THE WAR IN IRAQ AND INTERNATIONAL LAW

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[In this paper I argue that the 2003 war on Iraq was illegal, and that this illegality matters. In the first substantive part of the paper (Part II), I consider three legal justifications that have been offered, to varying degrees, formally and informally, for the war. These are self-defence (and its more contentious variants, anticipatory self-defence and preventative war), collective security under Chapter VII of the Charter of the United Nations, and, finally, the doctrine of humanitarian intervention. None of these provides a secure basis for going to war. The most plausible of these justifications, based on an interpretation of existing Security Council resolutions, is arcane and unconvincing. Part III situates the debate over the war in the context of some recent dilemmas concerning the international order; namely the problem of law in international affairs, the question of novelty, the claims of equality, the assessment of evidence and the presence of hyperpower. Part IV ends by reminding readers of the many and varied ways in which international law does matter in ways that transcend the tedious debates about compliance.]

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I 1939: SOME PERTINENT QUESTIONS

In 1939, Sir Kenneth Bailey gave a lecture to the Victorian Branch of the League of Nations Union entitled: ‘Why Did We Go to War? What Do We Hope to Achieve? What Sort of Peace Do We Want? — A Discussion of These Pertinent Questions’.¹ In that lecture, Sir Kenneth argued that ‘[i]t is entirely wrong to leave it until the war is over … before one starts thinking about the terms of peace’.² At the end of the meeting, held at 177 Collins Street 65 years ago, a general statement was issued by the Council of the Victorian Branch. This statement warned that ‘in order to establish peace on a just and permanent basis, it is not sufficient simply to win a war by force of arms’.³ The lecture and statement were published in 16 pages, full of simple truths about war and peace

¹ Sir Kenneth Bailey and William MacMahon Ball, ‘Why Did We Go to War? What Do We Hope to Achieve? What Sort of Peace Do We Want? — A Discussion of These Pertinent Questions’ (Speech delivered at the Victorian Branch of the League of Nations Union, Melbourne, Australia, 19 October 1939).
² Ibid 6.
³ Ibid 16.

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that ought, perhaps, to have been required reading at the Pentagon in February and March of 2003.

These ‘pertinent questions’ have not changed greatly with the passage of time. Sir Kenneth may not have recognised the technology but he would have been familiar with the terrible dilemmas we faced before, during and in the aftermath of our war. Like it or not, this is our war — the war, perhaps, by which our generation will be judged. First, though, we have to judge the war. I am not in a position to evaluate every aspect of the war in this paper, but I want to provide a framework for understanding Sir Kenneth’s questions.

On 7 March 2003, I was one of a small group of international lawyers in the United Kingdom who wrote to Prime Minister Tony Blair cautioning against engaging in an illegal war. The publication of that letter, and its consequences, led me to two insights about international law. The first was my belated appreciation of the extraordinary level of interest in, and dedication to, international law among a broad range of people. For many, international law is the last best hope on earth — the most powerful tool in the fight against poverty, oppression and Great Power arrogance. We who teach international law sometimes forget what it symbolises. We analyse it, we disclose its flaws, we enjoy the comfort of critique and we berate its lack of realism. Sometimes, though, international law requires us to be loyalists rather than critics.

My other insight was that international law exists in a particular context. It is not some free-floating set of ideas or institutions to be judged and rearranged in the abstract. It is situated at the heart of the great political and moral debates in which we must continue to engage. It reflects them and is reflected by them. More than this, international law derives its capacity and meaning from the international system of which it is part. Another way of putting it is to say that international law is only as good as the international society in which it finds itself. The League of Nations was an institution of sometimes great vitality, which had the misfortune to be around at the wrong time. As Professor Robin Sharwood has told us, the League was peopled by resourceful, sometimes heroic, figures. They did not fail, the system failed them. This paper will focus on these two insights: the centrality of international law and the significance of the context in which it operates.

Before I leave 1939 behind, let me quote once more from the Victorian Branch statement where it states that ‘[i]t is most important that … the aims of … war … should be considered and discussed by all citizens’. Discussion and debate have indeed been features of the war on Iraq. One of the most peculiar aspects of the war on Iraq is that nearly everyone seemed to have an opinion

5 For a fuller discussion of these consequences, see Matthew Craven et al, ‘We Are Teachers of International Law’ (2004) 17 Leiden Journal of International Law 363.
6 Robin Sharwood, ‘The Rule of Law and War: The Conflict with Iraq’ (Speech delivered at an Institute for Comparative and International Law Public Seminar, The University of Melbourne, Australia, 17 March 2003).
7 Bailey and Ball, above n 1, 16.
8 Interestingly, some aspects of the debate have been couched in terms of the 1939 debate about what to do regarding the German threat, with anti-appeasers viewing Iraq as a threat comparable to that of the Nazis and anti-interventionists seeing dangers in Great Power interference in the domestic affairs of foreign states.
American film stars jostled with archbishops for the opportunity to editorialise, while lawyers pontificated and even the late Pope John Paul II offered a legal opinion.9

I have been struck by the way the debate has been conducted by ordinary citizens, politicians and opinion-makers. I have noted, too, the manner in which the debate moves, sometimes problematically, between different spheres of justification. In this paper, I want to organise this mass of opinion, blast and counter-blast, into some sort of order. I will focus on the illegality of the war and its consequences. But I hope at least to acknowledge, if only implicitly, some other questions: How do we argue about war? How might we judge whether to go to war or not? What would constitute a compelling argument? How would we recognise it? Should these be legal arguments, moral arguments or arguments based on self-interest? What do we know? How do we know that we know it?

From the outset, I want to distinguish four influential languages or debates. We might call these jurisprudential (was the war lawful?), empirical (what are the facts?), prudential (was it in our interests to go to war?) and ethical (what was the virtuous course of action?). I cannot hope to do justice to these different argumentative domains, but I do want to place them at the foreground before embarking on what will be predominantly a legal argument about war and an


The United Nations Organisation … rise more and more above the cold status of an administrative institution and … become a moral centre where all the nations of the world feel at home and develop a shared awareness of being, as it were, a family of nations.

See Pope John Paul II, ‘An Ever Timely Commitment: Teaching Peace’ (Speech delivered for the celebration of World Peace Day, Vatican City, 1 January 2004) 5, 7 (emphasis in original). Meanwhile, when Archbishop of Canterbury Rowan Williams was asked whether he believed the war was immoral, he said that ‘[i]mmoral is a short word for a very, very long discussion’: Matt Wells and Stephen Bates, ‘Humphrys Furious as BBC Cuts Interview’, The Guardian (Manchester, UK), 18 October 2003, 6.
II 2003: WAS THE USE OF FORCE IN IRAQ LAWFUL?

