

# OPERATION IRAQI FREEDOM: UNITED STATES v IRAQ — THE LEGALITY OF THE WAR

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*[This article critically evaluates the legality of the use of force in 2003 by the United States and its allies against Iraq. The author considers the three main arguments advanced to justify the war: the use of force was authorised by existing United Nations Security Council resolutions; the use of force was justified pursuant to the legal doctrine of self-defence; and the use of force in Iraq was within the scope of humanitarian intervention. The author maintains that the current state of international law gives rise to the conclusion that the use of force against Iraq was probably not legal. However, the author contends that the combined threat of weapons of mass destruction and terrorism, as well as the changing values of the international community, are precipitating a paradigm shift in international law. This paradigm shift may in time result in a broadening of the notion of 'imminent threat' as it applies to the law of self-defence. It may also result in an expansion of the concept of humanitarian intervention and in the evolution of a customary rule of international law providing for humanitarian intervention in certain circumstances. Thus, whilst the use of force against Iraq was probably not legal in 2003, a similar type of war may be legal in years to come.]*

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## I PREAMBLE

The recent international dispute between the United States (and its allies)<sup>1</sup> and Iraq saw all sides of the dispute propounding numerous assumptions as facts. Given that an acceptance of the information that Iraq proffered as fact would clearly lead to the conclusion that the US use of force was in breach of international law, the author proposes, for argument's sake, to treat certain US assertions as fact. Consequently, this article is based on a number of assumptions; in particular that prior to the US invasion of Iraq, the US had a reasonable apprehension that:

- 1 Iraq possessed weapons of mass destruction ('WMD');
- 2 Iraq possessed ballistic missiles with live warhead<sup>2</sup> ranges greater than 150 kilometres; and
- 3 Iraq sponsored terrorist groups, including al-Qaeda.

The author acknowledges the controversial nature of these assumptions, and recognises that their evidentiary bases have been seriously challenged. This article also treats the following as factual:

- 1 Iraq materially breached numerous United Nations Security Council resolutions; and
- 2 Saddam Hussein was a cruel dictator who extensively violated the human rights of numerous individuals within and outside of Iraq.

## II INTRODUCTION

It is natural that an insect already deprived of vision should readily become adapted to dark caverns.<sup>3</sup>

On 11 September 2001, when fundamentalist Islamic terrorists launched a devastating attack on US citizens, on US soil and from within US airspace, the world was thrown into a state of chaos. What followed was a global sense of fury, turbulence, despair and disbelief. The basis for this reaction was not just the fact that thousands of innocent lives were lost or the reality that the powerful US was neither invincible nor impenetrable. It was also the realisation that the attack

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<sup>1</sup> Unless the context indicates otherwise, subsequent references to the US implicitly include its allies.

<sup>2</sup> Live warhead in this context refers to missile warheads carrying chemical or biological agents.

<sup>3</sup> Charles Darwin, *The Origin of Species by Means of Natural Selection* (6<sup>th</sup> ed, 1872) 111.

was not just an attack on a state; it was an attack by a non-state entity on the values of freedom and equality inherent in the concept of liberal democracy.

Within days of the 11 September 2001 terrorist attacks, US Secretary of Defense Donald Rumsfeld was already raising the prospect of a war against Iraq.<sup>4</sup> In his 2002 State of the Union address, US President George W Bush declared that Iraq, Iran and North Korea constituted an ‘axis of evil, arming to threaten the peace of the world’.<sup>5</sup>

Iraq was thus categorised as a ‘state of concern’. *The National Security Strategy of the United States of America* identifies a number of attributes indicative of such a state.<sup>6</sup> According to the *Strategy*, these states:

- brutalize their own people and squander their national resources for the personal gain of the rulers;
- display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party;
- are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes;
- sponsor terrorism around the globe;
- reject basic human values; and
- hate the US and everything for which it stands.<sup>7</sup>

On 19 March 2003, after numerous unsuccessful attempts to persuade the UN Security Council to pass a resolution authorising the use of force against Iraq, President Bush declared war on Iraq.<sup>8</sup> The US was joined by a ‘coalition of the willing’ consisting primarily of the United Kingdom and Australia.<sup>9</sup> Despite the fact that a number of states were involved in the use of force against Iraq, the action is still classified as a ‘unilateral action’ as it lacked formal authorisation by a competent regional or international body.<sup>10</sup> Whilst the first few weeks of battle did not produce the swift and painless victory that many expected,<sup>11</sup> by the middle of April, the war was drawing to a close.

Although it is worthwhile considering the damage caused by the use of force in Iraq, the purpose of this article is not to determine whether the US and its allies complied with international humanitarian law, that is, the law on the

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<sup>4</sup> Richard Wolffe and Michael Hirsh, ‘War and Consequences’, *Newsweek* (New York, US), 3 February 2003, 22.

