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

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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.

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.[4] The publication of that letter, and its consequences, led me to two insights about international law.[5] 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.[6] 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'.[7] Discussion and debate have indeed been features of the war on Iraq.[8] One of the most peculiar aspects of the war on Iraq is that nearly everyone seemed to have an opinion

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4 See Michael White and Patrick Wintour, 'No Case for Iraq Attack Say Lawyers', *The Guardian* (Manchester, UK), 7 March 2003, 1.

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.

about it. 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

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[9] With regard to Pope John Paul II's involvement in the debate, see, eg, John Hooper, 'Pope Calls for a New World Order', *The Guardian* (Manchester, UK), 2 January 2004, 2; Philip Pullella, CNN, *Pope Peace Message Takes Swipe at US over Iraq* (16 December 2003) <http://www.informationclearinghouse.info/archive21.htm> at 1 May 2005. Pope John Paul II, in his New Year message in 2004, noted the '*universal principles* … which take into account the unity and the common vocation of the human family' and went on to demand that:

> 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.

investigation of the status of legal determinations in choosing among possible outcomes.[10]

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.[11] 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.[12]

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).[13] In 1946, the Nuremberg War Crimes Tribunal put the matter more bluntly when it said, '[a]ggression … is the supreme international crime'.[14] Indeed, the whole thrust of the *UN Charter* is in favour of resolving disputes using peaceful means and in promoting cooperation.[15] 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, '[w]hat 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.

11 See, eg, Mayur Patel, American Society of International Law, *The Legal Status of Coalition Forces in Iraq after the June 30 Handover* (2004) <http://www.asil.org/insights/insigh129.htm> at 1 May 2005.

12 On the law of occupation as it relates to Iraq, see, eg, Leila Sadat, American Society of International Law, *International Legal Issues surrounding the Mistreatment of Iraqi Detainees by American Forces* (2004) <http://www.asil.org/insights/insigh134.htm> at 1 May 2005. See also Vaughan Lowe, 'The Iraq Crisis: What Now?' (2003) 52 *International and Comparative Law Quarterly* 859, 869–70.

13 Article 2(4) states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'.

14 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.

15 See, eg, *UN Charter* arts 2(3), 33.

forbidding intervention and unauthorised uses of force.[16] All this has been confirmed by the International Court of Justice in its *Nicaragua* decision[17] and by decades of state practice.[18]

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.[19]

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.[20]

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.[21]

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16 See, eg, the cases in which Yugoslavia accused 10 NATO Members of violating the international legal obligation not to use force against another state: *Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures)* [1999] ICJ Rep 124; *(Yugoslavia v Canada) (Provisional Measures)* [1999] ICJ Rep 259; *(Yugoslavia v France) (Provisional Measures)* [1999] ICJ Rep 363; *(Yugoslavia v Germany)(Provisional Measures)* [1999] ICJ Rep 422; *(Yugoslavia v Italy) (Provisional Measures)* [1999] ICJ Rep 481; *(Yugoslavia v Netherlands) (Provisional Measures)* [1999] ICJ Rep 542; *(Yugoslavia v Portugal) (Provisional Measures)* [1999] ICJ Rep 656; *(Yugoslavia v Spain) (Provisional Measures)* [1999] ICJ Rep 761; *(Yugoslavia v UK) (Provisional Measures)* [1999] ICJ Rep 826; *(Yugoslavia v US) (Provisional Measures)* [1999] ICJ Rep 916.

17 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits*) [1986] ICJ Rep 14.

18 See, eg, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131, UN GAOR, 1st Comm, 20th sess, 1408th plen mtg, UN Doc A/RES/2131 (21 December 1965); *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the* Charter of the United Nations, GA Res 2625, UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970); *Resolution on the Definition of Aggression*, GA Res 3314, UN GAOR, 6th Comm, 29th sess, 2319th plen mtg, UN Doc A/RES/3314 (14 December 1974); International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, as contained in *Report of the International Law Commission on the Work of its 48th Session, 6 May – 26 July 1996*, UN Doc A/51/10 (1996).

