mentioned, this is because different arguments were advanced at different times for the waging of war. At one time it appeared that reliance was placed on an imminent threat of the use of weapons of mass destruction by Saddam Hussein on the United States or their allies. Indeed, the now notorious government dossier of 24 September 2002 asserted: 'his military planning allows for some of the W.M.D. to be ready within 45 minutes of an order to use them ... Unless we face up to the threat ... we place at risk the lives and prosperity of our own people.'¹⁹ Later, emphasis was placed on the importance of bringing humanitarian relief against dictatorship to the people of Iraq.²⁰ Jack Straw stated: 'For over two decades, Saddam Hussein has caused a humanitarian crisis in Iraq and one which at least equals Milosevic's worst excesses ... Saddam has waged a war, but a hidden one, against the Iraqi people'.²¹ Yet later, the focus became the desirability of liberating that country and giving it the opportunity of democratic government.²² In a joint statement in April George Bush and Tony Blair stated: 'After years of dictatorship, Iraq will soon be liberated. For the first time in decades, Iraqis will soon choose their own representative government ... We will create an environment where Iraqis can determine their own fate democratically and peacefully'.²³

What became totally clear was that the United Nations would not approve the invasion of Iraq, at any rate until the weapons inspectors had been given a significantly greater time to find out whether Iraq currently possessed such weapons of mass destruction. So in March 2003 the United States and their allies withdrew their proposed resolution seeking approval for the use of force, because they knew the majority of the Council would reject it, including Russia, Germany and France. They had to find some other way of justifying their action in international law. So they fell back on the 12-year-old Resolution 678 of 1990 passed for the purpose of authorising the expulsion of Saddam Hussein from Kuwait and the restoration of peace in the Middle East.²⁴

were wider international support. In 1999 the coalition to liberate Kuwait orchestrated by President Bush funded 80% of the overall costs. See Leal Brainard and Michael O'Hanlon, *Financial Times*, 6 August 2003.

¹⁹ *Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (London, The Stationery Office Ltd, 2002), p7: 'The policy of the United Kingdom Government ... is related to the threat which the Saddam Hussein regime poses to the rest of the world. And that threat comes from its unlawful, unauthorised, wilful possession and development of weapons of mass destruction.' Jack Straw, interview on BBC Radio 4, 13 September 2002.

²⁰ This was never wholly explicitly put forward as a legal justification. 'The nature of Saddam's regime is relevant ... because Saddam has shown his willingness to use [weapons of mass destruction] ... let us ... not forget the 4 million Iraqi exiles, and the thousands of children who die needlessly every year due to Saddam's impoverishment of his country ... [and the] tens of thousands imprisoned, tortured or executed by his barbarity every year.' Tony Blair, HC Debates, col 130, 25 February 2003; '[This] is a war against Saddam because of the weapons of mass destruction that he has, and it is a war against Saddam because of what he has done to the Iraqi people.' Tony Blair, interview with the BBC World Service, 4 April 2003.

²¹ Jack Straw, Newspaper Society Annual Conference speech, 1 April 2003.

²² This was also not put forward explicitly as a legal justification. 'We know that most Iraqis want to see political change in their country ... The U.K. wants to help Iraq to achieve this. If we are obliged to take military action, our first objective will be to secure Iraq's disarmament. But our next priority will be to work with the United Nations to help Iraqi people recover from years of oppression and tyranny, and allow their country to move towards one that is ruled by law, respects international obligations and provides effective and representative government.' Jack Straw, International Institute of Strategic Studies speech, 11 February 2003.

²³ Tony Blair and George W Bush, joint statement on Iraq, 8 April 2003.

²⁴ n2 above. It was also suggested by the US that they were acting under their inherent right to self-defence in international law. 'Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk

An old resolution passed for a more limited purpose was ingeniously used as a cloak for the very action that the United Nations would not currently countenance. To a common lawyer, taking such a tortuous route to avoid the clear, current wish of the United Nations seems, as Professor Robert Skidelsky has put it, 'straining at a gnat'.²⁵ But it was seriously advanced and needs consideration in a little detail.

The facts

What are the facts on which the government relied? I shall not spend time on the so-called 'dodgy' dossier of February 2003. It seems to have been conceived in desperation, based on an old PhD research paper generated from the internet. It richly warranted Jack Straw's frank admission that it was 'Horlicks'. What I shall focus on is the government dossier of 24 September 2002 and the assessment by the two very experienced UN weapons inspectors, Dr Hans Blix and Dr Mohamed El Baradei. The dossier contained the 45 minutes claim. There is no doubt that this led to the widespread impression that our country could be attacked on 45 minutes' notice.²⁶ We now know that this was simply wrong. The claim should have applied only to the deployment of battlefield munitions. Yet the government did nothing to dampen down the concern they created. Perhaps one day we will be told why they allowed it to start. In as far as the parliamentary Intelligence and Security Committee has said: 'Saddam Hussein was not considered a current or imminent threat to mainland U.K.'²⁷

The whole thrust and purpose of the dossier at the time was to persuade us that Saddam Hussein's continuous breaches of UN resolutions called for further action by the international community. It acknowledged the success of weapons inspections between 1991 and 1998 in identifying and destroying very large quantities of chemical weapons and associated production facilities. It claimed that there had been an increase in capabilities to produce such weapons since 1998, but also acknowledged that these facilities are capable of dual use for petrochemical and biotech industries. It did not suggest that a nuclear threat is less than a minimum of one or two years away.

What the dossier does not contend is also of some importance. It does not suggest that Iraq has current links with Al Qaeda nor with the terrible assault on the United States of 11 September 2001. Nor does it suggest that Saddam has any present motive for launching an attack on any of his neighbours or any current intent to do so. It fails to tell us that the Joint Intelligence Committee had advised that an invasion of Iraq might increase the threat from Al Qaeda.

that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself.' Preamble to the Authorisation for Use of Military Force Against Iraq Resolution of 2002 (HJ Res 114).

²⁵ Robert Skidelsky, 'The American Contract', *Prospect Magazine*, July 2003.

²⁶ 'The dossier was for public consumption and not for experienced readers of intelligence material. The 45 minutes claim, included four times, was always likely to attract attention because it was arresting detail that the public had not seen before ... The fact that it was assessed to refer to battlefield chemical and biological munitions and their movement on the battlefield and not to any other form of chemical or biological attack, should have been highlighted in the dossier. The omission of the context and assessment allowed speculation as to its exact meaning. This was unhelpful to understanding the issue.' Report of the Intelligence and Security Committee, *Iraqi Weapons of Mass Destruction*, September 2003, p27.

²⁷ *ibid*, p31.

The dossier concludes with an account of the tyrannical behaviour, in breach of all human rights, of Saddam to his own people and highlights some of the grisly Stalinesque details. It is sickening reading but no suggestion is made that we have not known about this for years, nor any explanation offered as to why action was not taken before. So the dossier may make out a case for a new UN resolution such as 1441, but it nowhere argues that in the absence of such international action there are reasons for the United States and the United Kingdom to go it alone.

Nor did the information change between September and the fateful week in March when the inspectors were recalled and we launched the invasion. On the contrary the authoritative reports of the weapons inspectors confirmed the prior assessment. In February 2003 Dr Hans Blix reported to the United Nations that there were now more than 250 inspectors in Iraq and that although Iraqi co-operation had been less than full, access to sites had been promptly given on demand. No weapons had yet been found and there was as yet no firm evidence that they did or did not exist. He in no way suggested that there was a continuing build-up. He clearly saw his task in searching for chemical and biological weapons as unfinished.²⁸ On the same day Dr Mohamad El Baradei repeated that by December 1998 the International Atomic Energy Authority had neutralised Iraq's past nuclear programme and had to date found no evidence of ongoing prohibited nuclear or nuclear-related activities in Iraq.²⁹

In summary, the dossier and the later reports of the inspectors made out a convincing case that the United Nations should insist on continuing with inspections. But none of these facts made any case for the dramatic breaking off of inspections, disregarding the United Nations and invading another sovereign state with all the loss of life, civilian as well as military, destruction of infrastructure and internal occupation which followed. No wonder Kofi Annan said ahead of such action that it could not be in conformity with the UN Charter.³⁰ Which brings us to the Charter itself.

The Charter

The opening line of the preamble of the Charter, '[w]e the peoples of the United Nations, determined to save succeeding generations from the scourge of war ...', reflects a central purpose of the treaty: to ensure international peace and security through collective action. The Charter seeks to achieve this by outlawing the unilateral use of force except in self-defence, resolving international disputes by peaceful means, promoting co-operation in solving international economic, social, cultural and humanitarian problems, and promoting respect for human rights.

The lynchpin of the Charter is Article 2(4) which prohibits the use or threat of force in international relations in the following terms:

All members shall refrain in their international relations from the threat or use of force

²⁸ Hans Blix, Report to the Security Council, 14 February 2003.

²⁹ Mohamad El Baradei, Report to the Security Council, 14 February 2003.

³⁰ '[I]f action is taken without the authority of the Council, then the legitimacy and support for that action will be seriously impaired.' Kofi Annan, Secretary-General's press conference, Brussels, 17 February 2003.

against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations Charter.

The Charter permits only two exceptions to the prohibition. The first is collective action authorised by, and only by, the Security Council acting under Chapter VII. The second is the inherent right to individual or collective self-defence as enshrined in Article 51 of the Charter. This strong protection against the invasion of one country by another reflects the understandable reaction against the horrors inflicted before, and during, the Second World War.

Thus, Articles 41 and 42 in Chapter VII lay down both the non-forceful and, as a last resort, forceful measures that the Security Council may take to counter threats to international peace and security. If the Security Council decides that non-forceful measures under Article 41 are inadequate, Article 42 states that it may take 'such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. Article 51 contains the sole, and limited provision, for one country or group of countries to go it alone without prior Security Council backing. It states that '[n]othing in the ... Charter shall impair the inherent right to individual or collective self-defence if an armed attack occurs against a Member of the United Nations'.

I suspect that there are a comparatively large number of people who are unclear as to the exact legal justification ultimately advanced by the government for invading Iraq. So it is worth stressing that when it came to the point the UK government based its case on, and only on, UN Resolution 678 passed as long ago as 1990, in conjunction with Resolution 1441 of 2002. There were other potential legal arguments which would have seemed to be more in harmony with the various political reasons advanced. In the end none of them would have stood up in law. But they are worth looking at to show why the government was driven to scrape the bottom of the legal barrel. These arguments, which merit brief consideration, are fivefold: self-defence, humanitarian intervention, implied authorisation, the unreasonable use of a Security Council veto, and a breach of Resolution 1441.

Self-defence

There was a suggestion during the run-up to war that we were going to invoke our right to self-defence.³¹ This was the impression created by the 45 minutes claim. The right to self-defence is

³¹ 'It is right [to go to war] because weapons of mass destruction – the proliferation of chemical, biological, nuclear weapons and ballistic missile technology along with it – are a real threat to the security of the world and this country.' Tony Blair, HC Debates, col 682, 15 January 2003; 'This resolution [1441] does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant U.N. resolutions and protect world peace and security.' Ambassador Negroponte, statement to Security Council, 8 November 2002; Preamble to the Authorisation for Use of Military Force Against Iraq Resolution of 2002 (HJ Res. 114), quoted n24 above. However, arguments of self-defence were not in the end seriously advanced in the UK. Although much time has been spent scrutinising the quality of the government dossiers on Iraq, this is not an issue required to be analysed here. It seems to be common ground that parts of the second dossier, published 3 February 2003, were plagiarised from a PhD thesis. This implies that the government only presented information to the public that they thought would justify the course of action they had chosen to take. '[T]he significance of intelligence lies not only in the information, be it empiric or uncorroborated conjecture, which it is thought fit to put into this or that document, but more importantly what interpretation is placed upon it ... on the basis of the way in which whatever was said or written was presented, the British people obtained the distinct impression that the threat from Iraq was more massive and imminent than has since proved to be the case, or indeed may ever have been. There were other tenable reasons which could have been used to justify military force, but

protected by Article 51 of the Charter.³² The use of the word 'inherent' in that Article indicates that it is the customary international law right of self-defence that is preserved.³³ That doctrine was formulated in the seminal case of *The Caroline* in 1841 when American Secretary of State Daniel Webster wrote that there must be a 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'.³⁴ The element of necessity is to be determined by the claiming state. But once force has been initiated its legality must be assessed by an impartial body and not by the parties to the conflict.³⁵ The use of force in self-defence must always be proportionate, that is, in the words of Webster, involving 'nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it'.³⁶

Article 51 refers to the use of self-defence in the event of an 'armed attack'. This raises the question of when, if ever, a state may legally use self-defence in advance of an attack. There is a school of academic thought that considers that the wording of Article 51 precludes action in anticipation of an armed attack, or 'anticipatory self-defence' as it is known.³⁷ Anticipatory self-defence was an accepted part of customary international law. But it maintained the high standard of necessity enunciated in *The Caroline*. It required a threat to be imminent before a defensive attack could be undertaken in anticipation of it.³⁸ So the question at the heart of the debate is whether Article 51 qualifies or restricts the wide scope of the customary law doctrine of self-defence.³⁹

Those who argue for a restrictive interpretation point out that anticipatory self-defence is contrary to the wording of Article 51 as well as to the objects and purposes of the Charter. The imminence of an attack cannot usually be easily assessed on objective criteria. So the decision whether to

none which would have satisfied Parliament and the country as regards the necessity and legality of such action.' Field Marshall Lord Bramall, letter to *The Times*, 1 July 2003.

³² Article 51, Charter of the United Nations 1945. 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

³³ *Nicaragua v United States of America* (1986) ICJ Reports 4, 94.

³⁴ 29 BFSP 1137-38. During a Canadian rebellion against British rule in 1837, insurgents used an American ship to transport their supplies. In retaliation the British government sent a detachment of troops to capture the ship. The troops burned the ship and set it adrift causing the death of one man. It was during an exchange of conciliatory letters between the American Secretary of State Daniel Webster and Lord Ashburton in 1841 that the principles of self-defence were formulated.

³⁵ Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (London, New Haven Press, 1961), p230; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon Press, 1933), pp177-182; DW Bowett, *Self Defence in International Law* (Manchester, Manchester University Press, 1958), p193; Judgment of the International Military Tribunal at Nuremberg, 1946, 1 TRIAL OF GERMAN MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 208 (1947).

³⁶ n34 above.

³⁷ Hans Kelsen, *The Law of the United Nations* (London, Stevens, 1950), pp269, 787-789; Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1961), p275; Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 1994), p676. For the opposite view see Bowett, *Self-Defence in International Law*, n35 above, pp187-193; Stephen Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law' (1972-II) 136 Hague Rec 411, 479; MacDougal and Feliciano, n35 above, pp231-241.

³⁸ *The Caroline Case*, n34 above, was itself an example of anticipatory self-defence. The International Military Tribunal for the Far East (1948) 994 found that the declaration of war on Japan by the Netherlands in 1941 was a legitimate act of self-defence in response to an imminent Japanese attack on the Dutch East Indies.