<sup>5</sup> George W Bush, ‘State of the Union Address’ (Speech delivered at Joint Session of the 107<sup>th</sup> Congress, Washington DC, US, 29 January 2002).

<sup>6</sup> National Security Council (US), *The National Security Strategy of the United States of America* (2002) <<http://www.whitehouse.gov/nsc/nss.html>> at 1 October 2003 (‘*National Security Strategy*’).

<sup>7</sup> *Ibid.*

<sup>8</sup> George W Bush, ‘President Bush Addresses the Nation’ (Speech delivered at the Oval Office, Washington DC, US, 19 March 2003).

<sup>9</sup> Other members of the coalition included Bulgaria, the Czech Republic, Denmark, Poland, Romania, Slovakia, Spain and Ukraine: George W Bush, ‘Remarks by the President to SOCOM and CENTCOM Community’ (Speech delivered at the MacDill Air Force Base, Tampa, US, 26 March 2003).

<sup>10</sup> T Modibo Ocran, ‘The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping’ (2002) 25 *Boston College International and Comparative Law Review* 1, 9.

<sup>11</sup> Les Carlyon, ‘Heeding the Guns of History’, *The Bulletin* (Sydney, Australia), 8 April 2003, 22.

conduct of hostilities or *jus in bello*. Rather, its purpose is to determine whether the US and its allies complied with the law governing the recourse to force, or *jus ad bellum*.<sup>12</sup>

In considering the legality of the use of force against Iraq it is necessary to recall that, pursuant to art 1(1) of the *Charter of the United Nations*, the primary purpose of the UN is '[t]o maintain international peace and security'.<sup>13</sup> To this end, art 2(4) of the *UN Charter* prohibits the use of force by one state against another.<sup>14</sup> Two exceptions to this general rule are enshrined in the *UN Charter*. Article 42 allows the Security Council to 'take such action ... as may be necessary to maintain or restore international peace and security'.<sup>15</sup> Article 51 confirms the 'inherent right of individual or collective self-defence'.<sup>16</sup> Part III of this article considers whether the US and its allies legally used force in accordance with existing UN Security Council resolutions. Part IV of this article considers whether the US and its allies legally used force in self-defence.

The view has also been propounded that humanitarian intervention constitutes an additional legal exception to the prohibition on the use of force.<sup>17</sup> Part V of this article considers this contention in relation to the use of force against Iraq. The author concludes that the use of force against Iraq was probably illegal under current international law. However, social, political and technological changes are challenging the present state of the law of self-defence and precipitating developments in the doctrine of humanitarian intervention.

### III WAS THE USE OF FORCE AGAINST IRAQ AUTHORISED BY EXISTING UN SECURITY COUNCIL RESOLUTIONS?

#### A *The Role of the UN Security Council*

Under Chapter VI of the *UN Charter*, the Security Council is charged with facilitating the 'peaceful settlement of disputes'.<sup>18</sup> Thus, pursuant to Chapter VI, the Security Council may make non-binding recommendations for the resolution of disputes it considers likely to 'endanger the maintenance of international peace and security'.<sup>19</sup> However, it is only when acting under Chapter VII of the *UN Charter* that the Security Council can authorise the use of force. Chapter VII includes art 42 which states that should the Security Council consider measures not involving the use of armed force to be inadequate, 'it may take such action ... as may be necessary to maintain or restore international peace and security'.<sup>20</sup> It is commonly accepted that the UN itself may take such action or it may authorise

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<sup>12</sup> Steven Ratner, 'Jus ad Bellum and Jus in Bello after September 11' (2002) 96 *American Journal of International Law* 905, 905.

<sup>13</sup> *UN Charter* art 1(1).

<sup>14</sup> *Ibid* art 2(4).

<sup>15</sup> *Ibid* art 42.

<sup>16</sup> *Ibid* art 51.

<sup>17</sup> See, eg, W M Reisman, 'Editorial Comments: NATO's Kosovo Intervention: Kosovo's Antinomies' (1999) 93 *American Journal of International Law* 860.

<sup>18</sup> See generally *UN Charter* ch VI.

<sup>19</sup> Gillian Triggs, 'Attack on Iraq: Legal Perspectives' (Paper presented at the Law Institute of Victoria and Amnesty International Seminar, Melbourne, Australia, 2 December 2002).

<sup>20</sup> *UN Charter* art 42.

member states to take such action.<sup>21</sup> The Security Council resolutions adopted in relation to Iraq were made pursuant to Chapter VII of the *UN Charter*.

### B *The Resolutions Relating to Iraq*

The following is a brief chronological description of the main Security Council resolutions relating to Iraq passed since its 1990 invasion of Kuwait.