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

20 UK, *Parliamentary Debates*, House of Lords, 21 April 2004, vol 660, pt 70, columns 369–76 (Lord Goldsmith, Attorney-General).

21 Gerry Simpson, in Christopher Greenwood, Gerry Simpson and Philip Hurst, 'Iraq: Was It Legal?' (Debate held at London School of Economics, London, UK, 18 November 2004) available from <http://www.lse.ac.uk/collections/alumniRelations/events> at 1 May 2005.

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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22 This is the so-called 'Bush Doctrine', as outlined in US National Security Council, *National Security Strategy of the United States of America* (2002) ch 5 <http://www.whitehouse.gov/nsc/nss.html> at 1 May 2005 ('*US National Security Strategy*').

23 *Authorization for Use of Military Force against Iraq: Resolution of 2002*, HJ Res 114, 107th Cong (2002).

24 *Oil Platforms (Islamic Republic of Iran v US) (Merits)* [6 November 2003] ICJ [51] <www.icj-cij.org> at 1 May 2005. See also *UN Charter* art 51.

25 Donald Grieg, 'Self-Defence and the Security Council: What Does Article 51 Require?' (1991) 40 *International and Comparative Law Quarterly* 366, 368. Scholars have long been divided on the question of anticipatory self-defence. Some favour it: see, eg, Derek Bowett, *Self-Defence in International Law* (1958) 188; Yoram Dinstein, *War, Aggression and Self-Defence* (3rd ed, 1988) 168; Timothy L H McCormack, *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (1996) 111; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (2nd ed, 1969) 201. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 347 (Separate Opinion of Judge Schwebel). Others argue that art 51 of the *UN Charter* excludes it: see, eg, Ian Brownlie, *International Law and the Use of Force by States* (1963) 278; Hans Kelsen, *The Law of the United Nations* (4th ed, 1964) 269; Bruno Simma (ed), *The* Charter of the United Nations: *A Commentary* (1995) 676.

26 Stanimir Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) 173.

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.

28 UK Parliamentary Intelligence and Security Committee, *Iraqi Weapons of Mass Destruction — Intelligence and Assessments* (2003) 27 available from <http://www.fco.gov.uk> at 1 May 2005.

of self-defence, which we might call precautionary self-defence or preventative war, is not an idea that finds favour among most international lawyers.[29]

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;[30] 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.[31] 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'.[32] 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

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29 For a variety of views, see Abraham Sofaer, 'On the Necessity of Pre-Emption' (2003) 14 *European Journal of International Law* 209; Michael Byers, 'Letting the Exception Prove the Rule' (2003) 17 *Ethics and International Affairs* 9; Eric Myjer and Nigel White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' (2002) 7 *Journal of Conflict and Security Law* 5; Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego International Law Journal* 7.

30 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.

31 See Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004) 165–93.

32 *UN Charter* art 42.

had authorised the use of force against Iraq under Chapter VII.[33] Most international lawyers in the UK and Australia rejected this argument.[34] 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.[35] 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.[36]

Furthermore, there were no pre-existing resolutions authorising military intervention in Iraq. Resolutions such as *Resolution 678*[37] and *Resolution 687*[38] 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'.[39]

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.[40] 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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33 UK, *Written Answers to Questions*, House of Lords, 17 March 2003, vol 646, pt 65, column WA2 (Lord Goldsmith, Attorney-General); Attorney-General's Department and Department of Foreign Affairs and Trade, Australia, *Memorandum of Advice on the Use of Force against Iraq* (2003) available at <http://www.pm.gov.au/iraq/displayNewsContent.cfm?refx=96> at 1 May 2005. See also the full advice of Lord Goldsmith to the Prime Minister on the legality of the use of force (7 March 2003), released 28 April 2005, available at <http://image.guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf> at 1 May 2005 ('*Full Advice of the Attorney-General*').