Let me begin with the legal position, and here I am focussing on the *jus ad bellum* debate, that is, the decision to go to war itself. There are, of course, several other important legal questions related to the post-war occupation and its legality as well as the breaches of international humanitarian law committed on both sides. However, I want to concentrate on what I take to be a central concern of many people in the United States, the UK and Australia — the legality of the intervention.

In order to answer the question of whether the use of force in Iraq was lawful, one has to go back to the *Charter of the United Nations*, where one finds a general prohibition on the use of force in international relations in art 2(4). In 1946, the Nuremberg War Crimes Tribunal put the matter more bluntly when it said, ‘*aggression … is the supreme international crime*’. Indeed, the whole thrust of the *UN Charter* is in favour of resolving disputes using peaceful means and in promoting cooperation. In particular, the preamble to the *UN Charter* refers to the need to ‘save succeeding generations from the scourge of war’. In addition, there are norms outside the *UN Charter* in customary international law

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10 Public international lawyers may feel inclined to remain above the fray on these non-juridical questions, perhaps pleading lack of qualification. However, moral issues, for example, are unavoidable in three different respects. First, legal positions very often follow from moral convictions, however much we may wish to deny this, so that the particular position we take as international lawyers will be strongly informed, perhaps determined, by our moral beliefs. Second, the principles of international law generally retain traces of moral doctrine, so that in order to understand the law on the use of force or human rights law, we need to appreciate that each has some basis in religious or ethical doctrines. Third, there are rare occasions when there is a clash between a clear legal prohibition and a moral imperative. This, to an extent, is the problem of humanitarian intervention. In order to escape this dilemma, international lawyers and government officials have fastened on to the idea of legitimacy. For example, a Whitehall spokesman was quoted as saying in relation to the proposed invasion of Iraq, ‘*what will be important is that what we are being told to do has legitimacy. Legitimacy can derive not just from a UN mandate. Lawful and legitimate are not necessarily the same thing*’: Richard Norton-Taylor, ‘Threat of War: Blair to Order Invasion Force This Month: Tanks Will Form the Core of British Contingent’, *The Guardian* (Manchester, UK), 8 October 2002, 12. I doubt, however, whether this offers an escape from the problems of law and morality.


13 Article 2(4) states that ‘*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State*’. *International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1947) vol 1, 186.

14 See, eg, *UN Charter* arts 2(3), 33.
forbidding intervention and unauthorised uses of force. All this has been confirmed by the International Court of Justice in its *Nicaragua* decision and by decades of state practice.

Lawyers, though, love an exception, and there are two, possibly three, exceptions to the general rule against the use of force. States can use force in self-defence; they can use force when the Security Council has authorised force; and there may be an argument, though this is not a strong one in law, for the use of force to protect vulnerable foreign populations from gross and systematic violations of their human rights, that is, humanitarian intervention of the sort called for in the case of Rwanda and applied in Kosovo.

The US on one hand, and the UK and Australia on the other, have each drawn on these exceptions to make two quite distinct arguments in favour of the war on Iraq. It has been a largely unnoticed feature of this debate that the ‘Coalition of the Willing’ has itself been divided on the justification for war. The UK’s Attorney-General, for example, rejects the US argument, which favours pre-emptive self-defence.

### A The US Position

The US has tended to favour the self-defence argument because it leaves the US less beholden to the UN (an institution the Bush Administration does not seem to hold in high regard) and because it accords with what I have called elsewhere a ‘Texan international law’ — an international law that emphasises the threat from outlaws, the need for self-help, the unreliability of institutions and the frontier spirit.

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19 There are other possible exceptions (for example, invitation); however, none of these are relevant to the current crisis.


In accordance with this view, the US claimed a right to take pre-emptive action against Saddam’s Iraq and other enemies.\(^{22}\) The preamble to the US resolution authorising the use of military force in Iraq, for example, refers to ‘the risk that the current Iraqi regime will … employ those weapons [of mass destruction] to launch a surprise attack against the US’.\(^{23}\)

This pre-emptive self-defence argument stretches international law beyond breaking point. It is true that international law allows the use of force in self-defence where there is an ‘armed attack’.\(^{24}\) It may also be the case that force is permitted where there is a threat of imminent attack from an adversary.\(^{25}\) For example, this was the argument used by Israel in justifying the attack on Egypt and Jordan which began the Six-Day War.\(^{26}\) The formulation of this right dates back to The Caroline (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America), where it was said that anticipatory self-defence is permissible when there is a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.\(^{27}\) This does not sound like a description of the threat posed by Iraq towards the US and the UK. The US was not under attack from Iraq, nor was Iraq at the point of attacking the US. As the UK Parliamentary Intelligence and Security Committee put it, ‘Saddam Hussein was not considered a current or imminent threat’.\(^{28}\) That Iraq may have one day posed a threat to the US did not justify an armed assault on Iraqi territory in March 2003. This form

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27 Letter from Mr Webster to Mr Fox (24 April 1841) (1841–42) 29 British and Foreign State Papers 1129, 1138. See also International Military Tribunal for the Far East, Judgment of the International Military Tribunal for the Far East (1948) vol 2, 994–5, where the Tribunal accepted that the Dutch declaration of war on Japan in 1941 was a legitimate act of anticipatory self-defence; Robert Jennings, ‘The Caroline and McLeod Cases’ (1938) 32 American Journal of International Law 82.


There are very good policy reasons for this lack of approval. If India or Pakistan were to exercise this so-called right to pre-emptive self-defence, the consequences would be disastrous. Indeed, if we were to endorse this doctrine, we might say that Iraq had a better claim to use force in pre-emptive self-defence against the US than the US did against Iraq. Either way, it does not sound like a prescription for peace among nations.

In any event, the idea of ‘preventative war’ has a vaguely Orwellian ring about it. Indeed, its two previous high points were in 1984, when the Schultz Doctrine, named after George Schultz, Ronald Reagan’s Secretary of State, called for pre-emptive action against terrorist bases abroad;\footnote{For a discussion of the Schultz Doctrine, see Michael Byers, ‘Terrorism, the Use of Force and International Law after 11 September’ (2002) 51 International and Comparative Law Quarterly 401.} and in 1948, the year George Orwell wrote the novel 1984, the year of the Berlin Blockade and the year the US Joint Chiefs of Staff considered launching a pre-emptive nuclear war against the Soviet Union (Operation Broiler).