*Resolution 678* authorises member states ‘to use all necessary means’ to ensure that Iraq immediately and unconditionally withdraws from Kuwait and ‘to restore international peace and security in the area’.<sup>22</sup> *Resolution 687* sets out the terms of the cease-fire following the 1991 Gulf War which, amongst other conditions, prohibits Iraq from supporting terrorism,<sup>23</sup> developing or acquiring WMD,<sup>24</sup> and from obtaining ballistic missiles with warhead activated ranges greater than 150 kilometres.<sup>25</sup> *Resolution 707*, *Resolution 715*, *Resolution 1051* and *Resolution 1060* all relate to the international monitoring and inspection systems established to ensure compliance with the cease-fire agreement.<sup>26</sup> *Resolution 1154* provides for ‘severest consequences’ should Iraq fail to comply with the UN Special Commission (‘UNSCOM’) and the International Atomic Energy Agency (‘IAEA’) inspections.<sup>27</sup> *Resolution 1194* and *Resolution 1205* condemn Iraq’s decision to suspend and then cease cooperation with UNSCOM.<sup>28</sup> *Resolution 1284* establishes the United Nations Monitoring, Verification and Inspection Commission (‘UNMOVIC’) to replace UNSCOM.<sup>29</sup> In November 2002 the Security Council passed *Resolution 1441* which ‘decides ... to afford Iraq ... a final opportunity to comply with its disarmament obligations’.<sup>30</sup> This resolution also states that the Security Council has repeatedly warned Iraq that breaches of its obligations will attract ‘serious consequences’.<sup>31</sup>

In addition, *Resolution 1441* states that the Security Council ‘decides that Iraq has been and remains in material breach of its obligations under relevant resolutions’.<sup>32</sup> For example, Iraq’s history of cooperation with UN inspection mechanisms is unsatisfactory. Between 1991 and 1998 UNSCOM encountered considerable Iraqi resistance to the inspection process, and in October 1998, Iraq

<sup>21</sup> Vera Gowlland-Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’ (2000) 11 *European Journal of International Law* 361, 366–7; Christine Gray, ‘From Unity to Polarization: International Law and the Use of Force against Iraq’ (2002) 13 *European Journal of International Law* 1, 3.

<sup>22</sup> SC Res 678, UN SCOR, 45<sup>th</sup> sess, 2963<sup>rd</sup> mtg, UN Doc S/RES/678 (1990) [2].

<sup>23</sup> SC Res 687, UN SCOR, 46<sup>th</sup> sess, 2981<sup>st</sup> mtg, UN Doc S/RES/687 (1991) [32].

<sup>24</sup> *Ibid* [10].

<sup>25</sup> *Ibid* [8(b)].

<sup>26</sup> SC Res 707, UN SCOR, 46<sup>th</sup> sess, 3004<sup>th</sup> mtg, UN Doc S/RES/707 (1991); SC Res 715, UN SCOR, 46<sup>th</sup> sess, 3012<sup>th</sup> mtg, UN Doc S/RES/715 (1991); SC Res 1051, UN SCOR, 51<sup>st</sup> sess, 3644<sup>th</sup> mtg, UN Doc S/RES/1051 (1996); SC Res 1060, UN SCOR, 51<sup>st</sup> sess, 3672<sup>nd</sup> mtg, UN Doc S/RES/1060 (1996).

<sup>27</sup> SC Res 1154, UN SCOR, 53<sup>rd</sup> sess, 3858<sup>th</sup> mtg, UN Doc S/RES/1154 (1998) [3].

<sup>28</sup> SC Res 1194, UN SCOR, 53<sup>rd</sup> sess, 3924<sup>th</sup> mtg, UN Doc S/RES/1194 (1998) [1]; SC Res 1205, UN SCOR, 53<sup>rd</sup> sess, 3939<sup>th</sup> mtg, UN Doc S/RES/1205 (1998) [1].

<sup>29</sup> SC Res 1284, UN SCOR, 54<sup>th</sup> sess, 4084<sup>th</sup> mtg, UN Doc S/RES/1284 (1999) [1].

<sup>30</sup> SC Res 1441, UN SCOR, 57<sup>th</sup> sess, 4644<sup>th</sup> mtg, UN Doc S/RES/1441 (2002) [2].

<sup>31</sup> *Ibid* [13].

<sup>32</sup> *Ibid* [1].

ceased all cooperation with UNSCOM.<sup>33</sup> Despite the UN establishing UNMOVIC to replace UNSCOM in December 1999,<sup>34</sup> Iraq refused to submit to inspections until August 2002 when the threat of war was looming.<sup>35</sup> There is evidence to suggest that in the period following the Gulf War, Iraq continued to breach prohibitions relating to WMD and ballistic missiles.<sup>36</sup> There is also evidence to suggest that Iraq continued to breach prohibitions relating to the sponsorship of terrorism.<sup>37</sup> Furthermore, Iraq habitually engaged in serious violations of human rights.<sup>38</sup> Thus it is clear that, at the time of the US invasion, Iraq was in material breach of several Security Council resolutions.