34 See, eg, Australian Lawyers for Human Rights, *Open Letter — Iraq War* (2004) <http://www.alhr.asn.au/html/documents/OpenLetter_IraqWar.html> at 1 May 2005.

35 For a fuller discussion see Rabinder Singh and Alison Macdonald, Public Interest Lawyers on behalf of Peace Rights, UK, *Legality of the Use of Force against Iraq* (2002) <http://www.lcnp.org/global/IraqOpinion10.9.02.pdf> at 1 May 2005.

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.

37 *Resolution 678*, SC Res 678, UN SCOR, 55th sess, 2963rd mtg, UN Doc S/RES/678 (29 November 1990).

38 *Resolution 687*, SC Res 687, UN SCOR, 56th sess, 2981st mtg, UN Doc S/RES/687 (3 April 1991).

39 Colin Powell, *My American Journey* (1995) 490.

40 Amnesty International, *Iraq: Human Rights Committee Briefing* (1997) <http://web.amnesty.org/library/index/ENGMDE140081997> at 1 May 2005.

Wars.[41] 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.[42]

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.[43] The proposition that some vetos could be regarded as unreasonable was mostly unknown to international law until that very moment,[44] 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.[45]

A second, and stronger, UK argument — which may be termed the 'golden thread' argument — was grounded upon a possible right to enforce existing

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41 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).

42 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.

43 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.

44 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.

45 BBC News, 'Transcript of Blair's Iraq Interview', above n 43:

> [S]upposing in circumstances where there plainly was a breach of *Resolution 1441* and everyone else wished to take action, one of them put down a veto. In those circumstances it would be unreasonable. Then I think it would be wrong because otherwise you couldn't uphold the UN. Because you'd have passed your Resolution and then you'd have failed to act on it.

The French had already said they would veto any resolution authorising war: Toby Harnden, Philip Broughton and Ben Aris, 'France and Russia Will Vote No', *The Daily Telegraph* (London, UK), 11 March 2003, 1. The Russians and Chinese, too, were far from enthusiastic: CNN, *France, Russia Threaten War Veto* (10 March 2003) <http://www.cnn.com/2003/WORLD/europe/03/10/sprj.irq.france.chirac/> at 1 May 2005; CNN, *China Adds Voice to Iraq War Doubts* (23 January 2003) <http://edition.cnn.com/2003/WORLD/asiapcf/east/01/23/sprj.irq.china/> at 1 May 2005.

Security Council resolutions.[46] 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.[47] 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.[48] The problem here is that the *UN Charter* does not permit such legalised vigilantism.[49] 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?[50] 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.

47 For a discussion of the Kosovo intervention, see Ian Brownlie, 'Kosovo Crisis Inquiry: Memoranda on the International Law Aspects' (2000) 49 *International and Comparative Law Quarterly* 878; Christine Chinkin, 'The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law' (2000) 49 *International and Comparative Law Quarterly* 910; Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo' (2000) 49 *International and Comparative Law Quarterly* 926; Vaughan Lowe, 'International Legal Issues arising in the Kosovo Crisis' (2000) 49 *International and Comparative Law Quarterly* 934.

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 deplored 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.[51] The UK Government, in particular, has come closest to articulating a full-blown doctrine of humanitarian intervention.[52] 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).[53] However, the UK doctrine, which is by no means universally accepted, requires 'an immediate and overwhelming humanitarian catastrophe'.[54] 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.[55] 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,[56] and

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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.

52 For recent views on humanitarian intervention, see especially Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000); Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679. The most productive period, prior to this, followed the Israeli raid on Entebbe (not a humanitarian intervention in the strict sense) and the Tanzanian invasion of Uganda: Ian Brownlie, 'Humanitarian Intervention' in John Norton Moore (ed), *Law and Civil War in the Modern World* (1974) 217; Wil Verwey, 'Humanitarian Intervention under International Law' (1985) 32 *Netherlands International Law Review* 357; Jean-Pierre Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the *UN Charter*' (1974) 4 *California Western International Law Journal* 203.