There have, of course, been preventative wars before — the Soviet invasions of Hungary, Czechoslovakia and Afghanistan come to mind, each roundly condemned in the West as illegal. The Soviet invasion of Afghanistan resulted in misery and the emergence of a highly aggressive fundamentalism in that country, and yet was justified as a pre-emptive war. One might say bin Laden is both the cause and consequence of this preventative war doctrine. One preventative war has a habit of begetting another. We had no truck with such doctrines then and we should disavow them now.

B The Australian/UK Position

Along with self-defence, the UN Charter also contains a collective security framework. This mirrors Roosevelt’s idea at San Francisco and Dumbarton Oaks in 1944 and 1945 that all but four states of the world would be disarmed and policed by the Four Policemen: US, China, the Union of Soviet Socialist Republics and the UK.\footnote{See Gerry Simpson, Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order (2004) 165–93.} This idea, with the deletion of the disarmament principle and the addition of France, found its way into Chapter VII of the UN Charter, which allows the Security Council to ‘take such action as may be necessary to maintain or restore international peace and security’.\footnote{UN Charter art 42.} The UK Attorney-General and lawyers for the Australian Government, adopting quite a different approach from that of the Americans, argued that the Security Council
had authorised the use of force against Iraq under Chapter VII. Most international lawyers in the UK and Australia rejected this argument. Armed intervention is an extremely grave business, and in order to be lawful, there must be an explicit authorisation from the Security Council. Such an authorisation invariably refers to the right of states to take ‘all necessary measures’ to terminate a threat or breach of peace. The Security Council did not pass a resolution in these terms in 2002 or 2003. Resolution 1441, passed in 2002, referred to a threat of ‘serious consequences’ should Iraq not comply with the inspections regime but it did not authorise force.

Furthermore, there were no pre-existing resolutions authorising military intervention in Iraq. Resolutions such as Resolution 678 and Resolution 687 were passed in the context of the liberation of Kuwait in 1991. It is artificial and dangerous to read them as permitting a full-scale invasion of Iraq 12 years later. As former US Secretary of State Colin Powell put it, in his book on the first Gulf War, Resolution 678 ‘made it clear that the invasion was only to free Kuwait’.

The UK and Australian interpretation of Resolutions 678 and 687, and some of the other resolutions, is deeply worrying. In order to see how worrying it is, we need only imagine the response if, say, Russia and China had used these resolutions as a justification for invading Iraq in 2003, over the protestations of the US and UK. Would the legality of such an intervention have been a matter for debate? I think not.

It is true that the regime Saddam Hussein led displayed a vile disregard for basic standards of human decency. It is true also that the Security Council condemned his regime at various intervals in the 12 years between the two Gulf

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36 Resolution 1441, SC Res 1441, UN SCOR, 57th sess, 4644th mtg, UN Doc S/RES/1441 (8 November 2002). France and Russia would not have supported a resolution that did so: see, eg, Jon Henley, Gary Younge and Nick Walsh, ‘Threat of War: France, Germany and Russia Harden Stance’, The Guardian (Manchester, UK), 6 March 2003, 5.


Wars. However, the Council did not do what it could easily have done, that is, it did not explicitly authorise an air and ground assault on Iraq. Arguments about the meaning of Resolution 1441 and the language of Resolutions 678 and 687 seem disingenuous and theoretical in the light of the known divisions among the permanent members of the Security Council and the consequent failure to issue an authorising resolution.\footnote{See Resolution 688, SC Res 688, UN SCOR, 46th sess, 2982nd mtg, UN Doc S/RES/688 (5 April 1991); Resolution 706, SC Res 706, UN SCOR, 46th sess, 3004th mtg, UN Doc S/RES/706 (15 August 1991); Resolution 712, SC Res 712, UN SCOR, 46th sess, 3008th mtg, UN Doc S/RES/712 (19 September 1991); Resolution 986, SC Res 986, UN SCOR, 50th sess, 3519th mtg, UN Doc S/RES/986 (14 April 1995).}

The UK Government also hinted at two other justifications associated with collective security under the UN Charter. The first of these justifications was based on the idea of the ‘unreasonable’ veto. Prime Minister Blair was asked, on BBC’s Newsnight programme, whether he would go to war without a further resolution, and he said he would if a member of the Permanent Five (‘P5’) vetoed a draft resolution in an unreasonable manner.\footnote{For a robust debate on the scope and meaning of these resolutions, see Malcolm Shaw and Gerry Simpson, BBC News, E-mail Debate: So Was the War Legal? (8 March 2004) <http://news.bbc.co.uk/1/hi/magazine/3543079.stm> at 1 May 2005.} The proposition that some vetos could be regarded as unreasonable was mostly unknown to international law until that very moment,\footnote{BBC News, ‘Transcript of Blair’s Iraq Interview’, Newsnight, 6 February 2003 <http://news.bbc.co.uk/1/hi/programmes/newsnight/2732979.stm> at 1 May 2005.} and seems to have passed into obscurity since. In any case, it is harder to make this sort of argument when three members of the P5 threaten ‘unreasonable’ vetos.\footnote{There have been variations on this theme before. Julius Stone suggested in 1958 that the prohibition on force in art 2(4) depended on a fully-functioning collective security system: Julius Stone, Aggression and World Order: A Critique of United Nations Theories of Aggression (1958) 96. In the absence of such a system, the prohibition might be qualified by the requirements of self-help. This argument was repeated more recently by Michael Reisman in ‘Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention’ (2000) 11 European Journal of International Law 3.}

A second, and stronger, UK argument — which may be termed the ‘golden thread’ argument — was grounded upon a possible right to enforce existing
Security Council resolutions. Remember, this is different to the argument that the Security Council had authorised force (the argument based on Resolutions 678, 687 and 1441). Here, the UK, rehashing an argument made in justifying the Kosovo intervention, suggested that states can take military action to enforce Security Council resolutions even where those resolutions themselves do not mandate or authorise force. This argument is initially appealing. The Security Council sometimes passes resolutions that are disregarded; it is tempting to argue that groups of states can, in effect, enforce the law. The problem here is that the UN Charter does not permit such legalised vigilantism. No doubt, traffic violations in Carlton would decrease if private citizens could issue speeding and parking tickets but would or should we trust them to do it fairly and without prejudice? Would this make Carlton a more lawful place? The UN Charter, like the rule of law, is meant to replace individualised justice, not mandate it.