### C *Did Existing Resolutions Authorise the Use of Force?*

It has been argued that, where there has been a material breach of a Security Council resolution, the use of force is authorised as a response to that breach. The majority of those who supported the use of force against Iraq in 2003 relied on the notion that the authorisation to use force contained in Security Council *Resolution 678* had not expired.<sup>39</sup> According to this view, the authorisation for the use of force contains no time limitations and has not been expressly or impliedly withdrawn by the Security Council.<sup>40</sup> This idea is based on the premise that ‘what we have is not a series of disconnected events but a continuous series of events starting from the inception of the Gulf War and continuing until today. These events are governed by the same law and the same legal concepts.’<sup>41</sup> Therefore, according to this argument, ‘*Resolution 678* does continue to have life in the sense that if there is a material breach of the pre-conditions of the cease-

<sup>33</sup> During this period, Iraq failed to comply with or breached numerous Security Council resolutions including: *Resolution 687*, above n 23; *Resolution 707*, above n 26; *Resolution 715*, above n 26; *Resolution 949*, SC Res 949, UN SCOR, 49<sup>th</sup> sess, 3438<sup>th</sup> mtg, UN Doc S/RES/949 (1994); *Resolution 1154*, above n 27; *Resolution 1194*, above n 28; *Resolution 1205*, SC Res 1205, UN SCOR, 53<sup>rd</sup> sess, 3939<sup>th</sup> mtg, UN Doc S/RES/1205 (1998). See also Sean Murphy (ed), ‘Contemporary Practice of the United States Relating to International Law: Efforts to Address Iraqi Compliance with United Nations Weapons Inspections’ (2002) 96 *American Journal of International Law* 956, 956. It should be noted that the argument that the inspections were being used as a means of spying on Iraq and gathering intelligence information has been propounded to explain Iraq’s cessation of cooperation with UNSCOM: see, eg, William Pitt and Scott Ritter, *War on Iraq: What Team Bush Doesn’t Want You to Know* (2002) 55–6.

<sup>34</sup> *Resolution 1284*, above n 29.

<sup>35</sup> Murphy, above n 33, 958–9.

<sup>36</sup> Breach of *Resolution 687*, above n 23, [8]–[12]; *Resolution 707*, above n 26, [3]–[5]; *Resolution 1051*, above n 26, [15]. See below Part IV(B)(1) for a discussion of the threat of WMD and the evidence indicating that Iraq has breached prohibitions relating to WMD.

<sup>37</sup> Breach of *Resolution 687*, above n 23, [32]; *Resolution 707*, above n 26; *Resolution 1051*, above n 26. See below Part IV(B)(2) for a discussion of the threat of terrorism and the evidence indicating that Iraq has breached prohibitions relating to the sponsoring of terrorism.

<sup>38</sup> Breach of *Resolution 688*, SC Res 688, UN SCOR, 46<sup>th</sup> sess, 2982<sup>nd</sup> mtg, UN Doc S/RES/0688 (1991) [2]; *Resolution 1284*, above n 29, [27]. See below Part V(B) for a discussion of the human rights violations perpetrated by the Iraqi regime.

<sup>39</sup> See, eg, Bill Campbell and Chris Moraitis, ‘Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq’ (2003) 4 *Melbourne Journal of International Law* 178, [14]–[18].

<sup>40</sup> *Ibid*, [15].

<sup>41</sup> Michael Matheson in Michael Glennon (Chair), ‘The Challenge of Non-State Actors: Legal Authority for the Possible Use of Force against Iraq: Remarks’ (1998) *American Society of International Law: Proceedings of the 92<sup>nd</sup> Annual Meeting* 136, 137.

fire, there is still a right to use force'.<sup>42</sup> *Resolution 1441*, passed in November 2002, expressly states that Iraq was in material breach of its obligations under *Resolution 687* (the 'cease-fire'). Consequently, according to this analysis, the use of force against Iraq was permissible.

Further, it has been argued that *Resolution 1441* itself authorised the use of force. Pursuant to this resolution, Iraq was given a 'final opportunity to comply',<sup>43</sup> and was threatened with 'serious consequences'<sup>44</sup> failing compliance. It was argued that this indicated the UN Security Council understood military force to be a possible consequence of non-compliance.<sup>45</sup>

In addition, proponents of the view that existing resolutions authorised the use of force assert that *Resolution 678* was not confined to ensuring Iraq's withdrawal from Kuwait but extends to authorising the use of force to implement 'all subsequent resolutions and to restore international peace and security to the area'.<sup>46</sup> This is interpreted as authorising future uses of force where necessary for the restoration of international peace and security. Thus supporters of the US position contend that the war against Iraq was authorised in the name of restoring international peace and security.<sup>47</sup>

The author contends that the better view is that the basic *UN Charter* principles of peaceful resolution of disputes and Security Council control over the use of force dictate that, absent explicit words to the contrary, authority to use force expires once a permanent cease-fire is in place.<sup>48</sup> It is submitted that:

The duration of a UN-imposed or -sponsored cease-fire should be interpreted to be unlimited. As Count Bernadotte stated in reference to the binding cease-fire of 15 July 1948, and as Secretary-General Hammarskjöld reiterated regarding the obligations of the parties under the *1949 Armistice Agreements*, once the Security Council has ordered or decided that a cease-fire is necessary to maintain international peace and security, the parties are not free to reopen hostilities.<sup>49</sup>

Thus, once a cease-fire is in place, the art 2(4) prohibition against the use of force once again applies and a new Security Council resolution authorising the use of force must be obtained for such force to be legal.<sup>50</sup>

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<sup>42</sup> Ibid 142. It should be noted that the UN Secretary-General appeared to support this view in relation to the January 1993 raid carried out by the UK and US: Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego International Law Journal* 7, 35.

<sup>43</sup> *Resolution 1441*, above n 30, [2].

<sup>44</sup> Ibid [13].

<sup>45</sup> Darin Bartram et al, 'The Case for a Legal Attack', *The Australian* (Sydney, Australia), 18 March 2003, 11; Sam Blay and Ryszard Piotrowicz, 'The Use of Force and the Force of Law in Iraq' (2003) 77 *Australian Law Journal* 283, 287.

<sup>46</sup> Campbell and Moraitis, above n 40.

<sup>47</sup> Matheson, above n 41, 138.

<sup>48</sup> Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93 *American Journal of International Law* 124, 148–9.

<sup>49</sup> David Morriss, 'From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations' (1996) 36 *Virginia Journal of International Law* 801, 904, citing Cablegram from the UN Mediator to the UN Secretary-General, 7 August 1948, UN SCOR, 3<sup>rd</sup> sess, UN Doc S/955 (1948) 147; Report of the Secretary-General to the Security Council Pursuant to the Council's Resolution of 4 April 1956 on the Palestine Question, UN SCOR, 11<sup>th</sup> sess, UN Doc S/3596 (1956) 39.

<sup>50</sup> Absent other legal justifications for the use of force such as self-defence.

In the case of Iraq, Security Council *Resolution 678* was a specific response to the invasion of the sovereign state of Kuwait by Iraq. Force was authorised as a necessary measure to deal with this exceptional situation.<sup>51</sup> The use of force against Iraq was clearly not a response to a similar type of situation.

Further, *Resolution 686*, which sets out the terms of the provisional cease-fire, states that *Resolution 678* remains valid as regards the enforcement of certain terms of the provisional cease-fire until Iraq complies with its terms.<sup>52</sup> However, *Resolution 687*, which sets out the terms of the permanent cease-fire, contains no such statement. This indicates that whereas the use of force remained authorised whilst the provisional cease-fire was in place, the authorisation expired upon Iraq's acceptance of the permanent cease-fire. The word 'acceptance' is crucial in this context, as *Resolution 687* provides for a cease-fire predicated upon Iraq's acceptance of the terms of that resolution, not Iraq's compliance with those terms.<sup>53</sup> Given that Iraq accepted the terms of the cease-fire,<sup>54</sup> it seems that the authorisation contained in *Resolution 678* expired at that time.<sup>55</sup> However, even if the cease-fire was predicated upon Iraq's compliance with its terms, it is submitted that despite elements of the cease-fire, such as those relating to 'verification regimes or implementation mechanisms' being breached, 'the overriding obligation not to resort to force ... is deemed severable and continues to be binding'.<sup>56</sup>

Further, *Resolution 687* sets out the UN Security Council's decision 'to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region'.<sup>57</sup> Thus the resolution clearly maintains that it is for the Security Council, and not member states to determine what steps are required to ensure Iraq's compliance with its obligations and 'secure peace and security in the area'.<sup>58</sup>

Moreover, when the UN Security Council passed *Resolution 1154* in 1998, despite threatening the 'severest consequences',<sup>59</sup> it specifically rejected US and UK petitions to pass a resolution that would automatically authorise force should Iraq violate the agreement between UN Secretary-General Kofi Annan and Iraq's Deputy Prime Minister Tariq Aziz providing for compliance with the inspection regime.<sup>60</sup> In fact, the UN Security Council affirmed the view that explicit

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<sup>51</sup> See, eg, Boutros Boutros-Ghali (ed), *The United Nations and the Iraq-Kuwait Conflict 1990-1996* (1996) 3.

<sup>52</sup> *Resolution 686*, SC Res 686, UN SCOR, 46<sup>th</sup> sess, 2978<sup>th</sup> mtg, [1], [4], UN Doc S/RES/686 (1991).

<sup>53</sup> *Resolution 687*, above n 23, [33].