³⁹ The customary law doctrine of self-defence is very wide, arguably including more controversial rights such as the protection of nationals abroad, and the protection of certain vital economic interests. Simma, n37 above, p790.

undertake such an attack would be left to the individual state's discretion and this contains a manifest risk of abuse.⁴⁰ Those who take the contrary view point out cogently that the relinquishment or restriction of a right in international law should not be presumed. So the mention of 'armed attack' in Article 51 does not necessarily mean that a state cannot act to forestall an imminent attack upon it.⁴¹ The French text, too, may be slightly wider when it speaks of '*agression armée*'.

The capacity of modern weaponry equips many states with the capability to strike almost without warning and with devastating consequences. So the better, and more realistic, view is that the Charter does not prohibit the use of anticipatory self-defence in all circumstances.⁴² The requirements of necessity and proportionality in these cases are obviously even more stringent than when an attack has actually been launched.

A newer, and much more controversial, development in international law is the doctrine of pre-emptive self-defence, advocated by the Bush administration in their 'National Security Strategy of the United States' in 2002.⁴³ This doctrine is broader than anticipatory self-defence and seeks to adapt the concept of 'imminent threat' in order to counteract the dangers posed by rogue states and international terrorists.⁴⁴ This is a development that troubles many international lawyers, as the removal of the 'imminent threat' criterion lowers the threshold for the use of unilateral military action and may lead to the escalation of violence in already volatile situations.⁴⁵ In some circumstances regime change is a corollary of pre-emptive self-defence, and obtaining a new regime in Iraq has been an official part of US foreign policy since 1998.⁴⁶ Most states strongly oppose these developments, believing rightly that such policies pose too great a threat to state sovereignty. With such great international opposition the policy of one state is not sufficient to create a valid rule of international law. Neither regime change nor pre-emptive self-defence can provide a legal justification for the use of military force in Iraq. Nor, as I understand it, was it suggested in the end that it could.

⁴⁰ This interpretation of the effect of Article 51 was also adopted by the International Court of Justice in *Nicaragua v United States of America*, n33 above, 103: 'in the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack. Reliance on collective self defence of course does not remove the need for this.'

⁴¹ Schwebel, n37 above.

⁴² Jennings and Watts (eds), *Oppenheim's International Law* (9th ed, Harlow, Longman, 1992), pp421-422. See also Schwebel, n37 above, 481: 'Perhaps the most compelling argument against reading Article 51 to debar anticipatory self-defence whatever the circumstances is that, in an age of missiles and nuclear weapons, it is an interpretation that does not comport with reality.' Although this pragmatic approach is necessary in today's world, its dangers should not be forgotten. The Brezhnev doctrine was a derivative of self-defence and resulted in the annexations of Czechoslovakia in 1968 and Afghanistan in 1979. It is crucial that the boundaries of self-defence are fiercely drawn or there is an unacceptable potential for abuse.

⁴³ *National Security Strategy of the United States* (Washington DC, The White House, 2002).

⁴⁴ 'We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries', *ibid*, p19. This is because 'the nature of what [terrorists] do makes it difficult to apply the imminent threat criterion' meaning that for sake of security past practice and knowledge of a threat will suffice. (James Steinberg, quoted in *The Washington Lawyer*, January 2003).

⁴⁵ Rogue states, unlike terrorists, can be deterred from unwanted behaviour by other means, including economic and diplomatic pressure. *The Washington Lawyer*, January 2003, p26.

⁴⁶ Iraq Liberation Act (Public Law 105-338, 1998); Authorisation for the Use of Military Force Against Iraq (Public Law 107-243, 2002). W Michael Reisman, 'Assessing Claims to Revise the Laws of War' 97 AJIL 82. However, regime change has never been part of British foreign policy, nor was it submitted by the British government as a valid legal justification for war: 'is the focus of this international coalition which we hope to put together regime change? Is that the objective of the United Nations Security Council resolution? No. The whole focus is on the disarmament of Saddam Hussein's weapons of mass destruction.' Jack Straw, interview on BBC Radio 4, 12 October 2002; 'I have never put the justification for action as regime change. We have to act within the terms set out in resolution 1441 – that is our legal base.' Tony Blair, statement to the House of Commons, 18 March 2003.

Humanitarian intervention

The idea of humanitarian intervention has strong, understandable and emotional support. Humanitarian intervention has been a notoriously controversial doctrine since it was first advocated by Grotius in the seventeenth century.⁴⁷ But the prohibition on the use of force in Article 2(4) makes it very unlikely that any customary international law right of unilateral humanitarian intervention survived the Charter.⁴⁸ By contrast, under the auspices of the United Nations there have been several instances of multilateral intervention on humanitarian grounds. These operations were authorised by the Security Council exercising its powers under Chapter VII to counter threats to international peace and security. The relief of famine in Somalia in 1992, the intervention in the Rwandan genocide in 1994, and humanitarian operations in East Timor in 1999 are all examples of this.⁴⁹ Outside the United Nations, state practice reveals few clear-cut examples of humanitarian intervention before 1990. India's intervention in East Pakistan in 1971, Vietnam's overthrow of the Khmer Rouge in Kampuchea and Tanzania's ousting of the regime of Idi Amin in Uganda in 1979 all resulted, in fact, in humanitarian relief. All three states, however, preferred to justify their action in terms of self-defence.⁵⁰ Likewise US-led interventions in Grenada in 1983 and in Panama in 1989 cited humanitarian concerns as reasons for action, although it was not suggested that these concerns were sufficient legal justifications.⁵¹ Since 1990 there have been three occasions on which states have considered humanitarian considerations to be a justification for the use of force. These were the intervention of ECOWAS in the civil war in Liberia in 1990; the imposition of safe havens and no-fly zones by the United States, the United Kingdom and France to protect Iraq's ethnic minorities in the aftermath of the first Gulf war; and NATO's bombing campaign in Serbia in 1999 to bring a halt to ethnic cleansing in Kosovo.⁵² The international response to such initiatives has been mixed. Liberia's intervention was retrospectively approved of by the Security Council in Resolution 788 of 1992. The coalition in

⁴⁷ Hugo Grotius, quoted in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (6th ed, London, Sweet & Maxwell, 1994), p99.

⁴⁸ Brownlie, n37 above, pp338-342; Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Boston, Hingham, 1985), p108; Lori Fisler Damrosch in Damrosch and Scheffer (eds), *Law and Force in the New International Order* (Oxford, Westview, 1991). Examples cited in academic works of a pre-Charter practice of humanitarian intervention include France, Russia and the UK's intervention in the Ottoman Empire to protect the Greeks in 1827 and to protect the Christians in Lebanon in 1860. See Istvan Pogany (1986) 35 ICLQ 182.

⁴⁹ S/RES/794 (1992) (Somalia); S/RES/918 (1994) (Rwanda); S/RES/1264 (1999) (East Timor).

⁵⁰ India justified its action on the basis of self-defence following border incidents with East Pakistan and a massive influx of refugees. It also cited humanitarian reasons and the right to self-determination. Vietnam based its action on a tenuous argument of self-defence on the basis of border incidents. It also cited humanitarian intervention as a justification. Tanzania based its action on self-defence alone and did not use humanitarian justifications. Ronzitti, n48 above; Tom Farer, 'An Inquiry into the Legitimacy of Humanitarian Intervention' in Damrosch and Scheffer (eds), n48 above.

⁵¹ Ruth Wedgewood, 'Unilateral Action in a Multilateral World' in Forman and Patrick (eds), *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (London, Lynne Rienner, 2002).

⁵² ECOWAS cited four justifications for their actions: (i) the need to stop the large-scale killing of civilians; (ii) the need to protect foreign nationals; (iii) the need for a regional organisation to protect international peace and security in the region; (iv) the need to restore a measure of order to an anarchic state. Final Communiqué of the ECOWAS Standing Committee and the Committee of Five, paras 6-9, quoted in David Wippman, in Damrosch (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York, Council of Foreign Relations Press, 1993). The coalition in Iraq justified its action in part on S/RES/688 (1991) condemning Iraqi repression of its civilian population, and also by reference to humanitarian considerations. 'We operate under international law ... International law recognises extreme humanitarian need ... We are on strong legal as well as humanitarian ground in setting up this "no-fly zone"'. Foreign Secretary Douglas Hurd, BBC Radio 4's 'Today' programme, 19 August 1991. NATO expressly cited humanitarian intervention as a justification for its action. 'Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe.' Defence Secretary George Robertson, HC Debates, cols 616-617, 25 March 1999; 'Belgium in particular, felt obliged to intervene to forestall an ongoing humanitarian catastrophe ... The purpose of NATO's intervention is to rescue a people in peril, in deep distress.' *Serbia and Montenegro v Belgium*, Belgian Oral Pleading, Verbatim Record, 10 May 1999.

Iraq received little outright condemnation, but there was also little international support for the legality of the action. NATO's action was hotly contested by several states, and caused the International Court of Justice to express concern.⁵³ In the United Kingdom, the Foreign Affairs Committee concluded that: 'NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds'.⁵⁴

This examination of state practice reflects an evolving human rights culture in international law. This is reflected in the proliferation of treaties and international judicial fora designed to protect and enforce those rights. Some states, including the United Kingdom, are taking a more expansionist and interventionist approach to international law.⁵⁵ The Foreign Office has laid down guidelines in the hope of building an international consensus as to when a state should intervene in the affairs of another sovereign state on humanitarian grounds. One of these principles is that:

*When faced with an immediate and overwhelming humanitarian catastrophe and a government that has demonstrated itself unwilling or unable to prevent it, the international community should take action.*⁵⁶

These developments suggest that a doctrine of humanitarian intervention may be developing. It is however clear that any such legal doctrine is still evolving. The growing sympathy for such a right should surely shape the actions of the United Nations rather than leaving individual states to apply their own judgment of when they should intervene.

The humanitarian situation in Iraq in March 2003, grim though it was for the Iraqis, was not claimed by the government to amount to an 'overwhelming humanitarian catastrophe' as required by the Foreign Office criteria. Even if a right to humanitarian intervention had developed in international law, it would not have applied to Iraq any more than to any of the arbitrary tyrannies which sadly still exist. There are many who consider that, when it comes to removing Saddam Hussein, the end justified the means, indeed, would justify almost any means. This instinct is all too understandable. But surely it would be a most dangerous path to embark on. Careful criteria would need to be established to ensure that the oppressed are liberated in all cases of need, regardless of whether their state is rich in oil or diamonds. We must be careful when celebrating the demise of Saddam Hussein not to create a dangerous precedent in which any unilateral military action may be condoned when one of its consequences happens to be

⁵³ Russia, China, the FRY, Namibia, Brazil, Cuba, Belarus, Ukraine, India and Mexico expressed their disapproval of NATO action in Kosovo as being unlawful. Furthermore, Slovenia, Malaysia, Argentina, Bahrain, Gabon, Gambia, Costa Rica, Iran and Albania emphasised the central role of the Security Council in authorising the use of force. 4011th Security Council Meeting, 10 June 1999. The ICJ stated that: 'the Court is profoundly concerned with the use of force in Yugoslavia ... the Court deems it necessary to emphasise that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law.' *Serbia and Montenegro v Belgium*, Request for Indication of Provisional Measures, Order of 2 June 1999, paras 17, 19.

⁵⁴ Fourth Report from the Foreign Affairs Committee, *Kosovo*, Session 1999-2000, para 138. The government responded that it, 'is ... satisfied that it [the war in Kosovo] was legally justified'. Fourth Report from the Foreign Affairs Committee, Session 1999-2000, *Kosovo*, Response of the Secretary of State for Foreign and Commonwealth Affairs, August 2000, p8.

⁵⁵ Tony Blair, 'Doctrine of the International Community', Economic Club, Chicago, 24 April 1999: 'We are all internationalists now, whether we like it or not ... We cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure ... We are witnessing the beginnings of a new doctrine of international community ... the principle of non-interference must be qualified in important respects.'

⁵⁶ *Human Rights*, FCO Annual Report 2001 (London, The Stationery Office Ltd, 2001), p138.

humanitarian relief.⁵⁷ It is UN decisions and their implementation which should be the rock on which the international community sets its feet when it intervenes on humanitarian grounds.

Implied authorisation

It is sometimes argued that the existence of Security Council approval to use force can be implied from prior Security Council decisions without having to obtain explicit permission. Advocates of this approach argue that it is politically convenient because it enables states to act at times when minimum world order requires that action be taken, but there are geopolitical factors in play which prevent express Security Council authorisation.⁵⁸

In practice, there have been several instances when states have relied on arguments of this kind. These include: India's seizure of Goa from Portugal in 1961;⁵⁹ the US interdiction of ships en route to Cuba in 1962;⁶⁰ the protection of safe havens and enforcement of no-fly zones by the US-led coalition in Iraq in 1991;⁶¹ and, most recently, NATO's campaign in Kosovo in 1999.⁶² Most of these instances have been strongly contested by other states.⁶³ The practice does not amount to a 'constant and uniform usage practiced by the states in question' required to establish a customary norm in international law.⁶⁴

A short examination of the implied authorisation argument reveals its fallacy. First, it is inconsistent with the principles and purposes of the UN Charter. From reading Article 1 it is clear that the basic premise of the collective security system is that force should only be undertaken jointly and in the interests of the international community as a whole. A system that allows states to decide unilaterally when a use of force is or is not in the interests of the international

⁵⁷ Furthermore, as Lord Wright notes in his letter to *The Times*: 'There is no doubt that these discoveries [of mass graves] apparently of Iraqis slaughtered by Saddam Hussein's regime shortly after the 1991 Gulf War, add further confirmation, if confirmation were needed, of the appalling nature of Saddam Hussein's tyranny, and might well be argued to be justification for taking action against Iraq at that time. But they do not, in my view, affect the repeated claims of the British Government that the sole aim of the present coalition against Iraq was to remove Iraq's weapons of mass destruction – none of which have been found.' Patrick Wright, Head of HM Diplomatic Service 1986-91, House of Lords.

⁵⁸ 'There is a subtle interplay of politics that renders any demand for "unambiguous authorisation" unrealistic.' Anthony D'Amato, 'Israel's Airstrike on the Iraqi Nuclear Reactor' 77 AJIL 584, 586.

⁵⁹ India argued that it was enforcing UN resolutions against colonialism. A draft resolution complaining of Indian aggression and demanding Indian withdrawal was vetoed by the Soviet Union, and another rejecting the Portuguese complaint failed to pass. 'In these circumstances, Council silence suggests implied disapproval and not authorisation.' Quincy Wright, 'The Goa Incident' 56 AJIL 617, 629.

⁶⁰ The US argued that they had implied Security Council authorisation to interdict ships en route to Cuba on the basis that the Council had not voted on a Soviet resolution disapproving the US action and had encouraged a negotiated settlement. However, the Security Council also refrained from acting on a US draft resolution that would have expressed approval of US action.