As a final possibility, it might be suggested that there exists a third exception to the prohibition on the use of force. Can the West not use its overwhelming military superiority to end human rights violations against vulnerable foreign populations? Some Coalition officials, in speeches and statements, have

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46 The Australian position, as articulated in a 2004 speech by Foreign Minister Alexander Downer, also deployed this argument. For Downer, the violation of successive Security Council resolutions, in tandem with the last chance offered to Saddam in Security Council Resolution 1441, was enough to permit the intervention by the Coalition: see Alexander Downer, ‘The Challenge of Conflict, International Law Responds’ (Speech delivered at the International Law Conference, Adelaide, Australia, 27 February 2004) 4. The implied authorisation argument has been put more forcefully by the Belgians: Legality of Use of Force (Yugoslavia v Belgium) (Oral Pleadings of Belgium) [10 May 1999] ICJ <www.icj-cij.org> at 1 May 2005. In contrast, another version of the implied authorisation argument says that the absence of condemnation by the Security Council (as was the case during the Cuban missile crisis), or the overt failure of a condemnatory draft resolution (see, eg, Belarus, India and Russian Federation: Draft Resolution, 54th sess, UN Doc S/1999/328 (26 March 1999), which demanded the immediate cessation of the use of force against Yugoslavia and the urgent resumption of negotiations) can be read as approval for a particular use of force. For further criticism of the implied authorisation argument, see Lord Alexander of Weedon, Iraq: The Pax Americana and the Law (2003) 21 <http://www.justice.org.uk/images/pdfs/iraqpaxam.pdf> at 1 May 2005.


48 There are, of course, cases where a procedural claim based on implied authorisation has been combined with a substantive claim based on humanitarianism in order to invoke ‘legitimacy’; see, eg, Resolution 688, above n 41, which deployed the use of the Kurdish refugee crisis following the Gulf War to justify the Anglo-US-French establishment of no-fly zones in Northern Iraq.

49 Article 39.

50 I am not speaking here of the sorts of humanitarian interventions authorised by the Security Council itself: see, eg, Resolution 794, SC Res 794, UN SCOR, 47th sess, 3145th mtg, UN Doc S/RES/794 (3 December 1992), authorising action in Somalia.
gestured towards this idea of humanitarian intervention. The UK Government, in particular, has come closest to articulating a full-blown doctrine of humanitarian intervention. The idea is immensely attractive to both Prime Minister Blair (it combines a reflexive moralism and a propensity to use force) and to the UK’s memory and image of itself (a world power with a history of good-hearted paternalism). However, the UK doctrine, which is by no means universally accepted, requires ‘an immediate and overwhelming humanitarian catastrophe’. This may provide justification for invading Myanmar, Algeria, the Congo, Sudan and so on, but it sounds less plausible as a justification for invading Saddam’s Iraq — horrible dictatorship though it was. Then there is also the question of good faith. The West did not seem terribly interested in Iraq’s human rights violations before the Kuwait war. As the Cold War adage goes, ‘he’s a dictator, sure, but he’s our dictator’.

Ultimately, whether or not Baathist Iraq was a suitable object for humanitarian intervention may be irrelevant given the failure of states to support a general principle of humanitarian intervention, and the very patchy practice in favour of the doctrine. There are good policy reasons for this diffidence, too. Humanitarian intervention will no doubt remain a seductive idea but it does have a habit of falling into the wrong hands. For example, Hitler claimed that the invasion of Czechoslovakia was motivated by humanitarianism, and

51 According to Prime Minister Blair, ‘[t]his 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’: BBC Arabic, ‘PM Interviewed on Future of Iraq’, BBC World Service, 4 April 2003 <http://www.pm.gov.uk/output/page3421.asp> at 1 May 2005. This justification is closely associated with pro-democracy arguments used at Panama and in Grenada: see, eg, Marian Leich, ‘Contemporary Practice of the United States relating to International Law’ (1990) 84 American Journal of International Law 536, 546; Fernando Tesón, Humanitarian Intervention: An Inquiry into Law and Morality (2nd ed, 1997) 214; ‘For the first time in decades, Iraqis will be able to choose their own representative government’: Tony Blair and George Bush, ‘Joint Statement on Iraq’ (Press Release, 8 April 2003). See also Oscar Schachter, ‘The Legality of Pro-Democratic Invasion’ (1984) 78 American Journal of International Law 645.


54 UK, Written Answers to Questions, House of Commons, 29 April 1999, vol 330, column 261 (Tony Lloyd, Member for Manchester Central).


56 See Adolf Hitler (Speech delivered to the German Reichstag, Berlin, Germany, 28 April 1939).
Brezhnev’s invasion of the same country 50 years later was to ‘protect’ the revolution.57

So, the war was unlawful. None of the arguments in favour of the war provide the level of justification necessary.

Before I broaden out this discussion, I want to make one thing clear: a finding of illegality does not lead to the conclusion that somehow President Bush or Prime Ministers Howard and Blair will, or ought to, be brought before an international war crimes tribunal. It is not through lack of precedents for Presidents. Milošević, Kambanda and Dönitz were each heads of state who ended up on trial before international war crimes tribunals.58 Rather, the most likely forum, the International Criminal Court (‘ICC’), lacks a clear jurisdictional basis for trying Western leaders. In particular, the ICC does not, as the Rome Statute of the International Criminal Court presently stands,59 have material jurisdiction over the crime of aggression. In any case, in calling for the trial of world leaders, the opposition to the war seems to be mimicking the very thinking that led us into the war — based as it was on the belief that deep structural and systemic deformities that result in aggression or tyranny, can somehow be blamed on one person.60

III 2005: SOME QUESTIONS FOR THE FUTURE

The war, then, was illegal. Yet those who share my views on these questions must also interrogate the underlying structure of international law in order to fully respond to the sometimes sincerely argued pro-legality views outlined in the US National Security Strategy,61 the UK Attorney-General’s advice,62 and the various statements of Prime Minister Blair.63

There are five matters I want to raise that might frame this sometimes arcane and technical debate about legality and illegality. We might call these ‘questions for the future’ and they involve legal questions as well as empirical, moral and prudential considerations.