53 See Tony Blair, 'The Threat of Global Terrorism' (Speech delivered at Sedgefield, County Durham, UK, 5 March 2004) available at <http://www.number-10.gov.uk/output/Page5461.asp> at 1 May 2005.

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

55 For a discussion of humanitarian intervention in relation to Kosovo, see, eg, Antonio Cassese, '*Ex Iniuria Ius Oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23; see also Wheeler, above n 52, ch 8.

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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57 See Leonid Brezhnev, General Secretary of the Communist Party of the Soviet Union, (Speech delivered at the Fifth Congress of the Polish United Workers' Party, Warsaw, Poland, 13 November 1968) available at <http://www.cnn.com/SPECIALS/cold.war/episodes/14/documents/doctrine> at 1 May 2005.

58 See, eg, *Prosecutor v Kambanda (Judgment and Sentence)*, Case No ICTR 97–23–S (4 September 1998).

59 Opened for signature 17 July 1998, 2187 UNTS 90, art 5(2) (entered into force 1 July 2002).

60 Craven et al, above n 5, 372.

61 Above n 22.

62 UK, *Written Answers to Questions*, House of Lords, 17 March 2003, vol 646, pt 65, column WA2 (Lord Goldsmith, Attorney-General).

63 See, eg, Tony Blair, 'The Power of Community Can Change the World' (Speech delivered at the Labour Party Conference, Brighton, UK, 2 October 2001).

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?[65] 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.[66] 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.[67] 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.[68] 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.[69] 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.[70] This raises a serious point. Does the Westphalian system need to be adjusted in some way?[71] 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"'.[72]

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

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65 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.

66 *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.

67 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.

68 UK, *Written Answers to Questions*, House of Commons, 14 March 2003, vol 401, pt 363, column 482W (Tony Blair, Prime Minister).

69 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.

70 Blair, 'The Threat of Global Terrorism', above n 53.

71 UK Foreign Secretary Jack Straw has argued, in evidence given to the House of Commons Select Committee on Foreign Affairs, that any change to international law will have to be incremental, and will not involve an amendment to the *UN Charter*: Evidence to Select Committee on Foreign Affairs, House of Commons, UK, 30 March 2004, (Jack Straw, UK Foreign Secretary) available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4033003.htm> at 1 May 2005.

72 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.

were justified as pre-emptive (Norway and Poland) and humanitarian (Czechoslovakia).[73] 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[74] and Žižek,[75] to Blair[76] and Clinton,[77] to Bush[78] and Perle,[79] 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).[80]

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'.[81] This is appealing as poetry but not as law or politics.[82]

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 Hiltler (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).

75 See, eg, Slavoj Žižek, *Iraq: The Borrowed Kettle* (2004).

76 See, eg, Blair, 'The Threat of Global Terrorism', above n 70.

77 See, eg, Ann Simpson, 'Another Chelsea Girl: Clinton Promotes UK's Vital Role', *The Herald* (Glasgow, UK), 13 July 2004, 1.

78 'Bush's New World Order: Either You Stand with Us — Or against Us', *The Guardian* (Manchester, UK), 14 September 2001, 23.

79 Richard Perle, 'Thank God for the Death of the UN: Its Abject Failure Gave Us Only Anarchy. The World Needs Order', *The Guardian* (Manchester, UK), 21 March 2003, 26.

80 Simpson, *Great Powers and Outlaw States*, above n 31.

81 Donald Rumsfeld (Press conference at NATO Headquarters, Brussels, Belgium, 6 June 2002) available at <http://www.nato.int/docu/speech/2002/s020606g.htm> at 1 May 2005.

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'.[83] In June 2004, Colin Powell conceded that his testimony to the Security Council was largely inaccurate.[84] Few, if any, usable WMD existed.[85] 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.[86] However, an earlier British dossier dating from September 2002 was presented as evidence of Saddam's threat.[87] This was the document that contained a warning that Iraq could arm and use chemical and biological weapons within 45 minutes.[88] However, the document, without making it at all clear, refers only to battlefield weapons.[89] 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.[90] 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.[91]

It seems, then, that we were rushed into war (in the words of President Bush, 'go find me a way to do this'),[92] 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.[93] 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

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83 US Senate Armed Services Committee, *Hearing to Receive Testimony on Efforts to Determine the Status of Iraqi Weapons of Mass Destruction and Related Programs*, 28 January 2004 (David Kay, Weapons Inspector).