⁶¹ This action was based on S/RES/688 (1991), not passed under Chapter VII, calling on Iraq to end its repression of its civilian population. It was passed ten votes to three (Cuba, Yemen, Zimbabwe) with two abstentions (China, India). The Secretary General criticised the coalition's action saying that Iraq's consent was necessary for such consent to be legal (*Keesing's Record of World Events* (1991), p38126).

⁶² This action was based on the following resolutions, all taken under Chapter VII: S/RES/1160 (1998) noting a threat to international peace and security; S/RES/1199 (1998) expressing alarm 'at the impending humanitarian catastrophe'; S/RES/1203 (1998) finding a threat to international peace and security arising from the situation in Kosovo. A draft resolution condemning NATO action was rejected 12 votes to three (Russian Federation, FRY, Namibia). Belgium stated before the ICJ that: 'as regards the intervention ... Belgium takes the view that the Security Council's resolutions ... provide an unchallengeable basis for the armed intervention.' *Serbia and Montenegro v Belgium*, Request for Provisional Measures, Oral Pleadings, 2 June 1999.

⁶³ Jules Lobel and Micheal Ratner, 'Bypassing the Security Council: Ambiguous Authorisations to Use Force: Ceasefires and the Iraqi Inspection Regime', 93 AJIL 124, 133.

⁶⁴ *Columbia v Peru (Asylum Case)* (1950) ICJ Reports 266, 276-277.

community is dangerously vulnerable to abuse. The only way to ensure that military action is truly collective is if it is expressly authorised by the Security Council. But implicit authorisation would entail the interpretation of the words and actions of members of the Security Council said and done in a highly political context.⁶⁵ This is at best ambiguous, at worst a fig leaf giving the powerful states carte blanche to act as they wish, justified by the creative interpretation of past Security Council practice.⁶⁶

Second, the Charter requires the Security Council to consider whether non-forceful measures would be an appropriate solution to the problem before authorising the use of force.⁶⁷ For force is a last resort. This requirement is devalued, if not completely ignored, under the doctrine of implied authorisation. Some advocates of implied authorisation suggest that the failure of the Security Council to condemn an action is a tacit approval of it.⁶⁸ This is a similar argument to that advanced by the Attorney General that Resolution 1441 would have expressly stated if a further resolution was necessary for force to be authorised.⁶⁹ Given the veto power of the permanent five members this line of argument is unconvincing. It is also conceptually misconceived. It suggests that the Security Council must denounce an action in order to render it illegitimate. But this argument is an attempt to stand on its head the clear prohibition in Article 2(4) on the unilateral invasion of sovereignty.

Unreasonable Security Council veto

In the debates before the war the Prime Minister several times suggested that an unreasonable use of the veto in the Security Council would somehow allow members of the United Nations to act unilaterally without express authorisation.⁷⁰ This is a variation of a theory, expressed in academic literature, that the inability of the Security Council to fulfil its collective security role restores the right of each member state to act unilaterally.⁷¹ This concept has no basis in international law.⁷² The use of the veto is a legitimate exercise of Security Council procedure

⁶⁵ Lobel and Ratner, n63 above.

⁶⁶ Furthermore, as Christine Gray points out: 'there is a serious risk that the Security Council will become reluctant to pass resolutions under Chapter VII condemning state action if there is a possibility that such resolutions might be claimed as implied justification for some regional or unilateral use of force.' *International Law and the Use of Force* (Oxford, Oxford University Press, 2000), p195.

⁶⁷ Articles 33, 41, 42 UN Charter (1945).

⁶⁸ eg the US used this argument to justify their blockade on Cuba. Abram Chayes, 'Law and the Quarantine of Cuba', 41 *Foreign Affairs* 550, 556. D'Amato takes the argument further and argues that implicit support can even be derived from a Security Council resolution condemning an action so long as it does not impose sanctions: 'It is often politically expedient for the community to condemn a forceful initiative in explicit terms, yet approve of it in fact by stopping short of reprisals against the initiator.' Anthony D'Amato, *International Law: Process and Prospect* (New York, Transnational Publishers, 1987), p78.

⁶⁹ n2 above.

⁷⁰ 'Of course we want a second resolution and there is only one set of circumstances in which I've said that we would move without one ... that is the circumstances where the U.N. inspectors say he's not cooperating and he's in breach of the resolution that was passed in November but the U.N., because someone, say, unreasonably exercises their veto and blocks a new resolution [sic].' Tony Blair, BBC 'Breakfast with Frost', 26 January 2003.

⁷¹ Julius Stone, *Aggression and World Order* (London, Stevens, 1958), p96: 'any implied prohibition on Members to use force seems conditioned on the assumption that effective collective measures can be taken under the Charter to bring about adjustment or settlement "in conformity with the principles of justice and international law." It is certainly not self-evident what obligations (if any) are imported where no such effective collective measures are available for the remedy of just grievances.' For the opposite view, see Ian Brownlie, 'Thoughts on Kind-Hearted Gunmen' in Lillich (ed), *Humanitarian Intervention and the United Nations* (Charlottesville, University Press of Virginia, 1973), pp139, 145.

⁷² 'The Prime Minister's assertion that in certain circumstances a veto becomes "unreasonable" and may be disregarded has no basis in International Law.' Bernitz et al, n3 above.

under Chapter V of the Charter. The United Kingdom has itself used its veto 32 times since 1945.⁷³ A doctrine that enables one member to bypass the requirement of Security Council authorisation by unilaterally deeming a use of the veto to be unreasonable is dangerously subjective, and poses an unacceptable risk that the Security Council's monopoly on the authorisation of the use of force will be undermined.

Breach of Resolution 1441

Resolution 1441 was the freshest, and most immediate resolution in force at the time of the invasion. Yet there has been no suggestion that Resolution 1441 justified the invasion. Why? Because Resolution 1441 did not expressly authorise force.⁷⁴ The collective security system requires that the authority to use force, which is the most serious and deadly means of enforcement, can only be conferred by unambiguous means.⁷⁵ The graver the consequences, the clearer must be the words providing for them. No one has suggested that Resolution 1441 contains such clear language. Indeed a draft resolution containing the phrase 'all necessary means', the diplomatic code for the authorisation of force, was rejected by members of the Security Council in early October 2002.⁷⁶ The parties to 1441 all recognised that there was no 'automaticity' of consequences and that the issue would have to come back to the Council which was 'to remain seized of the matter'.⁷⁷ It was later suggested somewhat faintly that the 'further consideration' mentioned in 1441 meant that there would simply be a report and a debate without the Security Council determining what the serious consequences should be. If that was so it is far from clear why the United States and our government worked so hard to sponsor a second resolution to spell out the consequences of Iraq's failure to comply. It was only the realisation that a second resolution would not get through which led the United States and the United Kingdom to change tack and to look for some other basis in international law that allowed them to invade Iraq. They alighted upon Resolution 678. It was their only lifeline. For it is recognised that nothing short of a statement of the right to use 'all necessary means' or 'all necessary force' would be sufficiently unambiguous as to allow the extreme step of engaging in armed hostilities or invasion.⁷⁸ None of the subsequent resolutions, including 1441, gave such a mandate.

Does Resolution 678 justify the invasion of Iraq in 2003?

There has been a long-standing tradition that our government rarely, if ever, discloses the advice of the Attorney General or indeed, whether he has advised at all.⁷⁹ But on this occasion, in a

⁷³ Rabinder Singh, Legal Briefing Given to MPs, 12 March 2003.

⁷⁴ The Security Council diplomatic convention is to authorise force using one of the following phrases: 'all necessary means' S/RES/678 (1990), S/RES/794 (1992), S/RES/940 (1994), S/RES/929 (1994); 'all measures necessary' S/RES/770 (1993); and 'all necessary measures' S/RES/1264 (1999).

⁷⁵ Lobel and Ratner, n63 above.

⁷⁶ US/UK Draft Security Council Resolution, leaked to the *Financial Times*, 2 October 2002. It was circulated to other Security Council permanent members but was never formally tabled.

⁷⁷ Ambassador John Negroponte, statement to Security Council, 8 November 2002; Ambassador Sir Jeremy Greenstock, statement to the Security Council, 8 November 2002; Joint statement by China, Russia and France, 8 November 2002.

⁷⁸ n74 above.

⁷⁹ Whether or not to disclose the opinions of the Law Officers is a matter of discretion on the part of the government. There is no obligation to divulge such advice as to do so might inhibit the frankness and candour with which the advice was given, or cause a Law Officer to be criticised for a policy for which the Minister is rightly responsible (see John L J Edwards, *The Law Officers of the Crown: a study of the offices of the Attorney General and the Solicitor General*, with an account of the office of the Director of Public Prosecutions in England (London, Sweet & Maxwell, 1964).

parliamentary answer, Lord Goldsmith QC published his advice in summary form. Because of its importance and its brevity it is convenient to set it out in full:

Authority to use force against Iraq exists from the combined effect of Resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the U.N. Charter which allows the use of force for the express purpose of restoring international peace and security:

- 1. In Resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.*
- 2. In Resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under Resolution 678.*
- 3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.*
- 4. In Resolution 1441 the Security Council determined that Iraq has been and remains in material breach of Resolution 687, because it has not fully complied with its obligations to disarm under that resolution.*
- 5. The Security Council in Resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.*
- 6. The Security Council also decided in Resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of Resolution 1441, that would constitute a further material breach.*
- 7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.*
- 8. Thus, the authority to use force under Resolution 678 has revived and so continues today.*
- 9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.⁸⁰*

The Foreign Secretary also provided to many parliamentarians a longer Foreign Office advice that was to the same effect.

What is not known is whether the Attorney General had given any fuller advice. In response to my request that he should disclose his full advice he retreated behind the arras and claimed that his parliamentary answer was an exception to the usual convention and so we were not entitled even to know whether he had advised more fully or, if so, in what terms.⁸¹ This leaves us in doubt as to the extent to which he considered at all the cogent arguments that had been advanced against his view. Did he examine how, since there is no doctrine of implied authorisation, the quaint concept

⁸⁰ n2 above.

⁸¹ Letter to the author from the Attorney General Lord Goldsmith QC, 21 May 2001.

of the 'revival' of Resolution 678 was possible? Did he deal with the issues of necessity and proportionality, given that the inspectors had reported nothing concrete and were asking for more time? Did he grapple with the persuasive arguments advanced against the war by the majority of distinguished international lawyers who expressed a view? Did he explain how the United States and this country could act on their own because of Iraq's breach of resolutions rather than, as is normal, the United Nations authorising the appropriate action? Perhaps even more fundamentally, what were the facts he assumed for the purpose of his advice?

What does appear to be clear is that neither the Foreign Office opinion nor the parliamentary answer set Resolution 678 in its context. This was the invasion in August 1990 of Kuwait by Iraq. The United Nations responded by passing Resolution 660 the very same day. This determined 'that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait' and demanded the immediate and unconditional withdrawal of Iraqi forces. The nature of the issue was defined at the outset and was to be the expulsion of the Iraqi invaders from Kuwait. Four days later on 6 August Resolution 661 stressed the determination 'to bring the invasion and occupation of Kuwait by Iraq to an end' and affirmed the inherent right of individual or collective self-defence under Article 51 of the Charter. Sanctions were imposed on Iraq to achieve this clear but limited objective. This was reinforced by a decision 'to keep this item on its agenda and to continue its efforts to put an early end to the invasion by Iraq'.

This was the background for Resolution 678 almost four months later on 29 November. This resolution authorised member states, unless Iraq withdrew by 15 January 1991, fully to implement those resolutions and 'to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions, and to restore international peace and security in the area'. So Resolution 678 was always firmly anchored to implementing Resolution 660 and so to driving Iraq from Kuwait.

By 2 March the military action to end the invasion had been successful. Resolution 686 then confirmed all the previous resolutions on the issue and demanded essentially that Iraq should implement its withdrawal, provide appropriate compensation and return Kuwaiti property. There are two other interesting points that arise from this resolution. The first is that it affirms the commitment 'of all member states to the independence, sovereignty and territorial integrity of Iraq and Kuwait'. Resolution 686 also referred to the fact that allied forces were 'present temporarily in some areas of Iraq'. The resolution also recognised that 'during the period required for Iraq to comply ... the provisions of paragraph 2 of Resolution 678 remain valid'. In other words it was a temporary provisional ceasefire. This resolution is a cogent further indication of the limited purpose of Resolution 678. I do not believe that any of the political leaders at that time contemplated that Resolution 678 would justify waging wholesale war on Iraq in order to secure a regime change. Indeed, the leading actors in that drama said so clearly. George Bush senior has written that: 'Going in and occupying Iraq, thus unilaterally exceeding the United Nations' mandate, would have destroyed the precedent of international response to aggression that we hoped to establish'.⁸² General de la Billiere, Commander of the British Forces during the first Gulf War, wrote: 'We did not have a mandate to invade Iraq or take the country over ...',⁸³ and John Major has said: 'Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to

⁸² George Bush (Senior) and Lieutenant General Brent Snowcroft, *A World Transformed* (New York, Knopf, 1998).

⁸³ General Sir Peter De La Billiere, *Storm Command* (London, Harper Collins, 1995), p304.

bring down the Iraqi regime'.⁸⁴ Nothing could be plainer or more statesmanlike.

So we come to Resolution 687 on 3 April 1991. Again this resolution also affirms the 'sovereignty, territorial integrity and political independence of ... Iraq'. It also widens the obligations on Iraq because it requires Iraq in effect to accept the 'destruction, removal or rendering harmless' of chemical and biological weapons and ballistic missiles with a range greater than 150 km. It set up a regime for the provision of information and inspection. It provided for a formal or permanent ceasefire and that the United Nations could 'take such further steps as may be required to implement the present resolution and to secure peace and security in the area'. There was the specific provision enabling 'all necessary measures', which clearly would have included force, to guarantee the inviolability of the boundary between Kuwait and Iraq. But in sharp contrast there was no provision at all in this resolution for the use of force to enforce the disarmament obligations. Nor has there been any subsequent resolution that provided for the use of force against Iraq. Hence the government desperately trawled way back to Resolution 678 to find a flag of convenience, a flag disowned by Kofi Annan.⁸⁵ But the flag simply cannot fly.

The language of 660 was restrictive, clearly designed to achieve the end of the Iraqi invasion of Kuwait. Resolution 678 was backing this resolution by the potential use of force. Resolution 660 was complied with. Resolution 678 was contemplated as only remaining in force until the consequences of the Iraqi invasion of Kuwait had been dealt with. Resolution 687 introduced the wider and distinct issue of weapons of mass destruction. It gave no comfort to the use of force to achieve this aim and specifically contemplated that the United Nations, and not any member countries acting unilaterally, would remain in charge of the issue, as was cogently argued by Rabinder Singh QC and Charlotte Kilroy in one of their impressive opinions on the conflict. The suggestion that the authority to use force 'revives' like spring flowers in the desert after rain, to be invoked by the United States and the United Kingdom contrary to the wishes of the Security Council, is unconvincing.⁸⁶ Nor does it find any support in international law.