<sup>54</sup> *Identical Letters Dated 6 April 1991 from the Minister for Foreign Affairs of the Republic of Iraq Addressed Respectively to the Secretary-General and the President of the Security Council*, UN Doc S/22456 (1991).

<sup>55</sup> Lobel and Ratner, above n 48, 148-9.

<sup>56</sup> David Morriss, 'From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations' (1996) 36 *Virginia Journal of International Law* 801, 822-3.

<sup>57</sup> *Resolution 686*, above n 52, [34].

<sup>58</sup> Lobel and Ratner, above n 48, 150.

<sup>59</sup> *Resolution 1154*, above n 27, [13].

<sup>60</sup> *Memorandum of Understanding between the United Nations and the Republic of Iraq*, annexed to *Letter Dated 25 February 1998 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/1998/166 (27 March 1998) [2].

authorisation is required to justify the use of force and specifically included in the resolution an assertion that the UN Security Council itself remains ‘actively seized to ensure the implementation of this resolution’.<sup>61</sup> At the passing of this resolution, China, France and Russia, three permanent members of the Security Council, stated that the resolution does not authorise the use of force but confirms that it is for the Security Council, and not member states, to determine when a violation occurs and whether it warrants the use of force.<sup>62</sup>

The same analysis applies to Security Council *Resolution 1441*. Whilst *Resolution 1441* gives Iraq a ‘final opportunity to comply’<sup>63</sup> and warns of ‘serious consequences’<sup>64</sup> in the event of non-compliance, it is nevertheless clear that in passing the resolution, the Security Council was not authorising the use of force. For example, while *Resolution 678* authorises member states to ‘use all necessary means’<sup>65</sup> to ensure compliance, *Resolution 1441* employs no such terminology. In fact, following the adoption of *Resolution 1441*, China, France and Russia issued a joint statement asserting that the resolution ‘excludes any automaticity in the use of force’.<sup>66</sup> The statement clarifies that, should it be reported that Iraq has failed to comply with its obligations, ‘it will be then for the Council to take position on the basis of that report’.<sup>67</sup>

#### D Conclusion

There are arguments supporting the contention that existing Security Council resolutions authorise the use of force. However, the better view is that these arguments are legally flawed. They are incompatible with the fundamental principles of prioritising the peaceful resolution of disputes and of Security Council control over the maintenance of international peace and security which underpin the *UN Charter*. Therefore, the use of force by the US and its allies against Iraq was not authorised by existing Security Council resolutions.

### IV WAS THE USE OF FORCE AGAINST IRAQ LEGAL PURSUANT TO THE DOCTRINE OF SELF-DEFENCE?

#### A Introduction

Self-defence probably has to be an inherently relative concept — relative to the times and circumstances in which it is involved. Self-defence in the days of naval warfare, such as that at Trafalgar, is a very different thing from self-defence in the days of nuclear warfare, Exocet missiles, and the possibility of easy transport to

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<sup>61</sup> *Resolution 1154*, above n 27, [5].

<sup>62</sup> UN SCOR, 53<sup>rd</sup> sess, 3858<sup>th</sup> mtg, UN Doc S/PV.3858 (1998) 14–15, 17.

<sup>63</sup> *Resolution 1441*, above n 30, [2].

<sup>64</sup> *Ibid* [13].

<sup>65</sup> *Resolution 678*, above n 22, [2].

<sup>66</sup> China, France and Russia, ‘Iraq — Joint Statement by the People’s Republic of China, France and the Russian Federation’ (New York, US, 8 November 2002) <<http://www.info-france-usa.org/news/statmnts/2002/iraq111302.asp>> at 1 October 2003.

<sup>67</sup> *Ibid*. Given the consistent opposition of China, France and Russia to the 2003 use of force against Iraq, it may be presumed that they would have exercised their right to veto any resolution authorising the use of force.

almost any destination in the world of small packages of anthrax or nerve agents.<sup>68</sup>

When President Bush declared that ‘whatever action is required, whatever action is necessary, I will defend the freedom and security of the American people’,<sup>69</sup> he was asserting the right of the US to use force against Iraq in self-defence. Yet the concept of self-defence is in a state of flux. Changes in the potential forms of attack have significantly raised the stakes, and the increased threat of terrorism has altered the nature of the potential aggressor.

In 1945 the framers of the *UN Charter* envisioned an international system upholding international peace and security as the primary goal. They presumed that the illegal use of force, when it ensued, would be of a conventional kind and that the Security Council could be relied upon to respond effectively to such a threat. However, the passage of time has seen an increase in the threat posed by the illegal use of non-conventional force. The Security Council has not demonstrated itself to be a body which can be depended upon to safeguard against unlawful threats of force.<sup>70</sup> The traditional conception of the law relating to self-defence does not ‘adequately account for the unprecedented threat of terrorist-sponsoring states that pursue weapons of mass destruction’.<sup>71</sup> The changing nature of war and the ‘transformation of weaponry to instruments of overwhelming and instant destruction’<sup>72</sup> have altered the concept of force and the reality of what is necessary to defend against attack.<sup>73</sup> Further, as the 11 September 2001 attacks against the US illustrate, terrorism has become a far greater threat than was conceivable in 1945.