84 NBC, 'Meet the Press', *NBC News*, 13 June 2004 <http://msnbc.msn.com/id/4992558> at 1 May 2005.

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?'

86 George Jones, '"Dodgy" Iraq Dossier Was Error, Says Blunkett', *The Daily Telegraph* (London, UK), 9 June 2003, 2.

87 International Institute for Strategic Studies, *Iraq's Weapons of Mass Destruction: A Net Assessment* (2002) <http://www.the-hutton-inquiry.org.uk/content/evidence-lists/evidence-dos.htm> at 1 May 2005.

88 UK Government, *Iraq's Weapons of Mass Destruction — The Assessment of the British Government* (2002) <http://www.number10.gov.uk/output/Page271.asp> at 1 May 2005.

89 International Institute for Strategic Studies, above n 87.

90 UK Government, Hutton Inquiry, *Report of the Inquiry into the Circumstances surrounding the Death of David Kelly CMG* (2004) 153.

91 Ibid.

92 Quoted by Paul O'Neill, President Bush's former Secretary of the Treasury, in Ron Suskind, *The Price of Loyalty: George W Bush, the White House, and the Education of Paul O'Neill* (2004) 86.

93 Julian Borger, 'Iraq: After the War — General Admits Chemical Weapons Intelligence Was Wrong', *The Guardian* (Manchester, UK), 31 May 2003, 21.

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

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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.

97 John Westlake, *The Collected Papers of John Westlake on Public International Law* (1914) 6.

98 Simpson, *Great Powers and Outlaw States*, above n 31, ch 11.

99 Peter Rowe, 'War Crimes' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 203, 204.

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.[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'.[102]

Fifth, how do we confront the question of US hegemony, unipolarity and its 'hyperpower' status (as the French put it)?[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*,[104] the peculiar and histrionic hostility to the ICC,[105] and the ongoing defamations directed at the UN itself.[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.[107] A human rights tradition inaugurated by Eleanor Roosevelt, and a tradition of economic good sense and social responsibility exemplified by the Marshall Plan.[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, 43rd sess, 72nd 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'.

104 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (entered into force 16 February 2005).

105 See, eg, Amnesty International, *US Threats to the International Criminal Court* <http://web.amnesty.org/pages/icc-US_threats-eng> at 1 May 2005.

106 For example, nominee US Ambassador to the UN John Bolton is infamous for saying that the UN would lose nothing by lopping 10 stories from its headquarters in New York: see, eg, 'Bolton Backlash for UN Post', *The Age Online* (Melbourne, Australia), 20 April 2005, available at <http://www.theage.com.au/news/World/Bolton-backlash-for-UN-post/2005/04/20/1113854251823.html> at 1 May 2005. For a theoretically-inclined discussion of what US hegemony may mean for international law, see Detlev Vagts, 'Hegemonic International Law' (2001) 95 *American Journal of International Law* 843.

107 See Charles Seymour, 'Woodrow Wilson in Perspective' (1956) 34 *Foreign Affairs* 175; M Glen Johnson, 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights' (1987) 9 *Human Rights Quarterly* 19.

108 See Lord Alexander of Weedon, above n 46, 30–1.

they embarked on their illegal and ill-conceived adventure at Suez.[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.[110] The world and international law will be better for it.

IV 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 *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'.[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:

> 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.[112]

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:

> 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.[113]

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

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109 For a discussion of the parallels between the Suez and Iraq crises, see ibid 30–3.

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 *Case Western Reserve Journal of International Law* 295.