The suggestion that the violation of a ceasefire agreement authorises the other party to use force appears to be based on pre-Charter customary law. Under the Hague Regulations 1907 a party was released from his obligations under an armistice agreement when the terms were violated by the other party.⁸⁷ 'Ceasefires', the term being relatively modern, are not dealt with under these rules

⁸⁴ 'Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime ... We had gone to war to uphold international law. To go further than our mandate would have been, arguably, to break international law.' John Major, speaking at Texas A&M University 10th Anniversary celebrations of the liberation of Kuwait, 23 February 2001. See also the testimony of Assistant Secretary of State John Kelley and Assistant Secretary of Defence Henry Rowen before the Europe and Middle East Sub-Committee of the House Comm. on Foreign Affairs, *Federal News Service*, 26 June 1991, p151, available in LEXIS news library, Fednew File, cited in Lobel and Ratner, n63 above, at n61. This proposition has also been recognised by the current Foreign Secretary: 'the reason the United States did not continue on to Baghdad was because the United States and the other coalition allies felt they did not have a legal mandate for this; the legal mandate they had was to free Kuwait and then to deal with WMD, not to take over the state of Iraq.' Jack Straw, evidence to the Foreign Affairs Committee, 4 March 2003.

⁸⁵ n30 above. It is hard to see how a resolution passed 12 years ago can validate military action that was actively opposed and would have been vetoed by at least one, probably three, members of the permanent five in the Security Council, and whose legitimacy has been questioned by the Secretary General.

⁸⁶ '[The Security Council] decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area', S/RES/687 (1991). Rabinder Singh and Charlotte Kilroy, *In the Matter of the Potential Use of Armed Force by the U.K. Against Iraq*, Further Opinion for the Campaign for Nuclear Disarmament, 23 January 2003.

⁸⁷ Hague Regulations 1907, Article 40. 'Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.'

but are generally treated as being synonymous with armistices.⁸⁸ These rules are almost 100 years old and have certainly been modified, if not completely supplanted, by the UN Charter. For it remains the case that all non-defensive uses of force must be authorised by the Security Council, even if the use of force is a reprisal for the violation of the terms of a ceasefire.⁸⁹ In 1948, in response to violations by both sides of the Israel/Egypt armistice, the Security Council passed a resolution stating that: 'no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party'.⁹⁰ In 1955 and 1956 South Korea argued at the United Nations that North Korean and Chinese violations of the North Korea Armistice Agreement (1953) warranted a termination of the armistice and the resumption of hostilities. This was a position that no other state adopted.⁹¹ Once a ceasefire is in place it is the Security Council alone that must determine whether its terms have been complied with and, if they have not, whether the use of force is an appropriate response.⁹² This chimes in with the underlying purpose of the Charter that force must be used in the interests of the community as a whole and with UN authority. The unreality of the reliance on Resolution 678 was summed up by Michael P Scharf, the former Attorney Advisor for UN Affairs at the US Department of State: 'It is ... significant that the administration of Bush the elder did not view Resolution 678 as a broad enough grant of authority to invade Baghdad and topple Saddam Hussein. It is ironic ... that the current Bush administration would now argue that this Resolution could be used ten years later to justify a forcible regime change'.⁹³

Conclusion

The last time this country waged a war of aggression was almost 50 years ago during the brief Suez adventure. It was my first term as an undergraduate. Sir Anthony Eden, as is the case with Tony Blair, was not by temperament a warmonger. He had only shortly before refused the request of John Foster Dulles, the US secretary of state, that our countries should together intervene militarily in Indo-China and instead had brought that dispute to a temporary settlement at Geneva. In the first months of the Suez crisis he sought to act through the United Nations and with wide international support. Similarly Tony Blair insisted for months that we should act through the United Nations, subject only to the novel suggestion that we could ignore an 'unreasonable' veto.

Then in 1956, just as in the build-up to Iraq, there was a dramatic change of gear. We invaded Egypt with the nation, including undergraduates who like me were naïve enough to trust our government, blissfully unaware of the infamous Sèvres agreement providing secretly that Israel should invade, and France and we should then intervene to stop them. In the case of Iraq I shall never forget being in the United States in March 2003 and watching with dismay as events

⁸⁸ Ceasefire is a term used by the UN. It is used interchangeably with armistice. Sydney D Bailey, *How Wars End* (Oxford, Clarendon Press, 1982), Vol 1; Yoram Dinstein, *War, Aggression and Self Defence* (Cambridge, Grotius, 1988), p48.

⁸⁹ Richard R Baxter, 'Armistices and Other Forms of Suspension of Hostilities', *Rec. des Cours*, 149 (1976-10) 355, 382; David Morris, 'From War to Peace: A Study of Ceasefire Agreements and the Evolving Role of the United Nations' (1996) 36 *VJIL* 802, 822-823; Christine Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', 65 *BYIL* 135, 143; Lobel and Ratner, n63 above, 142.

⁹⁰ S/RES 56 (1948).

⁹¹ Unified Command Report on the Neutral Nations Supervisory Commission in Korea, UN Doc A/3167 (1956) UNYB 129, 130.

⁹² It seems self-evident that a ceasefire that is negotiated, drafted and signed under the aegis of the UN will also be policed and enforced by the UN. This is consistent with the clear and consistent philosophy of the UN Charter that only the Security Council may authorise non-defence uses of force.

⁹³ *International Bar News*, March 2003.

unfolded. We learnt that the proposed further resolution was to be withdrawn because of lack of support. The inspectors had their work in Iraq summarily terminated. The leaders of the United States and the United Kingdom travelled to the bizarre location of the Azores and delivered their ultimatum for regime change, and three days later launched the invasion. All this change of approach in a single week. We can only speculate why they did so in so much haste. The most probable reason is that the troops were there and were to be deployed before the summer heat of the Middle East. We will not know for a very long time whether there was any substance in Clare Short's assertion that the Prime Minister had committed himself way back last year to supporting the United States even if the United Nations declined its backing. If so, there would be another deeply dark parallel with Suez.

There is undoubtedly one more parallel. The strength of the United States was in each case decisive. At Suez, influenced by presidential electoral considerations, the United States declined their support and we had to withdraw. In Iraq it was the United States who similarly called the shots, but this time as the promoters of war.

What are the lessons for the future? The first is positive. Our government apparently accept that they must act in accordance with international law, even though their arguments were flawed and most experts doubt the lawfulness of what they did in our name. The second too is positive. The United States is, for the future, the only world power that can act unilaterally and their values and commitment to democracy make them the least undesirable supreme power. But while we are thankful for this, we should also be wary. The bi-polar world, in which the Soviet Union had an effective veto on US action when it threatened the balance of world power, has collapsed. To create a new multilateralism is not easy. It would, or so it seems to me, not require change to the UN Charter to allow UN sanctioned intervention to prevent genocide and humanitarian disaster. Nor would it require any change to allow the United Nations to act to prevent the proliferation of weapons of mass destruction.

For this country I would only offer two suggestions. The first is practical, which is that we should seek to influence the United States through Europe, which was at all times supportive of Resolution 1441. It seems to me that the Prime Minister followed the long-standing Atlanticist view succinctly expressed by Sir Winston Churchill in the last week of his premiership: 'We must never get out of step with the Americans – never!'⁹⁴ With our wider role in Europe this seems no longer wise. After all it was Eden himself who 50 years ago during his quest for peace in Indo-China wrote: 'Americans may think the time past when they need consider the feelings or difficulties of their allies'.⁹⁵ There should be time now for reflection. Our government has a massive job to rebuild trust before they could again lead us into war. And to rebuild resources before again fighting a war of choice as Admiral Sir Michael Boyce stressed on retirement this summer.

The second suggestion more directly relates to the part the law should play. As we have seen, it played a markedly subordinate role in the debate. I have for some time been unconvinced by the

⁹⁴ DR Thorpe, *Eden: The Life and Times of Anthony Eden First Earl of Avon 1897-1977* (London, Chatto & Windus, 2003), p541.

⁹⁵ *ibid*, p402. Echoes of this sentiment can be heard in the words of Peter Riddell: 'Yes, Britain should be a candid friend of America. But candour should not require the suppression of British interests when, occasionally, these clash with American interests.' *Times*, 24 April 2003.

argument that the Attorney General's advice is not normally disclosed.⁹⁶ It is given for the public good and the public should generally be entitled to know what is the government's view of the law, just as we receive the opinion of ministers on whether bills presented to parliament conform with the Human Rights Act. While it was welcome that the Attorney General allowed a peep through the curtains in his parliamentary answer, I find it almost incomprehensible that he then declined even to tell us whether he has given any advice apart from the published summary. The result is, and the Foreign Office advice is but a fuller version of the same answer, that the government's view of the law was never exposed to the spotlight of reasoned argument or scholarship. How can this be avoided, as I think it should, in the future?

I believe the time has arrived when the courts should not be so diffident where an important aspect of the legality of foreign policy is challenged. There can clearly be no challenge to the policy itself. This is obviously for the government to decide. But it is well recognised that international law is part of our domestic law. As Lord Phillips MR has said: '[The] court... is free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights'.⁹⁷ Where public law has evolved so far and now considers on a daily basis wide-ranging issues of varying importance, it seems strange for the courts not to be able to give rulings on the legality of an act as fundamental as the invasion of another sovereign state by an act of war. The knowledge that the courts might be willing to do so would surely promote greater responsibility and thoroughness in the giving of advice. Law cannot just be the handmaiden of real politik. The outcome of a legal decision would, I believe, be the firm conclusion that, except in self-defence against actual or imminent attack, we can only use force to invade another country under the authority of a current UN resolution passed to cover the specific situation. And that would seem to mean an end to Suez or Iraqi adventures.

Finally, it seems to me that the most important lesson to be learnt is the one that sadly has so often been ignored since time immemorial. In the words of General Sherman, and he was victorious: 'War is hell'. We abandoned diplomacy too fast in March. With it we abandoned the fragile international consensus on the way in which to handle the issue of the weapons in Iraq. The emphasis of the Charter is right. And that is because those who crafted it knew at first hand that the one reason that force is a last resort is that the human cost of war is too high for it to be used for any other reason. Nations need to respect the international institutions rather than give effect to their own beliefs as to how the law should be applied. It was President Dwight Eisenhower, who was also seared by war, who stated in his farewell address to the nation: 'The weakest must come to the conference table with the same confidence as do we, protected as we are by our moral, economic, and military strength. That table, though scarred by many past frustrations, cannot be abandoned for the certain agony of the battlefield.'⁹⁸ A timeless, eloquent statement and one which I hope may once again come to underpin the long-term policies of a nation whose passionate commitment to freedom and self-determination has given the world so much.

⁹⁶ See the author's Denning Society Lecture 2001.

⁹⁷ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*, n6 above, 97.

⁹⁸ President Dwight Eisenhower, Farewell Address to the Nation, 17 January 1961.

IO

The Rule of Law in the International Legal Order

(8) The rule of law requires compliance by the state with its obligations in international law as in national law

I used to be much attracted by the description of public international law as 'The Law of Nations'. It seemed to reflect the lustre of Gentili and Grotius, to invest the subject with a grandeur and dignity separating it from the mundane concerns of everyday life, to conjure up a vision of proud and equal sovereigns, declining to bow the knee to one another but condescending to parley through the medium of their immune envoys. I now think, for very much the same reasons and others, that the expression, if not actually pernicious, is better avoided. For although international law comprises a distinct and recognizable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so. Consistently with this, the current Ministerial Code, binding on British ministers, requires them as an overarching duty to 'comply with the law including international law and treaty obligations'.¹

In his report of 23 August 2004 to the Security Council, the Secretary-General of the United Nations spoke of the rule of law as a concept at the very heart of the organization's mission. He continued:

It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws

that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²

Nothing in this formulation points towards a concept different from that familiar in the domestic sphere. Nor does the formulation of Professor William Bishop, who, having posed the question 'What do we mean by "international Rule of Law"?' proceeded to answer the question:

Without precise definition, I believe we could agree that the concept includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals.³

He quoted a former president of the American Bar Association:

The rule of law within nations . . . connotes the existence of the hundreds of legal rules, the legal procedures, courts, and other institutions which in sum total add up to order and stability, equality, liberty, and individual freedom . . . The rule of law among nations means the regulation of mutual intercourse of nations, and international contacts and relations of individuals, by legal concepts, standards, institutions and procedures.⁴

This would suggest that the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large. Such an impression is fortified by two further sources. According to Professor Chesterman, "the international rule of law" may be understood as the application of rule of law principles to relations between States and other subjects of international law'.⁵ In their Millennium Declaration the member states of the United Nations resolved to 'strengthen respect for the rule of law in international as in national

affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties'.⁶

The analogy, even if inexact, with the domestic situation makes plain, I suggest, why we should favour strict compliance with the law. However much any of us as individuals might relish the opportunity to live our lives free of all legal constraints – whether to pay taxes, observe the Highway Code, obtain planning permission, discharge our debts or refrain from assaulting our next-door neighbour – we know quite well that acceptance of these constraints is the necessary price to be paid for their observance by others and that a society in which no one was subject to such constraints would not be a very congenial one. Then there might indeed be no such thing as society. The same is true in the international sphere. However attractive it might be for a single state to be free of the legal constraints that bind all other states, those states are unlikely to tolerate such a situation for very long and in the meantime the solo state would lose the benefits and protections that international agreement can confer. The rule of the jungle is no more tolerable in a big jungle.

The point is not infrequently made that there is no international legislature, which is, of course, strictly speaking true, and that international law, as a result, lacks the legitimacy which endorsement by a democratic legislature would give. This does not impress me as a very powerful argument. The means by which an obligation becomes binding on a state in international law seem to be quite as worthy of respect as a measure approved, perhaps in haste and without adequate inquiry, perhaps on a narrowly divided vote, by a national legislature. This is true of treaties to which, by signature and ratification, the state has formally and solemnly committed itself. It is true of 'international custom, as evidence of a general practice accepted as law', since the threshold condition – very widespread observance, as a matter of legal obligation – is not easily satisfied. It is true of 'general principles of law recognized by civilized nations',⁷ since such principles carry strong prescriptive authority. The failure of a national legislature to annul a treaty, or reject a rule of customary international law, or disown a general principle of law recognized by civilized nations, may properly be relied on as evidence at least of acquiescence.