To remain relevant, international law must adapt ‘to the times and circumstances in which it is involved.’<sup>74</sup> Thus in the current era, where the combination of WMD and terrorism pose a threat barely conceived of during the post-World War II formulation of the *UN Charter*, international law is in the process of undergoing a paradigm shift. The rules are changing to keep pace with social, political and technological changes.

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<sup>68</sup> Sir Arthur Watts, ‘The Importance of International Law’ in Michael Byers (ed), *The Role of Law in International Politics* (2000) 5, 11.

<sup>69</sup> Bush, ‘State of the Union Address’, above n 5.

<sup>70</sup> Michael Glennon, ‘Preempting Terrorism — The Case for Anticipatory Self-Defence’, *The Weekly Standard* (Washington DC, US), 28 January 2002, 24, 24–5.

<sup>71</sup> Christopher Posteraro, ‘Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention’ (2002) 15 *Florida Journal of International Law* 151, 199.

<sup>72</sup> Thomas Franck, ‘When, if Ever, May States Deploy Military Force without Prior Security Council Authorization?’ (2001) 5 *Washington University Journal of Law and Policy* 51, 57.

<sup>73</sup> *Ibid.*

<sup>74</sup> Watts, above n 68, 11.

B *The Threat of Weapons of Mass Destruction and Terrorism*1 *The Threat of Weapons of Mass Destruction*

As part of their justification for the use of force against Iraq, the US and its allies asserted that Iraq had been proliferating WMD and developing delivery systems for those weapons.<sup>75</sup> As British Prime Minister Tony Blair stated:

What I believe the assessed intelligence has established beyond doubt is that Saddam has continued to produce chemical and biological weapons, that he continues in his efforts to develop nuclear weapons, and that he has been able to extend the range of his ballistic missile programme.<sup>76</sup>

Whilst much of the evidence supporting the contention that Iraq was persistent in its efforts to proliferate WMD has remained classified, some evidence has been released. For example, in 2001 a civil engineer defected from Iraq and attested that he had visited 20 secret facilities for chemical, biological and nuclear weapons. He produced Iraqi government contracts to substantiate his testimony. He also maintained that Iraq used companies to purchase equipment permitted by the UN and then secretly used that equipment for the WMD program.<sup>77</sup>

Further, as US Secretary of State Colin Powell remarked to the Security Council in February 2003, Iraq has materially breached numerous Security Council resolutions and has consistently failed to cooperate with the UN inspection regimes of the past and present. For example, Secretary Powell stated that at the time of his address to the Security Council, the regime only allowed interviews with inspectors to take place in the presence of an Iraqi official and forced Iraqi scientists to sign documents acknowledging that the disclosure of information is a crime punishable by death. Secretary Powell also produced evidence in the form of audio and video tapes, which, though not conclusive, was suggestive of the existence of WMD.<sup>78</sup>

It should be noted that although Hans Blix, the Executive Chairman of UNMOVIC, confirmed in his February briefing to the Security Council that UNMOVIC had not found any WMD, he also asserted that ‘many proscribed

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<sup>75</sup> Given that findings of the Central Intelligence Agency (‘CIA’) constitute much of the evidence supporting this contention, it should be noted that the view has been expressed that the findings of the CIA were influenced by political ‘pressures to adopt alarmist views’ and that evidence was manipulated to accord with the alarmist views of politicians: see, eg, John Prados, ‘A Necessary War?’ *Bulletin of the Atomic Scientists* (Chicago, US), May/June 2003, 26, 33. Furthermore, admissions by US Defense Secretary Donald Rumsfeld that Iraq might have destroyed unconventional weapons before the war began ‘prompt new questions about the intelligence President Bush and his senior advisers relied on to go to war’: ‘Arms May Have Been Destroyed before War’, *The Age* (Melbourne, Australia), 29 May 2003, 13. Recent reports that ‘British Foreign Secretary Jack Straw and his US counterpart, Colin Powell, privately expressed serious doubts about the information’ cast even more serious aspersions on the intelligence that formed the basis of the justification for war: Michelle Grattan, ‘Doubt on Key War Claims’, *The Sunday Age* (Melbourne, Australia), 1 June 2003, 1.

<sup>76</sup> Joint Intelligence Committee, UK, *Iraq’s Weapons of Mass Destruction: The Assessment of the British Government* (2002) 3.

<sup>77</sup> Department of State (US), *A Decade of Deception and Defiance — Saddam Hussein’s Defiance of the United Nations* (2002) 8.