111 Editorial, 'A Legal Fiction', *The Sunday Telegraph* (London, UK), 29 February 2004, 24.

112 Dean Acheson, 'Law and Conflict: Changing Patterns and Contemporary Challenges — Panel: Cuban Quarantine: Implications for the Future: Remarks by Dean Acheson' (1967) *American Society of International Law: Proceedings of the 57th Annual Meeting* 13, 14 (emphasis added).

113 UK House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism* (2001–02) [221].

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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114 Michael Glennon, *Limits of Law, Prerogatives of Power: Intervention after Kosovo* (2001) 178.

115 Jeremy Carver, cited in Clare Dyer, Nicholas Watt and Richard Norton-Taylor, 'Legality of Iraq War: Doubts on Case for Conflict May Bring Flood of Claims: Pressure Grows to Publish Advice to Blair in Full', *The Guardian* (Manchester, UK), 1 March 2004, 4.

116 Richard Norton-Taylor and Ewen MacAskill, 'Spy Case Casts Fresh Doubt on War Legality', *The Guardian* (Manchester, UK), 26 February 2004, 1.

117 See 'Casualties of Terror: Security and Liberty', *The Guardian* (Manchester, UK), 26 February 2004, 27. The full advice was subsequently released on 28 April 2005: see *Full Advice of the Attorney-General*, above n 33.

118 Dyer, Watt and Norton-Taylor, above n 115.

119 Sarah Hall and Richard Norton-Taylor, 'Pressure over War's Legality Increases', *The Guardian* (Manchester, UK), 8 March 2004, 9.

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.[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, Syria, Libya and Saudi Arabia.[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',[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 *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'.[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 *Abbasi*, brought by the mother of one of the British detainees held at Guantánamo Bay, called a 'legal black hole'.[126]

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

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122 See Associated Press, 'Bush: We Will Go to War against Iraq without UN', *The Independent* (London, UK), 7 March 2003, <http://news.independent.co.uk/world/politics/story.jsp?story=384615> at 1 May 2005; Paul Waugh, 'US Told Britain to Get New Legal Opinion on Iraq War, Book Claims', *The Independent* (London, UK), 1 March 2004, 8. See also Julian Borger and Gary Younge, 'Threat of War: Compromise: Britain Tries to Sell New Resolution: Straw Seeks Suggestions from Both Sides', *The Guardian* (Manchester, UK), 7 March 2003, 5; Matthew Tempest and Agencies, 'Hoon Defends Iraq Advice', *The Guardian* (Manchester, UK), 1 March 2004 <http://politics.guardian.co.uk/iraq/story/0,,1159494,00.html> at 1 May 2005.

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

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

125 Editorial, 'A Legal Fiction', above n 111.

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

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.[128] Second, we need to make strategic and prudential decisions about the future of international order.[129] Third, we need to make ethically defensible decisions.[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';[131] but it was more than this: it was morally dubious, misinformed and contrary to basic precepts of international law.

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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.

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 *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 unilateralism. 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 *cannot* be illegal. As former US Secretary of State George Schultz emphasised, "the *UN Charter* is not a suicide pact"': George Schultz, US Department of State, *Low Intensity Warfare: The Challenge of Ambiguity*, Current Policy No 783 (January 1986) 3.

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, *The President of Good and Evil: The Ethics of George W Bush* (2004) 182–209.

131 See Brian Urquhart, 'A Matter of Truth', *The New York Review of Books* (New York, US), 13 May 2004, 8, who reviewed Richard Clarke's book. Clarke also observes in his book that '[n]othing America could have done would have provided al Qaeda and its new generation of cloned groups a better recruitment device than our unprovoked invasion on an oil-rich Arab country': Richard Clarke, *Against All Enemies: Inside America's War on Terror* (2004) 246.

But all is not lost. I am not one of these 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?[132] 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'.[133]

International law mattered to him and it should matter to us.

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[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.

[133] As quoted in Julian Borger, 'US Military in Torture Scandal: Use of Private Contractors in Iraqi Jail Interrogations Highlighted by Inquiry into Abuse of Prisoners', *The Guardian* (Manchester, UK), 30 April 2004, 1.