In his illuminating recent book, *International Law*, Professor Vaughan Lowe QC poses the question: 'Why do people comply with international law?'⁸ I pause to draw attention to the premise of his question, which is that by and large people, including of course states, do comply with international law. This is a very important premise, since it is easy, not least for lawyers, to become mesmerized by breaches of the law and overlook the overwhelming mass of transactions which proceed smoothly, routinely and lawfully. In the domestic sphere, goods are bought and sold, land is conveyed, testamentary bequests take effect and people walk unmolested in the streets because the law is clear and departure from it is the exception, not the rule. So it is in the international sphere also, and international law is not, as sometimes supposed, a code more honoured in the breach than in the observance. Indeed, Professor Lowe observes that this 'view, particularly widespread among those whose vision is unsullied by any knowledge or experience of the matter, is hopelessly wrong'.⁹ In answering his own question, the Professor relies on the fact that international law is not imposed on states by an external legislature,¹⁰ and suggests that a powerful reason why states do comply, and always have complied, with international law is that they make the rules to suit themselves.¹¹ They are the rules of a members', not a proprietor's, club. He suggests other reasons also, among them the tendency to err on the side of caution, habit, and the similarity of outlook among many of those who govern the nations and among the high priesthood of international lawyers who advise the chancelleries of the world.¹²

Most potent of all reasons for compliance by states with international law is the sheer necessity of their doing so. The point was well made by Douglas Hurd, in a passage in a 1997 book quoted by Professor Lowe at the outset of his own book:

[N]ation states are ... incompetent. Not one of them, not even the United States as the single remaining super-power, can adequately provide for the needs that its citizens now articulate. The extent of that incompetence has become sharply clearer during this century. The inadequacy of national governments to provide security, prosperity or a decent environment has brought into being a huge array of international rules, conferences and institutions; the only answer to the puzzle of the immortal but incompetent nation state is

effective co-operation between those states for all the purposes that lie beyond the reach of any one of them.¹³

The earliest rules of international law can, I think, be attributed to the self-interest of states, the need to do as one would be done by (I have in mind rules such as those governing the duty to comply with treaty obligations, the equality and immunity of sovereigns, or the immunity of diplomatic representatives) and recognition that there are some mischiefs which can only be effectively addressed if addressed by more states than one (such as piracy). But the passage of time has highlighted the number of situations in which a problem cannot be effectively regulated on a national basis. The international regulation of telecommunications, dating back to 1865, and mail services, dating back to 1874, are two examples. The international carriage of goods by sea provides another: shipowners, charterers, shippers and consignees must, to the greatest extent possible, enjoy the same rights and be subject to the same obligations at the port of loading, the port of discharge and any intermediate port of call, not rights and obligations peculiar to the national law of the port in question. Hence the Hague Rules of 1924, as amended by the Brussels Protocol of 1968. Hence too the Warsaw Convention 1929 on carriage by air, amended at The Hague in 1955 and further amended at Montreal in 1999. Hence also the CMR Convention on the Contract for International Carriage of Goods by Road made at Geneva in 1956 and now, no doubt, applying to the juggernauts from eastern Europe which familiarly thunder up and down the motorways of western Europe.

These are far from unimportant examples. They give effect to Lord Mansfield's insight (quoted in Chapter 3) that if commerce is to prosper investors and businessmen must know where they stand, not only in the UK but abroad. Important as they are, however, such examples scarcely scratch the surface of the current need for international co-operation in tackling problems which are national, in the sense that they afflict single states, but also international, in the sense that they afflict more states than one and can only be tackled jointly. I can make no more than cursory reference to some of these.

It is a matter of history that at the Bretton Woods conference, held in 1944 as the Second World War was approaching its end, the Great

Powers sought to lay the foundations of international economic stability in the aftermath of war, a movement which led to establishment of the International Monetary Fund and the World Bank and, less directly, to the General Agreement on Tariffs and Trade. Here were serious, effective and strictly controlled international schemes to promote development, relieve poverty and raise living standards, reinforced by establishment of the International Centre for the Settlement of Investment Disputes and the Multilateral Investment Guarantee Agency. Regional international groups such as the European Union and the Caribbean Commercial Community have many of the same objects. It is hard to suppose that the traumatic market experience which followed the collapse of the American sub-prime mortgage market in 2007–2009 will not strengthen the hands of those who wish to stiffen such international controls as now exist of the conduct and lending practices of international institutions.

The propensity of criminals who have committed a crime in one jurisdiction to fly to another where they hope to escape apprehension is in no way novel. Nor is the making of bilateral treaties for the extradition of such criminals (usually, with some unfortunate exceptions, on a reciprocal basis). But the need to apprehend and try serious criminals has been greatly strengthened by a number of causes: among them are the increased ease, with modern methods of business and means of communication, of committing a crime in one state of which the effects are felt in another; the utter abhorrence now felt for those who commit the most serious of crimes such as genocide, torture and war crimes; and the international activity of that special brand of criminals whom we stigmatize as terrorists, whose acts of violence are not constrained by national boundaries. These cross-border problems call for cross-border solutions, which can only be provided by a coherent body of enforceable international rules. So it is not surprising, for example, to find the member states of the European Union devising a streamlined means (the European arrest warrant) of procuring the surrender of criminals by and to each other, with much less formality and much less scope for delay than was formerly the norm, a system described as providing for the free movement of judgments.¹⁴ It is not surprising that agreement is reached to extend the jurisdiction of national courts to try the most serious offences, such as genocide,

torture and war crimes, wherever the crimes were committed. It is not surprising to find the United Nations establishing an International Criminal Court to try the most serious crimes which will not be tried elsewhere, and ad hoc tribunals to try serious crimes committed in the former Yugoslavia and in Rwanda. It is not surprising to find the United Nations urgently calling on member states to take measures to combat the scourge of terrorism.

If international co-operation is the key to successful action against cross-border criminal activity, it is also essential to secure effective protection of the environment. That is so whether one considers the conservation of a scarce natural resource such as fish, or the activity of one state which causes pollution in another or, pre-eminently, the emission of carbon into the atmosphere. In areas such as these the interests of different states are, in one sense, inherently antithetical. All states want to maintain prosperous fishing fleets, free to catch what they can. All wish to encourage profitable activity without restrictive environmental controls. All wish to maintain, and preferably enhance, their prosperity and the living standards of their people. But of course they know that if fish stocks are depleted beyond a certain point, all lose; freedom to pollute may mean liability to be polluted; and each state knows (or ought to know) that other states will not take the stringent steps necessary to control climate change if it does not. None, I think, can doubt that if effective measures are not taken, on an international basis, to combat climate change, new meaning will be given to Keynes's aphorism that in the long run we are all dead.

Even a cursory and incomplete sketch such as this cannot ignore the international protection of human rights. Such international protection is significant, I suggest, for at least five reasons. First, it is founded on values which, if not universally shared, command very wide acceptance throughout most of the world. No other field of law, perhaps, rests so directly on a moral foundation, the belief that every human being, simply by virtue of his or her existence, is entitled to certain very basic, and in some instances unqualified, rights and freedoms.

Secondly, such international protection is relatively new, essentially a post-Second World War phenomenon inspired by the Universal Declaration on Human Rights of 1948 and followed by the International Covenants on Civil and Political Rights and Economic, Social and

Cultural Rights of 1966, a string of later Conventions such as those on the Elimination of All Forms of Racial Discrimination (1966), the Elimination of All Forms of Discrimination against Women (1979) and that on the Rights of the Child (1989), quite apart from regional instruments such as the European and American Conventions and the African and Arab Charters. Such protection as existed before 1945 was largely extended on a national basis.

Thirdly, the closeness of the relationship between the international protection of human rights and the rule of law has been increasingly recognized. Not until 1996 did the Security Council make express reference to the rule of law in the operative paragraph of a resolution;¹⁵ but it has done so very frequently since. By contrast, the European Court of Human Rights first referred to the rule of law in 1975,¹⁶ and has done so with great consistency since. In 2007 twenty-eight judgments of the Court referred to the rule of law, in January and February 2008 alone no fewer than ten.¹⁷ In a judgment of 22 November 2007, the Court declared that 'the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention'.¹⁸ After a slow start, the European Court of Justice referred in an obiter dictum in 1969 to 'the fundamental human rights enshrined in the general principles of Community law and protected by the Court'.¹⁹ Very soon the European Convention acquired a special and central role as a source for identifying fundamental rights,²⁰ and a judge of the European Court of Justice (Antonio Tizzano) has written of 'the defining characteristics of a Community that is first of all a community of principles and values at the heart of which are fundamental rights, constitutionalism, democracy and the rule of law'.²¹

Fourthly, the international protection of human rights is important to the rule of law internationally because of the extent to which national courts are drawn into the process of determining questions of international law. And, lastly, it is important because this is a field in which individual claimants feature very prominently, giving the lie to the old belief that the purview of international law is confined to the regulation of inter-state relations.

The notion that there is a great gulf fixed between national and international law is contradicted both by the osmotic absorption of customary international law into national law, as strikingly illustrated by the

Court of Appeals *Bank of England v Bell & Howland Corporation v Central Bank of Nigeria*,²² upheld by the House of Lords in *1 Congreso del Partido*²³ (General Pinochet's first appearance on the English forensic scene), but also and even more prominently by the involvement of the national courts, here and elsewhere, in deciding questions of international law. In his very interesting Michael Kirby Lecture in International Law delivered in Canberra in June 2008,²⁴ Professor James Crawford SC reviewed and compared the activity of the House of Lords and the High Court of Australia in this field over the period 1996–2008, almost the whole span of Justice Kirby's membership of the High Court. His survey showed that over that period the House of Lords had given judgment on questions of international law in forty-nine cases. The breakdown, on his analysis, of the aspects involved was as follows:

• Relation between treaty law and national law	7
• Relation between customary international law and national law	1
• Treaty interpretation	5
• State immunity	4
• Refugee Convention obligations	8
• Other international human rights	12
• Extradition	6
• Extra-territorial jurisdiction	3
• Miscellaneous	3

His last (miscellaneous) heading embraced compensation of the armed forces for injuries sustained abroad, challenge to an arbitral award and inconsistency between decisions of the European Court of Human Rights and domestic case law. The total would have been significantly higher had decisions pertaining to European Community law been included.

For purposes of his comparison, Professor Crawford reviewed the response of the two courts to four problems which both courts addressed. The upshot of the comparison is not important for present purposes, but the problems addressed are, I think, of interest as showing the range of international law problems arising for decision in national courts. One turned on the meaning of 'a particular social group' as a ground of persecution under Article 1A(2) of the 1951 Refugee Convention. On

this point the House made what in my opinion (I was not a party to it) was a bold but correct decision in *R v Immigration Appeal Tribunal, ex p. Shah*,²⁵ followed more recently in *Fornah v Secretary of State for the Home Department*.²⁶ The first of these cases related to the treatment of married women suspected of adultery in Pakistan, the second to female genital mutilation in Sierra Leone. Those affected were held to be members of a 'particular social group'. A second question discussed by Professor Crawford, also arising under the Refugee Convention, was the applicability of the Convention where the persecution complained of is not by agents of the state. On that issue of interpretation of the Convention the House again ruled.²⁷ A third issue addressed by Professor Crawford was indefinite executive detention, on which the British courts made decisions relating both to derogation from the European Convention under Article 15 and compatibility with Article 5 ('the *Belmarsh* case')²⁸ and the justification under Security Council Resolution 1546 and article 103 of the United Nations Charter for detaining an Iraqi/UK national in Iraq (*Al-Jedda*).²⁹ The fourth of the Professor's examples examined the question, canvassed in both the High Court and the House of Lords, of whether unincorporated treaties could give rise to legitimate expectations of a kind which could constrain official action, an issue on which an initial divergence of view between the two jurisdictions appears to have narrowed.³⁰ The cases chosen by Professor Crawford for purposes of comparison were, of course, a very small sample. The breadth of the field is made clear in Shaheed Fatima's interesting recent book, *Using International Law in Domestic Courts*,³¹ in which the author lists the main practice areas where issues of international law may arise in national courts: they are aviation law, commercial and intellectual property law, criminal law, employment and industrial relations law, environmental law, European treaties, family and child law, human rights law, immigration and asylum law, immunities and privileges, international organizations, jurisdiction, law of the sea, treaties and, finally, warfare and weapons law. In recent years the British courts have ruled on questions arising in most of these areas. The interrelationship of national law and international law, substantively and procedurally, is such that the rule of law cannot plausibly be regarded as applicable on one plane but not on the other.

War

The last of Shaheed Fatima's headings points to what many, encouraged by Grotius, would reasonably regard as the most fundamental preoccupation of international law: the resort to war, the conduct of war and the rights and duties of an occupying power after a war is over (or, in the legal vernacular, the *ius ad bellum*, the *ius in bello* and the *ius post bellum*). In these areas above all, scrupulous observance of the rule of law may be seen to serve the common interest of mankind.

As Professor Sir Michael Howard has observed, 'war, armed conflict between organized political groups, has been the universal norm in human history'.³² He quotes Sir Henry Maine, who in 1888 wrote that 'War appears to be as old as mankind, but peace is a modern invention.' Sir Henry spoke too soon. The Hague Conferences of 1899 and 1907, while seeking to humanize the conduct of war, recognized the use of force as an available option. The Covenant of the League of Nations discouraged resort to force, but did not prohibit it. Not until the Kellogg-Briand Pact of 1928 (ratified by Germany, the United States, Belgium, France, Britain and its overseas Dominions, Italy, Japan, Poland, Czechoslovakia and Ireland) was there any renunciation of warfare as an option open to states as an instrument of national policy. But the making of the pact did not, over the coming decades, deter Japan from invading Manchuria, Italy from invading Abyssinia, Russia from invading Finland, Germany from invading most of Europe or Japan from invading large swaths of south-east Asia. Clearly it was necessary for the states of the world to make a further attempt to outlaw a practice whose evil results had been so amply demonstrated.

The Charter of the United Nations, adopted in 1945, to which 192 independent states have acceded, did just that. Having enjoined member states to settle their international disputes by peaceful means, it required them in Article 2(4) to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Primary responsibility for taking prompt and effective action for the maintenance of international peace and security was conferred on the Security Council,

which was authorized to act on behalf of member states.³³ Chapter VII of the Charter, covering threats to and breaches of the peace, provides in Article 39 that 'The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.' Article 41 is directed to measures decided on by the Security Council which do not involve the use of armed force. Article 42 is directed to military measures and provides: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security . . .'. By Article 51 the right of a state to defend itself was recognized: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . .'. This provision has been interpreted in a way very similar to the right of personal self-defence in domestic law: there must be an armed attack on the state or a threat of imminent attack; the use of force must be necessary and other means of meeting or averting the attack unavailable; the response must be proportionate and strictly limited to defence against the attack or threatened attack. There is controversy whether force may exceptionally be used to avert an overwhelming humanitarian catastrophe, but otherwise the law under the Charter is clear: save in self-defence, force may be used if authorized by the Security Council but not otherwise. Unilateral resort to war is replaced by collective decision-making in the Security Council on behalf of all member states.

Despite this apparently clear and unambiguous regime, an American academic author writing in 2005 recorded that in the past twenty-five years the United States had been involved in some forty military actions, including wars in Iraq, Afghanistan and Yugoslavia; regime-changing invasions in Grenada, Panama and Haiti; military assistance to rebel groups in Angola, El Salvador and Nicaragua; and missile attacks in Lebanon, Libya, Yemen and Sudan.³⁴ Of these, by far the most contentious was the US-led invasion of Iraq in 2003.