First, how are we to interpret Security Council resolutions, especially those phrased with deliberate ambiguity? What do we do about those resolutions passed after the invasion which might be read as giving tacit approval to the invasion?64 How should disagreements over the meaning of legal texts be resolved? Is it too quixotic to suggest, as the East Timorese Government has in

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58 See, eg, Prosecutor v Kambanda (Judgment and Sentence), Case No ICTR 97–23–S (4 September 1998).
60 Craven et al, above n 5, 372.
61 Above n 22.
64 See, eg, Resolution 1483, SC Res 1483, UN SCOR, 58th sess, 4761st mtg, UN Doc S/RES/1483 (22 May 2003); Resolution 1511, SC Res 1511, UN SCOR, 58th sess, 4844th mtg, UN Doc S/RES/1511 (16 October 2003).
relation to the Timor Gap dispute with Australia, that conflicts under international law be resolved in court.\footnote{See, eg, ABC Radio, ‘East Timor Ups Ante in Oil and Gas Fight’, The World Today, 16 December 2004 \<http://www.abc.net.au/worldtoday/content/2004/s1266589.htm> at 1 May 2005.} After the assassination of Archduke Ferdinand in 1914, the Serbian Government suggested to the Austrians that their differences be resolved by the Permanent Court of Arbitration, then recently established in The Hague.\footnote{Serbian Response to the Austro-Hungarian Ultimatum, Belgrade (25 July 1914) art 10 available at \<http://www.gwpda.org/1914/serbresponse.html> at 1 May 2005.} However, the Austrians had a better idea — they invaded Serbia and set in train the Great War. Maybe it is eccentric to call on the various parties to disputes such as the one leading to the Iraq war to have recourse not to force but to judicial institutions.\footnote{No court has judged the legality or illegality of the war. In two cases, Doe v Bush, 323 F 3d 133 (1st Cir, 2003) and Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom [2002] EWHC 2759, heard in US and UK courts respectively, the judiciary declined to adjudicate the matters, regarding them as non-justiciable political matters.} It may even be dangerous — but sometimes judicial oversight will serve to defuse crises or, at least, help determine the weight of legitimacy.

Second, how do we respond to the argument that international law needs to be changed to accommodate the new international order? Prime Minister Blair has undergone an interesting intellectual journey through this war. He began by saying that the UK would always act within international law.\footnote{UK, Written Answers to Questions, House of Commons, 14 March 2003, vol 401, pt 363, column 482W (Tony Blair, Prime Minister).} He then asked his Attorney-General, Lord Goldsmith, if Goldsmith could supply him with a justification for the war when its legality came under scrutiny.\footnote{See Chris Bunting, ‘Attorney-General Distanced Himself from War Advice’, The Independent (London, UK), 14 February 2005, 6; ‘Full Advice of the Attorney-General’, above n 33.} Then, when the campaign to find a legal justification for the war seemed to fail, he said at his Sedgefield constituency that if the war really was illegal then international law was the problem, not the war.\footnote{Blair, ‘The Threat of Global Terrorism’, above n 53.} This raises a serious point. Does the Westphalian system need to be adjusted in some way? We must, of course, be wary and suspicious of the call for transformation. Novelty’s allure lies partly in its potential to legitimise acts rendered illegitimate by the existing system. As Philip Jessup put it, “of all the clichés which infect patriotic exhortations, the most subtly poisonous is that which calls the war in progress at the moment “different from all other wars””.\footnote{Philip Jessup, Neutrality: Its History, Economics and Law (1936) 76. Note also Jessup’s rebuke to those with “the all-too-ready and frequent tendency to pin the label of novelty on anything which does not happen to have come previously to one’s individual attention”: at 58.}

In one sense then, recent wars are not so unlike other wars. These ‘new wars’, pre-emptive or humanitarian, are rather old-fashioned. The justifications offered for prosecuting these wars are hardly unprecedented. Hitler’s initial conquests
were justified as pre-emptive (Norway and Poland) and humanitarian (Czechoslovakia). The nature of these wars is also familiar. The war on anti-American resistance or ‘global war on terror’, and the humanitarian wars of the 1990s can both be characterised as classic interstate conflicts. For all the fanfare surrounding new wars and new enemies, the US and its allies have, in the past half-decade or so, fought state rivals including Serbia, Afghanistan and Iraq.

Yet we must acknowledge that many strategists, thinkers, critics, philosophers and statesmen, across the political spectrum, from Chomsky and Žižek to Blair and Clinton, to Bush and Perle, speak of new world orders and new crises. Public international law, especially in its orthodox guises, is viewed as an anachronism. Lawyers have a tough job defending the field. There are no ready answers but in a recently published book I have tried to show the existence of structural continuity in the system (Great Power hegemony, outlaw status, existential threats to the order) as well as the portents of novelty in some recent practices (the asymmetrical application of the jus ad bellum and jus in bello and the changed language around war, that is, its subtle humanitarianism).

Third, how, in the absence of full disclosure and accurate information, can we judge these decisions about war and peace? We need good law but we also need access to facts. We were poorly served by our political leaders in that regard. US Secretary of Defense Donald Rumsfeld, in one of his epigrammatic flourishes, said of the search for Weapons of Mass Destruction (‘WMD’), ‘the absence of evidence is not evidence of absence’. This is appealing as poetry but not as law or politics.

David Kay, the American erstwhile Head of the Iraq Survey Group has admitted that the Bush Administration’s claims about WMD were ‘almost

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73 In relation to Norway, see Adolf Hitler, ‘Order of the Day’ (Speech delivered to the German Army, Berlin, Germany, 6 April 1941); in relation to Poland, see Adolf Hitler (Speech delivered to the German Reichstag, Berlin, Germany, 4 May 1941); in relation to Czechoslovakia, see Adolf Hitler (Speech delivered to the German Reichstag, Berlin, Germany, 28 April 1939).
74 See, eg, Noam Chomsky, ‘The “War on Terrorism” and the New Rules of World Order’ (Speech delivered at St Francis Xavier University, Antigonish, Canada, 13 October 2004).
76 See, eg, Blair, ‘The Threat of Global Terrorism’, above n 70.
80 Simpson, Great Powers and Outlaw States, above n 31.
82 This question is related to the Blix–Blair/Bush contretemps that poisoned UN–US relations in the months leading up to the war. There is not much that usefully can be appended to this debate so let me add only one small gloss. Part of this disagreement was about who had authority to determine the existence of such weapons: the arms control people, the UN Security Council, the US or the UK? The qualification of the fact-finders turns out to have been a key but rather under-argued issue.
wholly wrong’. In June 2004, Colin Powell conceded that his testimony to the Security Council was largely inaccurate. Few, if any, usable WMD existed. The UK Government’s famous ‘dodgy dossier’ from February 2003 can be discounted from the outset, based as it was on some old PhD research cobbled together from the internet. However, an earlier British dossier dating from September 2002 was presented as evidence of Saddam’s threat. This was the document that contained a warning that Iraq could arm and use chemical and biological weapons within 45 minutes. However, the document, without making it at all clear, refers only to battlefield weapons. The British Government did not rush to correct this misconception. After all this, it may seem surprising that Lord Hutton, in an inquiry held after the death of Dr David Kelly, found that the BBC had been guilty of falsely accusing the British Government of ‘sexing up’ the intelligence material. The only harsh words Lord Hutton reserved for the Government was that it might have ‘subconsciously influenced’ the way in which intelligence material was presented to it.