It is not at all clear to me what, if any, legal justification of its action the US Government relied on. Prominent figures in the administration made clear their ambition to remove Saddam Hussein and replace his governmental regime,³⁵ and British officials gave assurances of the UK's support for regime change.³⁶ But the British Attorney General, Lord Goldsmith QC, was consistent in his advice that while regime change might be a result of disarming Saddam Hussein, it could not in itself be a lawful objective of military action.³⁷

Sir Michael Wood, formerly the senior Legal Adviser to the Foreign and Commonwealth Office but now speaking in a purely personal capacity, has said that the British intervention in Iraq raised no great issue of principle: 'The legality of the use of force in March 2003 turned solely on whether or not it had been authorized by the Council. No one disputes that the Council can authorize the use of force. The question was simply whether it had done so. That turned on the interpretation of a series of Security Council resolutions.'³⁸ This was the approach taken by the Attorney General in his full written advice of 7 March 2003 to the Prime Minister (not made public at the time) and in his more summary statement published on 17 March 2003, a few days before fighting began.

In the earlier opinion the Attorney General addressed in some detail the interrelationship between three Security Council resolutions, respectively numbered 678, 687 and 1441. Resolution 678 was passed in 1991; it built on earlier resolutions calling for the withdrawal of Iraq from Kuwait following its invasion of that country and authorized the use of force to eject Iraq from Kuwait and restore peace and security in the area. This was the authorization of Operation Desert Storm, which drove the Iraqis out of Kuwait. Resolution 687 (1991) brought military operations to an end, imposing conditions on Iraq with regard to weapons of mass destruction and inspection. It suspended but did not revoke resolution 678. Resolution 1441 was adopted unanimously in November 2002. It recorded that Iraq had been and remained in material breach of its obligations under relevant resolutions, including 687. It offered Iraq a final opportunity to comply with its disarmament obligations. It established a stricter inspection regime and provided that further breaches would be reported to the

Security Council for it 'to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'. In his earlier opinion the Attorney General considered that resolution 1441 could in principle revive the authority to use force, but only if the Security Council determined that there was a violation of the conditions of the ceasefire sufficiently serious to destroy the basis of it. The Attorney General reviewed the competing arguments: on the one hand, that there was authority to use force if the Council discussed the matter, even if it did not reach a conclusion; on the other, that nothing short of a further Council decision would provide a legitimate basis for using force. He saw force in both arguments, but concluded that resolution 1441 left the position unclear and that the safest legal course would be to secure the adoption of a further resolution to authorize the use of force. A reasonable case could be made that resolution 1441 was capable in principle of reviving the authorization in resolution 678, but the argument could only be sustainable if there were 'strong factual grounds' for concluding that Iraq had failed to take the final opportunity. There would need to be 'hard evidence'.

In his summary statement of 17 March the Attorney General stated that a material breach of resolution 687 revived the authority to use force under resolution 678; that in resolution 1441 the Security Council had determined that Iraq had been and was in material breach of resolution 687; that resolution 1441 had given Iraq a final opportunity to comply with its disarmament obligations and had warned it of serious consequences if it did not comply; that the Council had also decided in resolution 1441 that any failure to co-operate in implementing resolution 1441 would be a further material breach; that it was 'plain' that Iraq had failed to comply and therefore was at the time of resolution 1441 and continued to be in material breach; and that accordingly the authority to use force under resolution 678 had revived and continued to that date. He ended: 'Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.'

This statement was, I think, flawed in two fundamental respects. First, it was not plain that Iraq had failed to comply in a manner justifying resort to force and there were no strong factual grounds or hard evidence to show that it had: Hans Blix and his team of weapons inspectors had found no weapons of mass destruction, were making progress and expected to complete their task in a matter of months. Secondly, it cannot be accepted that a determination whether Iraq had failed to avail itself of its final opportunity was intended to be taken otherwise than collectively by the Security Council. The revival argument itself has been ill-received. Lord Alexander of Weedon QC in his brilliant Tom Sargant memorial annual lecture for JUSTICE of 14 October 2003 (without access to the Attorney General's earlier advice) described it as 'unconvincing'.³⁹ Professor Sands QC has called it 'a bad argument'.⁴⁰ Professor Lowe has described the argument as 'fatuous': 'The whole point of the UN system is that when the Security Council is seized of a problem it is the Council, and not individual Member States, that has the right to control matters. If the Security Council had intended that the United States, the United Kingdom and others should invade Iraq in 2003 with its blessing and its mandate, it would have said so. It did not.'⁴¹

If I am right that the invasion of Iraq by the US, the UK and some other states was unauthorized by the Security Council there was, of course, a serious violation of international law and of the rule of law. For the effect of acting unilaterally was to undermine the foundation on which the post-1945 consensus had been constructed: the prohibition of force (save in self-defence, or, perhaps, to avert an impending humanitarian catastrophe) unless formally authorized by the nations of the world empowered to make collective decisions in the Security Council under Chapter VII of the UN Charter. The moment that a state treats the rules of international law as binding on others but not on itself, the compact on which the law rests is broken. 'It is', as has been said, 'the difference between the role of world policeman and world vigilante.'⁴²

I should make it plain that Mr Jack Straw, Foreign Secretary in March 2003, and Lord Goldsmith, Attorney General at the time, strongly challenge the conclusions I have expressed,⁴³ and others may also do so.

Lord Goldsmith has emphasized that he believed the advice which he gave at the time to be correct – which I have not challenged – and remains of that view. On the issue of legality he has stressed three points in particular. First, the use of force in 2003 was (he has said) authorized by the United Nations because of the original authorization, which remained in force. He has pointed out that the revival argument had been relied on before, had been consistently supported by British Law Officers and had been endorsed by the Secretary-General of the UN in 1993 and by the then Legal Advisor to the UN. Resolution 678 was not tied to expelling Iraq from Kuwait.

His second point is that the Security Council did set the conditions for the permission to use force to revive. Resolution 1441 made a finding of material breach and gave Iraq a final opportunity to comply. This did not require the Security Council to decide that there had been a further material breach. The negotiating history made this clear.

His third point is that the UK was justified in concluding that the final opportunity had not been taken. He had advised the Prime Minister that he had to be sure. Resolution 1441 was not about weapons of mass destruction. Under resolution 1441 Iraq had to co-operate fully and the British government judged that it had not done so.

Mr Straw has agreed with what Lord Goldsmith has said. The negotiating history and wording of resolution 1441 show, he has said, that it was not the intention of the Security Council, nor was it so expressed, that a decision on material breach had to be decided by the Security Council. This might be surprising, he comments, but it is true.

The question, then, is one of authority. This suggests three questions calling for an answer. First, who was authorized? Resolution 678 authorized 'the Member States cooperating with the Government of Kuwait'. That expression had a very clear meaning in 1991. But it could scarcely be read as a reference to a shrunken core of two of the former coalition partners, shorn of most of their former partners and against the strong vocal opposition of several of them. The multilateral application of resolution 678 was an important feature of it.

The second question is: what did resolution 678 give authority to do? The answer is clear. It gave authority to expel Iraq from Kuwait and 'restore peace and security in the area'. It is difficult to read this as authority to launch a full-scale invasion of Iraq in 2003 with the

obvious intention of deposing its government and occupying its territory, the foreseeable consequence of causing widespread loss of life, and the potential to destabilize the area.

The third question is: when was authority given to invade? It cannot be plausibly suggested that authority was given by resolution 1441, for that gave the Iraqi government a final opportunity to co-operate. Clearly, therefore, an invasion could not have been launched the next day. But if not then, when? As soon as any member state of the UN decided that the Iraqi government had had sufficient time to co-operate and had not done so? This, as I have already suggested, would subvert the collective decision-making process of the Security Council which lies at the heart of the Chapter VII regime. A decision as massive and far-reaching as one to invade and occupy a foreign sovereign state must be based on something very much more solid than a good arguable case. The inescapable truth is that the British government wished and tried to obtain a further Security Council resolution authorizing the use of force, but was unable to do so in the face of international opposition and went ahead without.

The legal duties of belligerents while hostilities are in progress and after they have ended are very largely governed by the regulations annexed to the 1907 Hague Convention and by the four 1949 Geneva Conventions as extended by Protocols adopted in 1977. These give effect to a wide international consensus that there are some methods of making war which are impermissible (such as killing or wounding an enemy who is already wounded or has surrendered, and the destruction of property without military necessity); that prisoners of war should be protected, and treated with humanity and decency; and that civilians, non-combatants, the sick and the wounded should be so far as possible protected from the military activity. When hostilities are over, an occupying power 'shall take all measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.⁴⁴ Property and life must be respected.⁴⁵ The occupying power has no mandate to transform the law and institutions of the defeated state, a somewhat anomalous rule given that the two most successful post-1945 occupations, those of West Germany and Japan, comprehensively transformed the laws and institutions of those countries.⁴⁶

The record of the British as an occupying power in Iraq has, as we know, been sullied by a number of incidents, most notably the shameful beating to death of Mr Baha Mousa in Basra.⁴⁷ But such breaches of the law were not a result of deliberate government policy, and the rights of the victims have been recognized. This contrasts with the unilateral decisions of the US government that the Geneva Conventions did not apply to the detention conditions in Guantanamo Bay, Cuba, or to trial of Al-Qaeda or Taleban prisoners by military commissions,⁴⁸ that Al-Qaeda suspects should be denied the rights of both prisoners of war and criminal suspects, and that torture should be redefined, contrary to the Torture Convention and the consensus of international opinion, to connote pain, where physical, 'of an intensity akin to that which accompanies serious physical injury such as death or organ failure'.⁴⁹ This is what underlay the abuses indelibly associated in the mind of the world with the photographs of Abu Ghraib but occurring elsewhere also, described in horrifying detail in reports of the International Committee of the Red Cross (February 2004 and February 2007),⁵⁰ General Taguba (March 2004),⁵¹ Generals Fay and Jones (August 2004 and February 2007)⁵² and the American Bar Association (August 2004).⁵³ Particularly disturbing to proponents of the rule of law is the cynical lack of concern for international legality among some top officials in the Bush administration. Thus in one memorandum the Deputy Assistant Attorney General (John Yoo), writing to the Counsel to the President, advised:

Thus we conclude that the Bush administration's understanding created a valid and effective reservation to the Torture Convention. Even if it were otherwise, there is no international court to review the conduct of the United States under the Convention. In an additional reservation, the United States refused to accept the jurisdiction of the [International Court of Justice] (which, in any event, could hear only a case brought by another state, not by an individual) to adjudicate cases under the Convention. Although the Convention creates a Committee to monitor compliance, it can only conduct studies and has no enforcement powers.⁵⁴

The British government did not adopt practices such as these, of which a number of prominent British ministers (including the Attorney General) were openly critical.

As I stressed at the outset, most transactions governed by international law proceed smoothly and routinely on the strength of known and accepted rules. I have perhaps dwelt disproportionately on the non-compliant tip of the iceberg, illustrated by events in Iraq and elsewhere. But those events highlight what seem to me to be the two most serious deficiencies of the rule of law in the international order. The first is the willingness of some states in some circumstances to rewrite the rules to meet the perceived exigencies of the political situation, as the UK did in relation to the Suez crisis of 1956. The second is the consensual basis of the jurisdiction of the International Court of Justice (ICJ). Cases come before the Court only if the parties agree. While 65 of the 192 member states of the United Nations have chosen to accept the compulsory jurisdiction of the ICJ, a majority do not, and it is a lamentable fact that, of the five permanent members of the Security Council, only one, the UK, now does so, Russia and China never having done so and France and the United States having withdrawn earlier acceptances. As HE Judge Rosalyn Higgins, then the President of the ICJ, said in a lecture at the British Institute of International and Comparative Law in October 2007, 'the absence of a compulsory recourse to the Court falls short of a recognisable "rule of law" model'.⁵⁵ The suggestion that the rule of law requires, in this day and age, a routine and obligatory recourse to the Court in matters connected to the UN Charter and related issues is obviously, she suggested, still a step too far. But it is, I think, a step which must be taken if the rule of law is to become truly effective in this area.

If events in Iraq and elsewhere highlight some of the deficiencies of international law, they may nonetheless yield a public benefit in the longer term. For while the lawfulness of earlier military interventions has attracted academic analysis (as, notably, by Geoffrey Marston on the Suez crisis⁵⁶), I do not think the public at large has been much interested in whether the interventions were lawful or not. In the case of Iraq, perhaps because of widespread doubt in this country about the wisdom and necessity of going to war, the issue of legality has loomed larger than, I think, ever before. This has enhanced the importance of international law in the public mind, and Chapter VII of the UN Charter has come to be more widely recognized not only as a constraint on unauthorized military action but also as a guarantee

that such action is necessary to maintain or restore peace and proportionate, traditional conditions of a just war. While prophecy is always perilous, it is perhaps unlikely that states chastened by their experience in Iraq will be eager to repeat it. They have not been hauled before the ICJ or any other tribunal to answer for their actions, but they have been arraigned at the bar of world opinion, and judged unfavourably, with resulting damage to their standing and influence. If the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order.⁵⁷

CHAPTER 9. A FAIR TRIAL

1. See, for example, *Engel v The Netherlands* (No. 1) (1976) 1 EHRR 647, para. 91.
2. T. Goriely, 'The Development of Criminal Legal Aid in England and Wales', in R. Young and D. Wall (eds.), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press, 1996), p. 29.
3. (1904), vol. 1, chap. IV, p. 34.
4. See Tom Bingham, 'Lecture at Toynbee Hall on the Centenary of its Legal Advice Centre', in *The Business of Judging* (Oxford University Press, 2000), pp. 394–95.
5. See Lord Hewart of Bury, *The New Despotism* (Ernest Benn, 1929), p. 119.
6. *Ibid.*, p. 124.
7. Tom Bingham, 'Judicial Ethics', in *The Business of Judging*, p. 77; D. Edwards, 'Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act', (1987) 75 Calif LR.
8. Philip Ayres, *Owen Dixon* (The Miegunyah Press, Melbourne, 2003), pp. 235–8, 249–50, 258–9; and see 121 LQR (2005), p. 158, quoting the Solicitor General for New South Wales in the *Sydney Morning Herald*, 21 June 2003.
9. Anthony Lewis, reviewing *The Nine: Inside the Secret World of the Supreme Court* by Jeffrey Toobin in *New York Review of Books*, 20 December 2007, p. 61.
10. *Brown v Board of Education of Topeka et al.* 347 US 483 (1954).
11. Stephen Ambrose, *Eisenhower the President* (Allen and Unwin, 1984), p. 190.
12. *Ibid.*
13. *Davidson v Scottish Ministers* [2005] SC (HL) 7.
14. *R v Bentley, decd.* [2001] 1 Cr App R 307, 334.
15. *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42, 68, repeated in *Attorney General's Reference* (No. 2 of 2001) [2003] UKHL 68, [2004] 2 AC 72, 85, para. 13.
16. *Brown v Stott* [2003] 1 AC 681, 719.
17. Article 6(3) of the European Convention.
18. *R v Hayward* [2001] EWCA Crim 168, [2001] QB 862; *R v Jones (Anthony)* [2002] UKHL 5, [2003] 1 AC 1.
19. *Guardian*, 8 September 2008, p. 16.
20. This summary is based on the decision of the House of Lords in *R v H* [2004] UKHL 3, [2004] 2 AC 134.
21. *R v Davis* [2008] UKHL 36, [2008] AC 1128.
22. This, broadly, is the effect of Part 31.6 of the Civil Procedure Rules.

23. *Ventouris v Mountain* [1991] 3 All ER 472, 475.
24. The current procedure is well summarized by Paul Matthews and Hodge Malek QC in *Disclosure* (3rd edn., Sweet & Maxwell, 2007), pp. 327–45.
25. *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.
26. *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738.
27. *In re K (Infants)* [1965] AC 201, 237.
28. *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 603.
29. See *Roberts*, above (n. 26), paras. 16–17.
30. *Ibid.*, para. 19.
31. *Ibid.*, para. 70.
32. *Ibid.*, para. 78.
33. *Ibid.*, para. 88.
34. *Ibid.*, para. 97.
35. *Ibid.*, paras. 19, 76–8, 83, 112, 144.
36. *Ibid.*, para. 144.
37. Prevention of Terrorism Act 2005.
38. *Secretary of State for the Home Department v MB* [2006] HRLR 878, [2007] QB 415, [2007] UKHL 46, [2008] 1 AC 440.
39. *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin), [2007] UKHL 46, [2008] 1 AC 440.
40. *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, [2004] 2 All ER 863; *MB and AF*, above (nn. 38, 39).
41. *R v H*, above (n. 20), para. 22.
42. *M v Secretary of State for the Home Department*, above (n. 40), para. 13; *Roberts*, above (n. 26), para. 60.
43. *Secretary of State for the Home Department (Respondent) v AF (Appellant) and another (Appellant) and one other action* (No. 3) [2009] UKHL 28.
44. I have based this chapter in part on a lecture ('A Fair Trial') given to the Constitutional and Administrative Bar Association on 4 November 2008.

CHAPTER 10. THE RULE OF LAW IN THE INTERNATIONAL LEGAL ORDER

1. Ministerial Code, July 2007, para. 1.2.
2. S/2004/16, 23 August 2004, para. 6.
3. W. Bishop, 'The International Rule of Law', *Michigan Law Review*, 59 (1961), p. 553.
4. Charles Rhyner, Opening Statement before Boston Conference on World Peace through Law, 27 March 1959.

5. Simon Chesterman, 'An International Rule of Law?', *American Journal of Comparative Law*, 56/2 (2008), pp. 331–61 at p. 355.
6. Millennium Declaration, GA Res 55/2, UN Doc A/RES/55(2) (2000).
7. I have followed the formulation in Article 38 of the Statute of the International Court of Justice (1945).
8. *International Law* (Oxford University Press, 2007), p. 18.
9. *Ibid.*, p. 20.
10. *Ibid.*, p. 19.
11. *Ibid.*
12. *Ibid.*, pp. 21–2.
13. Douglas Hurd, *The Search for Peace* (Warner Books, 1997), p. 6.
14. See *King's Prosecutor, Brussels, Office of the v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1; *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31; *Pilecki v Circuit Court of Legnica, Poland* [2008] UKHL 7, [2008] 1 WLR 325; *Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] UKHL 51, [2008] 1 WLR 1724.
15. Chesterman, 'An International Rule of Law?', p. 348.
16. In *Golder v United Kingdom* (1975) 1 EHRR 524, para. 54.
17. Judge Mark Villiger, in a paper based on his oral contribution at the first International Law in Domestic Courts colloquium, held in The Hague on 28 March 2008, paras. 2(a) and (b).
18. *Ukraine-Tyumen v Ukraine*, 22 November 2007, para. 49.
19. *Erich Stauder v City of Ulm-Sozialamt* [1969] ECR 419, para. 7.
20. Antonio Tizzano, 'The Rule of the ECJ in the Protection of Fundamental Rights', in A. Arnulf, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008), 126–38, at p. 138.
21. *Ibid.*, p. 138.
22. [1977] QB 529.
23. [1983] AC 244.
24. 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison', The First Michael Kirby Lecture in International Law, Canberra, 27 June 2008.
25. [1999] 2 AC 629.
26. [2006] UKHL 46, [2007] 1 AC 412.
27. *Adan v Secretary of State for the Home Department* [1999] 1 AC 293; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.
28. *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.
29. *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58, [2008] 1 AC 332.
30. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (UNHCR intervening)* [2004] UKHL 55, [2005] 2 AC 1; *R v Asfaw (UNHCR intervening)* [2008] UKHL 31, [2008] AC 1061; *Re Minister for Immigration and Multicultural Affairs, ex p. Lam* (2003) 214 CLR 1.
31. (Hart Publishing, 2005), chap. 1, pp. 3–26.
32. *The Invention of Peace & the Reinvention of War* (Profile Books, 2002), p. 1.
33. Article 24(1).
34. R. Peerenboom, 'Human Rights and the Rule of Law: What's the Relationship?', *Georgetown Journal of International Law*, 36 (2004–5), pp. 809–945, at pp. 936–7.
35. Philippe Sands, *Lawless World* (Allen Lane, 2005), p. 182.
36. Mark Danner, *The Secret Way to War* (New York Review of Books, 2006), pp. 129, 134.
37. *Ibid.*, p. 91; Advice to the Prime Minister, 'Iraq: Resolution 1441', 7 March 2003.
38. Sir Michael Wood KCMG, Hersch Lauterpacht Memorial Lecture 2006, Third Lecture, 'The Security Council and the Use of Force', 9 November 2006, para. 9.
39. 'The pax Americana and the Law', first published in the JUSTICE journal in 2004, republished in extended form in 2007. In his oral presentation he used the word 'risible', which he later changed.
40. Sands, *Lawless World*, p. 189.
41. Lowe, *International Law*, p. 273.
42. Vaughan Lowe, 'Is the Nature of the International Legal System Changing? – A Response', *Austrian Review of International and European Law*, 8 (2003), pp. 69–73, at p. 72.
43. In communications to the author.
44. Article 43 of the 1907 Hague Regulations.
45. *Ibid.*, Art. 46.
46. This subject is valuably discussed by Professor Sir Adam Roberts in 'Transformative Military Occupation: Applying the Laws of War and Human Rights', *American Journal of International Law*, 100/3 (July 2006), pp. 580–622.
47. See *R (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and others intervening)* [2007] UKHL 26, [2008] 1 AC 153, para. 6, case 6.
48. Memorandum by John Yoo and Robert Delabunty to William Haynes of 9 January 2002; Memorandum by Jay Bybee to Alberto Gonzales and William Haynes of 22 January 2002; Memorandum by Alberto Gonzales to President George W. Bush of 25 January 2002; Memorandum by the President

to the Vice-President and others of 7 February 2002: see Karen Greenberg and Joshua Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005), pp. 38–79, 81–117, 118–21, 134–5. The development of the administration's policy on 'enhanced interrogation techniques' is traced by Professor Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, 2008).

49. Memorandum by Jay Bybee (largely drafted by John Yoo) to Alberto Gonzales of 1 August 2002; see Greenberg and Dratel (eds.), *Torture Papers*, pp. 172–217, at pp. 213–14; see also Jane Mayer, *The Dark Side* (Doubleday, 2008), pp. 151–2, 224, 231.

50. Greenberg and Dratel (eds.), *Torture Papers*, pp. 383–404; ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody, www.nybooks.com.

51. Greenberg and Dratel (eds.), *Torture Papers*, pp. 405–556.

52. *Ibid.*, pp. 987–1131.

53. *Ibid.*, pp. 1132–64.

54. Memorandum by John Yoo to Alberto Gonzales of 1 August 2002, quoted *ibid.*, at pp. 220–21.

55. 'The Rule of Law: Some Sceptical Thoughts', 16 October 2007, pp. 6–7.

56. 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government', (1988) 37 ICLQ 773.

57. This chapter closely follows the text of a Grotius lecture ('The Rule of Law in the International Order') given on 17 November 2008 to mark the fiftieth anniversary of the establishment of the British Institute of International and Comparative Law.

CHAPTER 11. TERRORISM AND THE RULE OF LAW

1. William J. Brennan, Jr., 'The Quest to Develop a Jurisprudence in Times of Security Crises', *Israel Yearbook of Human Rights*, 18 (1988), 11, at 11.

2. *Ireland v United Kingdom* (1978) 2 EHRR 25.

3. Speech to the Council on Foreign Relations, 10 February 2003.

4. *Bell v Maryland* 378 US 226, 346 (1964), (Black J, dissenting).

5. Arthur Chaskalson, 'The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law', *Cambridge Law Journal*, 67 (2008), pp. 69–91, at p. 74, footnotes omitted.

6. See K. J. Greenberg, 'Secrets and Lies', *Nation*, 26 December 2005, p. 39, at p. 40.

7. John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004), p. 192.

8. David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate, 2007), pp. 4, 352.

9. 'Blair: Shackled in War on Terror', *Sunday Times*, 27 May 2007.

10. See, for instance, Phillip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (Allen Lane, 2008).

11. John Selden, *Table Talk* (1892), p. 131; see John Gray, *Lawyer's Latin* (Hale, 2002), p. 125.

12. Quoted by A. C. Grayling, *Towards the Light* (Bloomsbury, 2007), p. 6.

13. Conor Gearty, 'Human Rights in an Age of Counter-Terrorism', Oxford Amnesty Lecture, 23 February 2006.

14. *New York Review of Books*, 12 June 2008, pp. 68–71.

15. US PMO entitled 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', White House Press Release, 13 November 2001.

16. See Intelligence and Security Committee Report on *Rendition* (Cm. 7171, July 2007), para. 53.

17. *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42.

18. *R v Mullen* [2000] QB 520.

19. See *United States v Alvarez-Machain* 504 US 655 (1992).

20. ISC Committee Report, above (n. 16), para. 35.

21. Presidential Decision Directive 39, 'Counterterrorism Policy', 21 June 1995.

22. ISC Committee Report, above (n. 16), para. 35.

23. See Chaskalson, 'The Widening Gyre', pp. 83–4; David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, New York, 2007), p. 25; Craig Barlow, 'The Constitutional Tree: Rendering the Branches', *Amicus Curiae*, 70 (Summer 2007), pp. 17–21; David Cole, 'The Man Behind the Torture', *New York Review of Books*, 6 December 2007, pp. 38–43, at p. 38; Stephen Grey, *Ghost Plane* (Hurst & Co., 2006), chap. 4; *El Masri v Tenet* 437 F Supp 2d 530 (E. D. Va 2006), 2007 US App LEXIS 4796 (4th Cir. 2 March 2007).

24. Cole and Lobel, *Less Safe, Less Free*, p. 25.

25. See Irwin Cotler, 'Lessons of History', 2007 Raoul Wallenberg International Human Rights Symposium: Conference Proceedings, pp. 9–14; Chaskalson, 'The Widening Gyre', pp. 84–5; Cole and Lobel, *Less Safe, Less Free*, pp. 23–4; Grey, *Ghost Plane*, chap. 3.

26. Cm. 7171, paras. 65–6, 111–47; Grey, *Ghost Plane*, pp. 210–71.

27. *R (Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and another* (United Nations High Commissioner for Refugees intervening) [2006] EWCA Civ 1279, [2008] QB 289.

28. Cm. 7171, p. 49, conclusion Y.

A Very British Deceit

Philippe Sands

A year ago British Prime Minister Gordon Brown announced a long-awaited inquiry into Britain's involvement in the 2003 Iraq war, to coincide with the departure of British troops from the country. The Iraq inquiry would be chaired by a retired senior civil servant, Sir John Chilcot—a “safe pair of hands,” the *Guardian* called him—and would work behind closed doors under arrangements designed to minimize public disclosure of the underlying documents, many of which were classified as “Secret.” Sir John has summarized the inquiry's mandate as considering “the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned.”

At its launch on July 30, 2009, expectations of the inquiry were—to put it generously—low. The carefully chosen composition of the five-member panel did not lead to a quickening of public interest. One member, the historian Sir Martin Gilbert, had previously suggested that Tony Blair and George W. Bush might eventually bear comparison with Winston Churchill and FDR. Another, the academic Sir Lawrence Freedman, contributed to the preparation of the 1999 Chicago speech in which Tony Blair first expressed the emotional and ahistorical interventionist instincts that later led directly to the Iraq debacle. None of the five has any legal background or qualification, as the examination of witnesses—think Gilbert and Sullivan rather than Old Bailey—has shown. The only member to demonstrate forensic ability is Sir Roderic Lyne, a retired diplomat. Most of the key witnesses, particularly the lawyers, politicians, and diplomats, have been adept at swatting away troublesome questions. More significantly, the inquiry has been undermined by its in-

information, filling out if not completing a picture the broad lines of which were well known before it commenced. The general conclusions are inevitable and unsurprising: Blair gave Bush an early commitment of support without extracting anything much in return or developing a basis for leverage; he needed to justify his desire to remove Saddam by overstating the very limited and not probative evidence of Saddam's alleged activity concerning WMDs, and then manipulated its public presentation; he persuaded Bush to go down the UN route, but in so doing he badly undermined his own position by

His 337 words of reasoning (an advocacy document for which Lord Goldsmith required the assistance of no fewer than nine lawyers and senior civil servants) have the great merit of simplicity: Security Council Resolution 678 authorized the 1990 Iraq intervention and was “revived” as a result of Saddam's “material breach” of the terms of the subsequent cease-fire. At the heart of the argument is Resolution 1441, adopted unanimously by the Security Council in November 2002. According to Goldsmith, Resolution 1441 gave Iraq “a final opportunity to comply with its disarmament obliga-

their willingness to mislead. Nor was the Cabinet aware of the decisive role played by senior Bush administration lawyers in contributing to Goldsmith's change of mind. “We had trouble with your attorney,” the legal adviser to Condoleezza Rice—John Bellinger—later told a visiting British official, “we got him there eventually.” Nor did the Cabinet learn of the terms of the resignation letter of the deputy legal adviser at the Foreign Office, Elizabeth Wilmshurst, that elegantly referred to Lord Goldsmith's late change of mind without revealing the details.

Lawyers are of course entitled to change their minds, and frequently do. New facts emerge, or new legal arguments come to the fore. Between March 7 and March 17, 2003, there were, however, no new facts and no new legal arguments on which Lord Goldsmith could rely. In the intervening seven years he has not been able to provide a convincing explanation for his change of position to rebut the obvious inference that he succumbed to the political pressures that plainly abounded. When Lord Goldsmith appeared before the Chilcot inquiry on January 27, 2010, he was under pressure to explain. His silky performance did not dispel the doubts. He confirmed that his change of mind was largely due to the persuasive arguments of senior Bush administration lawyers, with whom he had met in early February 2003. Tantalizingly, new information did emerge about the views he had expressed in writing before March 7, 2003. This suggested that the inquiry had before it other documents not publicly available. Without being able to refer to the documents, his inquisitors were barely able to lay a glove on the former attorney general.