It seems, then, that we were rushed into war (in the words of President Bush, ‘go find me a way to do this’), without being supplied with remotely credible evidence of wrongdoing. Former US Deputy Secretary of Defense Paul Wolfowitz has said that this did not matter anyway. However, the presence or absence of WMD did matter in two respects. These weapons formed part of the democratic justification as well as the legal justification for the war. They constituted Saddam’s ‘material breach’ of UN resolutions permitting reactivation

85 Note that it is clearly not simply possession of WMD that makes a state dangerous or opens it up to intervention. On this measure, the most dangerous states are certainly Russia and the US. So, another ‘empirical’ controversy relates to the propensity of a particular state or individual to threaten international order. How might X or Y behave in a certain case? Is previous behaviour the key? Or put more bluntly, the question was: ‘to what extent might Saddam Hussein threaten us?’
89 International Institute for Strategic Studies, above n 87.
91 Ibid.
of Resolution 678 in the UK ‘golden thread’ argument, and they represented the ‘threat’ from Iraq in the US self-defence version.94

Fourth, the principle that stands at the very heart of international law is that of sovereign equality — states and their citizens are to be treated the same way by international law. In 1825, in *The Antelope*, Chief Justice Marshall of the US Supreme Court remarked that ‘[n]o principle of general law is more universally acknowledged than the perfect equality of nations’.95 This may be a rough equality but it informs many of the basic principles of international law.96 Now, we seem to be moving towards a world in which distinctions are to be drawn on the basis of cultural attributes or ideological proclivities and tendencies — a world in which not everyone is entitled to the full protection of the law. This works at both the state level and the individual level. At the state level, we seem to be returning to the 19th century perception of civilised and uncivilised states, where states divided into what John Westlake labelled those ‘interested in maintaining the rules of good breeding’ and those that were not.97 At the individual level, we see this in the way the citizens of outlaw states are denied the basic protection of the law. This has become clear at Guantánamo Bay and Bagram.98

In this regard, the language of war is important. The bandying around of words like ‘uncivilised’ or ‘terrorist’ can lead to an atmosphere in which, in the words of Peter Rowe, ‘there is an unwillingness among combatants to accord the “protection” of the law to their adversaries, who are seen in this light’.99 Or as Carl Schmitt put it:

To confiscate the word humanity, to invoke and monopolize such a term … has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.100

Abu Ghraib is the logical and horrific conclusion of this asymmetry. Worse still, some of those initially implicated in the abuses did not belong to the US or

94 Before the war, the self-defence arguments (even on the worst-case assessments of Saddam’s possession of WMD) were untenable. In light of what has been found in Iraq since, the arguments lack any shred of credibility. Tony Blair said it was right to go to war ‘because weapons of mass destruction — the proliferation of chemical, biological, nuclear weapons … are a real threat to the security of the world and this country’: UK, Parliamentary Debates, House of Commons, 15 January 2003, vol 397, pt 329, column 682 (Tony Blair, Prime Minister). Note the rhetorical slippage here, too. It is true that such weapons threaten our security (this might be a reason to get rid of them altogether, of course), but it is not at all clear that this is a reason to attack Iraq.

95 23 US 66, 122 (1825).

96 States enjoying sovereign equality are often said to possess internal sovereignty (a monopoly of legitimate power within a certain territory and jurisdictional primacy in that area) and external sovereignty (a right to territorial integrity and immunity from suit in the courts of another state): see, eg, Ivan Shearer, *Starke’s International Law* (11th ed, 1994) 90–1.


100 Carl Schmitt, *The Concept of the Political* (George Schwab trans, first published 1976, 1996 ed) 54 [trans of: *Der Begriff des Politischen*].
British armies. Instead, they owed allegiance to a country none of us had heard of until recently: CACI International, a private security and intelligence contractor based in Virginia and immune from the jurisdiction of local Iraqi law and from the military code of conduct. While outlaws are denied the protection of law, those who work for the Great Powers are immune from its responsibilities.\(^\text{101}\)

These developments are to be deplored. We must avoid embracing a world that former Soviet President Mikhail Gorbachev warned against, in which there is ‘the view that some live on Earth by virtue of divine will while others are here quite by chance’.\(^\text{102}\)

Fifth, how do we confront the question of US hegemony, unipolarity and its ‘hyperpower’ status (as the French put it)\(^\text{103}\)? American power and weakness is the most remarkable phenomenon of this period. The opportunities presented by the end of the Cold War have been more or less squandered. The US, a great civilisation and an extraordinarily vibrant country, is cursed with a deformed political system for which Watergate established a pattern, not an aberration. The US, or rather a very small political elite in Washington and Texas, has turned its back on multilateralism with the denunciation of the Kyoto Protocol,\(^\text{104}\) the peculiar and histrionic hostility to the ICC,\(^\text{105}\) and the ongoing defamations directed at the UN itself.\(^\text{106}\)

But there is another US — a republican tradition going back to people like Elihu Root and those who opposed the League of Nations because it did not outlaw war altogether. A democratic tradition, going back to Woodrow Wilson and Franklin D Roosevelt, dedicated to the promotion of democracy through law.\(^\text{107}\) A human rights tradition inaugurated by Eleanor Roosevelt, and a tradition of economic good sense and social responsibility exemplified by the Marshall Plan.\(^\text{108}\) This is the US that sided with the anti-colonial movements against the great European empires and condemned Britain and France when

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\(^{101}\) See Coalition Provisional Authority (Iraq), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, Order No 17 (27 June 2004).

\(^{102}\) Mikhail Gorbachev (Address delivered to the UN General Assembly, New York, US, 7 December 1988) as contained in UN GAOR, 43\textsuperscript{rd} sess, 72\textsuperscript{nd} plen mtg, 2, UN Doc A/43/PV.72 (8 December 1988).

\(^{103}\) See, eg, Hubert Védrine and Dominique Moïsi, France in an Age of Globalization (2001) 2. See also Samuel Huntington, ‘The Lonely Superpower’ (1999) 78 Foreign Affairs 35, 42 in which Huntington famously describes the US as a ‘rogue superpower’.


\(^{108}\) See Lord Alexander of Weedon, above n 46, 30–1.
they embarked on their illegal and ill-conceived adventure at Suez.\textsuperscript{109} This was an America that could see the folly in inserting large Western armies into the Middle East on spurious pretexts. This America has not disappeared — it may even be reasserting itself in the various inquiries into the maltreatment of prisoners at Abu Ghraib. There is a language of liberty and responsibility in America — it brought down Nixon, ended the Vietnam War and nourished the civil rights movement. That language has been degraded by the robotic incantations of the Bush Presidency, but it can, and must, be retrieved.\textsuperscript{110} The world and international law will be better for it.