Then, in May 2010, the Labour Party



Nick Danziger/Contact Press Images

George W. Bush and Tony Blair after a joint press conference in the early days of the Iraq war, April 8, 2003

agreeing to a Security Council resolution that his own attorney general told him was an inadequate basis for war; and then he failed to live up to his own expectations of his ability to persuade the Security Council to vote for a second resolution.

As all this was proceeding, and after

tions” and determined that a failure to so comply and cooperate would constitute a further material breach of those obligations. “It is plain,” wrote Lord Goldsmith, “that Iraq has failed so to comply,” thus giving rise to a material breach and the revival of the original authority to use force.

yers, politicians, and diplomats, have been adept at swatting away troublesome questions. More significantly, the inquiry has been undermined by its inability to refer publicly to documents that it has seen and that contradict or undermine witness testimony. It did not seem that its final report, not expected before the end of the year, would be revelatory or forceful.

Nevertheless, public and media interest and political pressures have combined to force greater openness than Brown intended. Many—but not all—of the hearings have been public and broadcast on TV and the Internet, and for some appearances—Blair's and Brown's in particular—there has been widespread media attention. In recent weeks a growing number of classified documents have been made public by the inquiry, including a damning one-page minute dated January 30, 2003, from Attorney General Lord Peter Goldsmith to Tony Blair. Ending with the words "I have not copied this minute further," the document is revelatory of the prime minister's modus operandi, of the tragic weakness of his attorney general, and of the extent to which the British Parliament, Cabinet, and people were misled by these two men. The document, reproduced here on page 56, includes brief, handwritten reactions that are particularly telling. Nothing beats raw material in black and white.

In spite of its limitations, the inquiry has succeeded in teasing out some new

expectations of his ability to persuade the Security Council to vote for a second resolution.

As all this was proceeding, and after the invasion took place, he failed to intervene in order to remedy the badly conceived and managed post-conflict situation. Against this background, Blair's refusal during his public appearance at the inquiry to express any regret whatever for his actions defined a memorable moment. So surprised was Sir John Chilcot that at the end of the session he twice offered Blair an opportunity to express some regret. To the allegations of incompetence, deception, and criminality there are now added the charges of hubris and bad form.

A question that runs through the narrative concerns the legality of a war that was not (and could not be) justified on the grounds of self-defense. The issue won't go away, and in the British media the conflict is often referred to as "the illegal Iraq war." Blair justified the war on the grounds that it was authorized by the Security Council. On March 17, 2003, the attorney general, Lord Goldsmith, answered a parliamentary question on the legal authority for war, which was already by then a lively public issue. Without any hint of ambiguity, Goldsmith apparently indicated to the British Cabinet and then to the House of Lords that military force was unambiguously lawful.

Goldsmith, "that Iraq has failed so to comply," thus giving rise to a material breach and the revival of the original authority to use force.

Goldsmith's parliamentary answer simply skated over the key question: Who decides whether Iraq is in material breach, the Security Council or one or more individual members such as the US or the UK? It is virtually impossible to find any seasoned international lawyer in Britain who agrees with Goldsmith's conclusion, as expressed in the statement of March 17, 2003, that the Security Council did not have to make this decision in the form of a new resolution. It is now clear that until shortly before he put his name to the 337-word statement, he didn't agree with it either.

Well before the Chilcot inquiry it was known that the attorney general had changed his mind just days before the war. On March 7, 2003, Lord Goldsmith gave the prime minister a secret, thirteen-page memo that essentially concluded that although a "revival" argument could be made, it would probably not be successful if it were to reach a court of law. In other words, the better view was that the war was unlawful.

The full memo was not put before the Cabinet, which, like Parliament, had no inkling about the attorney general's serious doubts. The inquiry has teased out that Foreign Secretary Jack Straw talked Goldsmith out of sharing his doubts with the Cabinet, reflecting both men's lack of backbone and

being able to refer to the documents, his inquisitors were barely able to lay a glove on the former attorney general.

Then, in May 2010, the Labour Party lost the general election and a new Conservative/Liberal Democrat coalition came to power. This appears to have contributed to a decision to declassify documents for which the inquiry, as the Cabinet secretary put it, had waited for "some time." On June 25, around its first anniversary, the inquiry quietly published a set of documents that laid bare the clear and consistent legal advice that Lord Goldsmith gave to Tony Blair at key moments, from July 2002 right up to February 12, 2003. The documents paint a devastating picture, principally (but not only) emphasizing the attorney general's sudden, late, and total change of direction. Following a year of consistent advice, he made a 180-degree turn in the space of a month.

The documents laid an unhappy trail. On July 30, 2002, Lord Goldsmith wrote the prime minister that self-defense and humanitarian intervention were not admissible, and that military action without explicit Security Council authorization would be "highly debatable." On October 18, 2002, he told Straw that the draft of Security Council Resolution 1441 "did not provide legal authorisation for the use of force," and that the British government must not "promise the US government that it can do things which the Attorney considers to be unlawful." On November 11, 2002, immediately

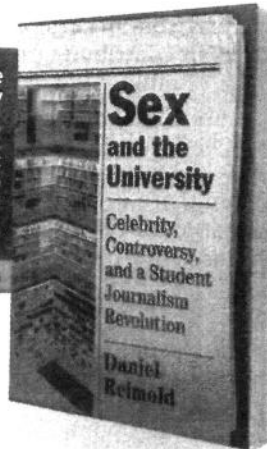


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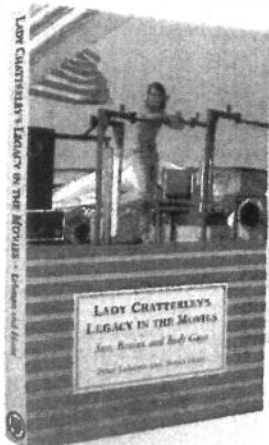
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after Resolution 1441 was adopted, he told Jonathan Powell (Blair's chief of staff) that "he was not at all optimistic" that there would be "a sound legal basis for the use of force against Iraq." At a Downing Street meeting on December 19, 2002, Goldsmith declined to tell those present that they would have a green light for war without a further resolution. On January 14, 2003, he wrote a draft memo that concluded unambiguously that "resolution 1441 does not revive the authorisation to use of force contained in resolution 678 in the absence of a further decision of the Security Council." These words directly contradict what he would later tell the Cabinet and Parliament.

Which brings us to the most devastating document, Goldsmith's January 30, 2003, one-pager to Blair, written the day before Blair's meeting with President Bush at the White House. Lord Goldsmith explained that "I thought you might wish to know where I stand on the question of whether a further decision of the Security Council is legally required in order to authorise the use of force against Iraq." His conclusion? "I remain of the view that the correct legal interpretation of resolution 1441 is that it does not authorise the use of military force without a further determination by the Security Council." Clear, unambiguous, and without caveat. The published version of this message, reproduced on this page, includes the gloriously graphic handwritten reactions of three key players.

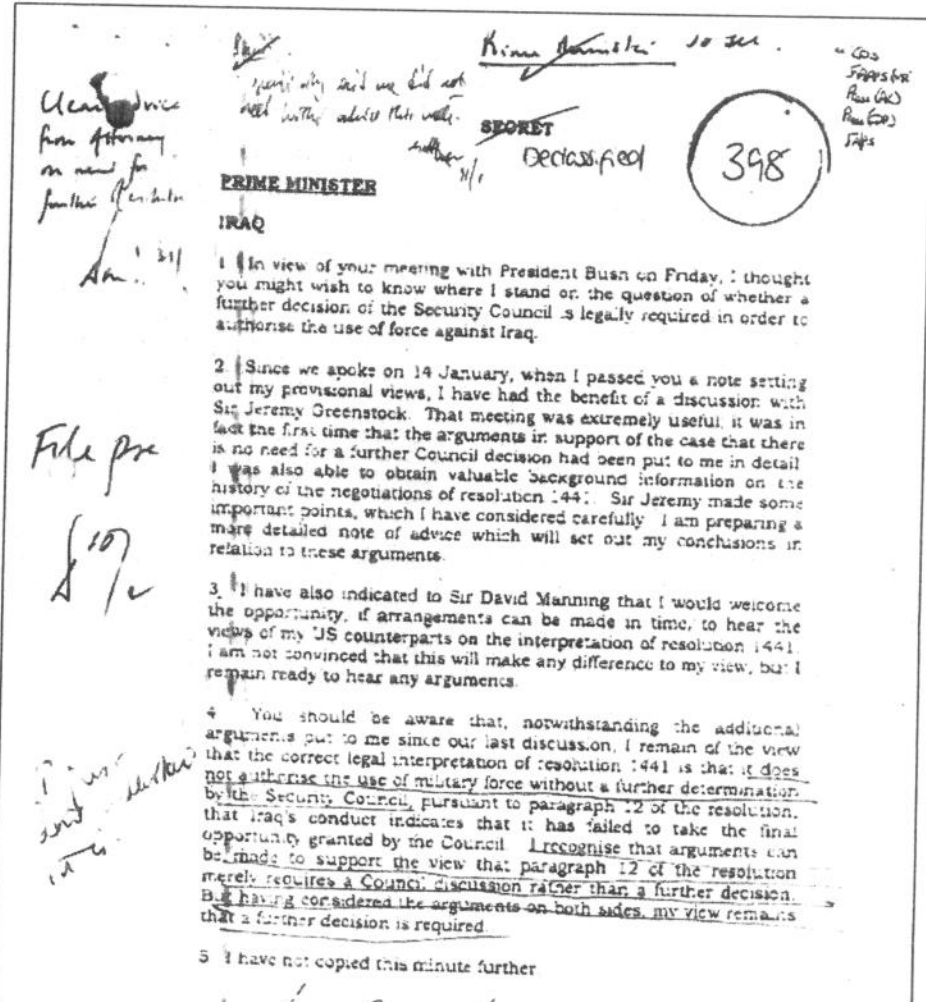
In the top left-hand corner, Sir David Manning, Blair's principal foreign policy adviser, notes: "Clear advice from Attorney on need for further Resolution." Alongside, Matthew Rycroft, who served as Blair's private secretary, sounds irritated: "Specifically said we did not need further advice this week" (apparently confirming allegations that Blair did not want a paper trail of early, unhelpful advice). And on the left-hand side of the minute

strategy had to be arranged around the military planning."

Sir David then records Blair's response, stating that he was "solidly" with the President and ready to do whatever it took to disarm Saddam. He wants a second resolution "if we could possibly get one," because it would make it much easier politically to deal with Saddam, and as an insurance policy "against the unexpected." According to the memo, the prime minister completely ignores the views of his attorney general, who has told him only the previous day that a further resolution is necessary to act lawfully, not merely desirable.

accommodating the desires of the prime minister.

The Chilcot inquiry has given us all we need on this dismal story: the evasive testimonies and the few but damning documents provide an incontrovertible account. The proceedings of the inquiry decisively expose the lamentable and dysfunctional processes that brought Britain into such disrepute, even if its mandate and its members' lack of formal legal qualifications necessarily mean that it has no particular authority to express a view on the legality of the war. (In January 2010 a parallel Dutch inquiry chaired by a retired Supreme Court judge and



... Insightfully analyzing the 'body guy' genre, the authors persuasively demonstrate the need for and value of a radical reassessment of the discourses previously used to talk about male and female sexual power and pleasure and their representation in film."

—Robert Eberwein, author of *Armed Forces: Masculinity and Sexuality in the American War Film*

Smart women, sophisticated ladies, savvy writers ...



week" (apparently confirming allegations that Blair did not want a paper trail of early, unhelpful advice). And on the left-hand side of the minute, with Goldsmith's damning conclusions underlined by the same hand, these scrawled words: "I just don't understand this." The handwriting is Blair's, and it is difficult to see quite what he might have had trouble understanding. Lord Goldsmith's words—consistent with every view he had expressed over the previous six months—admit of no doubt, adopting the views taken by the UK since 1990, by the Foreign Office legal advisers, and by virtually every international lawyer in Britain (if not the world, outside of the US). What Blair seems to be saying is that he doesn't understand why this wretchedly unhelpful view was reduced to writing at that key moment.

The timing could not have been worse. The next day, on January 31, 2003, Blair met Bush, accompanied by Sir David Manning and Matthew Rycroft. Sir David wrote up a widely reported five-page note of the meeting that is before the inquiry but has not yet been made public in full. Sir David records the President telling Blair that the US would put its full weight behind efforts to get another Security Council resolution but if that failed, "military action would follow anyway"; that the "start date for the military campaign was now pencilled in for 10 March," which was "when the bombing would begin"; and that the "diplomatic

... having considered the arguments on both sides, my view remains that a further decision is required

5 I have not copied this minute further

Lord Goldsmith
The Rt Hon the Lord Goldsmith QC
30 January 2003

A classified memo to Tony Blair from his attorney general, Lord Peter Goldsmith, that was recently made public by the UK's Iraq inquiry. The contents of the memo and the handwritten notes are discussed by Philippe Sands in this article.

It is against this background that the attorney general's sharp change of mind will surely haunt him. After Blair's meeting with Bush, the attorney general went to the US to meet the Bush administration lawyers (he made no similar trip to any other country, whose lawyers would no doubt have held rather different opinions). He told the Chilcot inquiry that it was their views that caused him to abandon his long-held position. Yet many of the Bush administration's lawyers with whom he engaged were among the officials who failed to prevent the Bush administration's descent into serial illegalities in 2001 and 2002: ditching the Geneva Conventions, imprisoning suspects at Guantánamo without granting them minimum rights, and embracing waterboarding and other acts of obvious torture. Goldsmith has spoken out against all these measures. Just why he would find the US lawyers' views on the use of force any more convincing is a question that seems to admit of only one answer. Many have concluded that he was

largely composed of lawyers concluded that the war was illegal, contributing to the downfall of the Dutch government.)

In late July, Deputy Prime Minister Nick Clegg, standing in for Prime Minister David Cameron at the Dispatch Box in Parliament, described the war as "illegal." When asked for clarification about whether this was now British government policy, the official spokesman conspicuously failed to back Blair and Goldsmith and to defend the war as lawful, indicating instead that the new government would prefer to await the outcome of the Chilcot inquiry. A spokesman for the inquiry was then reported as saying that Sir John would not make a conclusion on whether the war was legal. In British parlance, this is what's called a dog's breakfast. In any event, the British have come to be deeply skeptical about such inquiries. In the court of public opinion, for this one in particular, the process and its revelations may be more significant and lasting in their effects than any final report that eventually emerges. □

—August 31, 2010

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