IV \hspace{1em} 2005: DOES INTERNATIONAL LAW MATTER?

For some people, of course, making international law better is unlikely to change the world. For them, the illegality or otherwise of the war is entirely beside the point. It simply does not matter, or it can be endlessly manipulated. As the Editorial in \textit{The Sunday Telegraph} on 29 February 2004 put it, ‘[t]he most striking thing about this debate is its pointlessness’ since international law ‘is almost entirely bogus … [and its] … content varies wildly according to which lawyer is consulted’.\textsuperscript{111}

According to this view, neither law nor institutions have any place in the decisions of nation states. This view can lead to the alienation of international law altogether. Dean Acheson, former US Secretary of State, adopted a variant of precisely this argument when he said during the Cuban Missile Crisis that:

\begin{quote}
\textit{The power, position and prestige of the US had been challenged by another state; and the law does not deal with such questions of ultimate power — power that comes close to the sources of sovereignty.}\textsuperscript{112}
\end{quote}

Whole attitudes of mind and bodies of thought are dedicated to the view that parts of the international order are anarchic or without law. This perspective has found widespread support in the media since 11 September 2001. It is a view that is also prevalent within the Bush Administration. The UK House of Commons Select Committee reported on their investigations in the US in the following terms:

\begin{quote}
The impression we obtained from those with whom we discussed the question was that, instead of establishing first whether military action would be legal, the US would act first and then use international law to defend its action retrospectively if it were possible to do so.\textsuperscript{113}
\end{quote}

Similarly, Michael Glennon reports that former US Secretary of State, Madeleine Albright, on being told by former British Foreign Secretary Robin

\begin{itemize}
\item\textsuperscript{109} For a discussion of the parallels between the Suez and Iraq crises, see ibid 30–3.
\item\textsuperscript{110} President Bush is not the first US President to adopt this attitude towards international law: see Burns Weston, ‘The Reagan Administration versus International Law’ (1987) 19 \textit{Case Western Reserve Journal of International Law} 295.
\item\textsuperscript{113} UK House of Commons Foreign Affairs Committee, \textit{Foreign Policy Aspects of the War against Terrorism} (2001–02) [221].
\end{itemize}
Cook that UK Foreign Office lawyers were finding it hard to justify war in Kosovo, replied: ‘Get new lawyers’.114

This is a powerful and pervasive view of international law — that it is neither prescriptively powerful as law nor descriptively compelling as analysis. So does international law matter?

My response is that international law clearly matters. For example, at the legal level, it may mean that the battlefield immunity protecting the Crown from claims by soldiers injured or killed in the battlefield may not apply.115

It matters to the defendants in various criminal prosecutions brought in the UK against those who committed criminal acts in order to oppose the war. For example, it mattered to Katherine Gun when the UK Department of Public Prosecutions charged her with breaching the Official Secrets Act 1989 (UK) by leaking an email which discussed bugging activities against UN Security Council members in the lead-up to the Iraq war.116 This case was dropped after Gun’s lawyers demanded to see the Attorney-General’s full, unpublished advice to the Prime Minister regarding the legality of the war on Iraq.117

International law mattered to Admiral Boyce, then British Chief of Defence Staff, who was worried about the ambiguous nature of the legal advice prior to war and insisted on a clear legal mandate before committing ground forces to war.118 As Boyce stated in March 2004, ‘I required a piece of paper saying it was lawful … If that caused them to go back saying we need our advice tightened up then I don’t know’.119

It matters because under the terms of various Security Council resolutions the new ICC will not have jurisdiction over forces deployed on UN authorised missions,120 but it will probably have jurisdiction over forces engaged in illegal wars.

It mattered enough for the highly-respected deputy legal adviser to the UK Foreign Office, Elizabeth Wilmshurst, to resign in protest at the illegality of the war. ‘Some agreed with the legal advice of the Attorney-General’, she announced, ‘I did not’.121

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120 See, eg, Resolution 1422, SC Res 1422, UN SCOR, 57th sess, 4572nd mtg, UN Doc S/RES/1422 (12 July 2002); Resolution 1487, SC Res 1487, UN SCOR, 58th sess, 4772nd mtg, UN Doc S/RES 1487 (12 June 2003).
121 Norton-Taylor and MacAskill, above n 116.
It mattered enough to supply front-page headlines in UK newspapers on 7 March 2003 and on 1 March 2004 — international law was the subject of feverish coverage for weeks before the war and for weeks exactly a year later.\textsuperscript{122}

International law matters in assessing the war on Iraq because law is a creature of precedent and this war is a bad precedent. Richard Perle and David Frum indicate in their recently published book that other rogue states may be next: North Korea, Iran, Libya and Saudi Arabia.\textsuperscript{123}

It matters because Prime Minister Blair said it mattered and because the Bush Administration says it matters. When the Prime Minister of the UK says, as he was quoted as saying in the context of the action brought against him by the Campaign for Nuclear Disarmament, that ‘[w]e always act in accordance with international law’,\textsuperscript{124} lawyers need to hold him to it.

International law matters because people care about the legality of the war. Perhaps they should not. Perhaps they are naïve. But they do. When people march through London with banners calling on the UK Government to desist from an illegal war, it is not enough to label them as utopian or misguided. The British, like the Australians and Americans, are largely a law-abiding people. They would like to see law enforced at the international and national level. The same \textit{Sunday Telegraph} editorial referred to above reasoned that ‘[i]f a solid majority of the British people can be persuaded that the war was right and just, then Mr Blair’s problems will be at an end’.\textsuperscript{125} But it is hard, as the Prime Minister has discovered, to persuade people that illegal wars are just and right.

Finally, public international law matters because people languish in jail in Bagram, at Baghdad Airport, at Abu Ghraib and in detention facilities in Cuba, often without recourse to any other legal order. Were it not for the protections offered by international law, they would be in what the UK Court of Appeal in \textit{Abbasi}, brought by the mother of one of the British detainees held at Guantánamo Bay, called a ‘legal black hole’.\textsuperscript{126}

So, international law matters, but three other things also matter.\textsuperscript{127} First, we need to have access to the credible facts upon which democracies must state their

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\textsuperscript{123} David Frum and Richard Perle, \textit{An End to Evil: How to Win the War on Terror} (2003) 97–8.

\textsuperscript{124} UK, \textit{Written Answers to Questions}, House of Commons, 14 March 2003, vol 401, pt 363, column 482W (Tony Blair, Prime Minister).

\textsuperscript{125} Editorial, ‘A Legal Fiction’, above n 111.

\textsuperscript{126} \textit{R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs} [2002] EWCA Civ 1598, [22] (Lord Phillips MR).

\textsuperscript{127} There are, of course, interesting questions of priority, which I cannot fully explore here. Indeed, the whole of international thought can be arranged around priorities within this axis: realism (the priority of the prudential), rationalism (the priority of the constitutional) and cosmopolitanism (the priority of the moral).
cases.\textsuperscript{128} Second, we need to make strategic and prudential decisions about the future of international order.\textsuperscript{129} Third, we need to make ethically defensible decisions.\textsuperscript{130} It is hard to make a case for the war in Iraq on any of these grounds. We might agree with Richard Clarke, former Intelligence Adviser at the White House, who in his new book describes the Iraq war as a ‘gross and extremely costly strategic error’;\textsuperscript{131} but it was more than this: it was morally dubious, misinformed and contrary to basic precepts of international law.

\textsuperscript{128} Such enquiry becomes even more vital when we are asked to endorse a response to a ‘terrorist threat’ when such threats are sometimes imagined, or worse, politically useful as a way of pursuing unrelated political preferences.

\textsuperscript{129} In confronting terrorism, the following questions must inevitably emerge. Is this response to terrorism politically wise? Is it strategically advisable? What might be the long-term consequences of such an operation? Sometimes the best lawyers can do is set a framework in which negotiated solutions can arise. So, for example, lawyers and statesmen created a Security Council free to act in any way it wished within the broad parameters of Chapter VII of the \textit{UN Charter}. Perhaps, too, many of the legal arguments dissolve into policy arguments if pushed hard enough. One line of argument might go as follows: ‘The war was illegal because the Security Council did not approve it. Institutionalism makes the world safer than unilaterality. A safe world is in the UK’s interests’. Another might reach different law–policy conclusions: ‘The war was lawful because pre-emptive self-defence is permitted in cases where a threat of this magnitude arises. Any action that extinguishes a threat to the US as serious as Saddam’s \textit{cannot} be illegal. As former US Secretary of State George Schultz emphasised, “the \textit{UN Charter} is not a suicide pact”: George Schultz, \textit{US Department of State, Low Intensity Warfare: The Challenge of Ambiguity, Current Policy No 783 (January 1986)} 3.\textsuperscript{3}

\textsuperscript{130} There seemed to be four distinct sets of moral claims being made around the war. First, there were explicit religious positions and quasi-religious debates centred around the ‘just war’ doctrine. Catholic priests quoted Aquinas to show that the war was unjust; political scientists quoted him to show that it was just. Second, there were utilitarian arguments concerning the question of regime change. Sometimes these arguments were about the loss of life that might occur as a result of an armed intervention in Iraq, or the more distant losses that might result from a failure to remove Iraqi military capacity. Third, there were moral–historical arguments, often made by the Left in opposition to the war and referring to, for example, the collusions between the West and Saddam, the arming and support for Iraq in its war with Iran, the failure to issue a Security Council resolution condemning the Iraqi invasion of Iran, the refusal on the part of the Western allies to censure Saddam when he first used chemical weapons against the Kurds, the decision in 1991 to leave dissident groups to their fate and the imposition of sanctions against Iraq that seriously degraded the conditions of life for children in Iraq. Examined closely, none of these arguments are conclusive — we live in the here and now. Having failed to deal with, or having caused, lesser evils, do we necessarily lose the right to meet the threat of a greater one? Fourth, some commentators have equated morality with lawfulness and the legality or illegality of the war seemed vitally important to the moral hygiene of some of the combatants and commentators. As the Archbishop of Canterbury Rowan Williams said, ‘[i]t seems to me that the action in Iraq was one around which there were so many questions about long-term results, about legal justification that I would find it very hard to give it my unqualified support’: as cited in Wells and Bates, above n 9. The late Pope, curiously for a religious leader, said the war would be unjust because it was not backed by the UN, which he considered to be a repository of moral acuity: Pope John Paul II, ‘An Ever Timely Commitment: Teaching Peace’, above n 9. For a discussion of George Bush’s personal and political moralities in relation to the war in Iraq, see Peter Singer, \textit{The President of Good and Evil: The Ethics of George W Bush} (2004) 182–209.

But all is not lost. I am not one of those people who believe that every consequence of the war is negative. Who could fail to rejoice at the fall of a damaged and brutal leader? The war on Iraq is a blow to the idea of an international society, but not, perhaps, a fatal one. The Security Council proved that it was not simply a rubber-stamp for US power. The leading powers are now undergoing an agony of self-reflection (for example, the Hutton Inquiry in the UK and the Senate Inquiries in the US) and this is the mark of the great democracies and a contrast to a pre-war period marked by secretive and arbitrary decision-making hidden in a slew of misinformation.

And every so often, someone, somewhere, in the midst of brutality, disorder and lawlessness, stands up and says, as the US prison guard who handed over evidence to US authorities in January 2004 said: ‘There are some things going on here that I can’t live with’. International law mattered to him and it should matter to us.

132 I have great sympathy with those who celebrate the fall of Saddam Hussein, the efforts of Iraqis to rebuild their country and the success of the Kurdish Autonomous region. However, when Prime Minister Blair asks anti-war activists if they would rather that Saddam was still in power, this is the wrong question. It is possible to both be glad that Saddam Hussein is no longer in power and reject the argument in favour of the war to remove him. This simply involves welcoming some positive consequences of an otherwise disastrous circumstance. Imagine a US nuclear strike on the Soviet Union in 1948: one could be delighted that Stalin was no longer capable of inflicting grave damage on his nation, while at the same time utterly deploring the attack. If the anti-war Left was entirely candid it might argue, in classic utilitarian terms, that the intellectual, cultural, material and financial resources spent on the war might have been better spent saving 5000 children from dying each day through lack of clean water. (Financially, the war is estimated to cost up to US$207.5 billion at the end of the fiscal year 2004–05: National Priorities Project, Cost of Iraq War Rises for American Taxpayers (2005) <http://www.nationalpriorities.org/issues/military/iraq/highcost/us.pdf> at 1 May 2005.) This would have meant leaving people to die in Saddam’s prisons but we are leaving people to die in prisons every day because we have found better things to do with our resources than invade Sudan, Algeria or the Congo. It was not so long ago, after all, that the liberal consensus in the West was for leaving Saddam in power. As Alan Cowell commented in ‘Special to The New York Times’, The New York Times (New York, US), 11 April 1991, A11:

the allied campaign against President Hussein brought the United States and its Arab coalition partners to a strikingly unanimous view: whatever the sins of the Iraqi leader he offered the West and the region a better hope for his country’s stability than did those who have suffered his repression.