<sup>78</sup> UN SCOR, 58<sup>th</sup> sess., 4701<sup>st</sup> mtg., UN Doc S/PV.4701 (2003) 3–16.

weapons and items are not accounted for'.<sup>79</sup> Iraq's unwillingness to account for proscribed weapons, together with other evidence indicating that Iraq possessed WMD, rendered the US assumption that Iraq possessed WMD fair and reasonable.<sup>80</sup> Further, it was also reasonable to assume that Iraq would at some stage in the future use those weapons, since, during the Iran–Iraq war, Iraq had unleashed mustard and nerve agents on Iran's civilian population.<sup>81</sup> In addition, in 1987 and 1988 chemical weapons were used as part of the ongoing persecution of Iraqi Kurds.<sup>82</sup>

WMD pose an unparalleled threat to world peace and security. As UN Secretary-General Kofi Annan proclaimed, 'it is hard to imagine how the tragedy of 11 September could have been worse. Yet, the truth is that a single attack involving a nuclear or biological weapon could have killed millions.'<sup>83</sup> WMD have the capacity to inflict untold damage with a single strike. They are relatively affordable and easy to use. Therefore, states of concern, whose military might cannot compare with that of the US, can nevertheless inflict horrendous wide-scale injury using WMD. WMD under the control of a state of concern, such as Hussein's Iraq, which had displayed its capacity and propensity for use of those weapons, pose a significant threat to world order, peace and security.<sup>84</sup>

## 2 *The Threat of Terrorism*

In a speech following the 11 September 2001 terrorist attacks, US President George W Bush stated, '[f]rom this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime ... I will not relent in waging this struggle for freedom and security for the American people'.<sup>85</sup>

The US could only legally hold Iraq to account for terrorist activity if Iraq could be deemed responsible for that activity at international law. The International Court of Justice ('ICJ') in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* set out the circumstances in

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<sup>79</sup> UN SCOR, 58<sup>th</sup> sess, 4707<sup>th</sup> mtg, UN Doc S/PV.4707 (2003) 3.

<sup>80</sup> It should be noted that in August 2002 former UN Weapons Inspector Scott Ritter stated that he did not believe that Iraq had an operative program for the development of WMD: Pitt and Ritter, above n 33, 33. Further, it has been reported that '[t]he group directing all known US search efforts for weapons of mass destruction in Iraq is winding down operations without finding proof that President Saddam Hussein kept clandestine stocks of outlawed arms': Barton Gellman, 'Weapon Hunters Come Up Empty-Handed', *The Age* (Melbourne, Australia), 12 May 2003, 9.

<sup>81</sup> Sean Condon, 'Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox' (1999) 161 *Military Law Review* 115, 143. It should be noted that Iraq is a signatory to the 1925 Geneva Protocol prohibiting the use of chemical and biological weapons in war: *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, opened for signature 17 June 1925, 94 UNTS 65 (entered into force 8 February 1928).

<sup>82</sup> Posteraro, above n 71, 158.

<sup>83</sup> Kofi Annan, 'Secretary-General, Addressing Assembly on Terrorism, Calls for "Immediate, Far-Reaching Changes" in UN Response to Terror' (Press Release, 1 October 2001).

<sup>84</sup> Guy Roberts, 'The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction' (1999) 27 *Denver Journal of International Law and Policy* 483, 486–8.

<sup>85</sup> George W Bush, 'Address to a Joint Session of Congress and the American People' (Speech delivered at Joint Session of the 107<sup>th</sup> Congress, Washington DC, US, 20 September 2001).

which an attack by terrorists could be deemed an attack by a state for the purposes of the law of self-defence.<sup>86</sup> The Court stated that:

an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’. ... But the Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.<sup>87</sup>

The Court also stated that:

For this conduct to give rise to legal responsibility ... it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>88</sup>

The International Law Commission essentially adopts this test in its Draft Articles on Responsibility of States for Internationally Wrongful Acts.<sup>89</sup> Thus it seems that according to the ICJ in *Nicaragua* and the International Law Commission’s Draft Articles on State Responsibility, for a terrorist attack to constitute an ‘armed attack’ by Iraq, Iraq would have to be an active (not merely a passive) supporter of the attack.<sup>90</sup>

Nevertheless, Security Council *Resolution 1368*, adopted the day after the September 11 terrorist attacks, ‘stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.’<sup>91</sup> Further, in *Resolution 1373*, the Security Council emphatically condemns the provision of any kind of assistance to terrorist groups.<sup>92</sup> It goes so far as to decide that all states shall ‘deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens’.<sup>93</sup> In addition, the resolution specifically reaffirms ‘that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts’.<sup>94</sup> Consequently, it seems that the

<sup>86</sup> [1986] ICJ Rep 14 (‘*Nicaragua*’).

<sup>87</sup> *Ibid* [195], quoting *Definition of Aggression* art 3(g) annexed to *Resolution 3314*, GA Res 3314 (XXIX), 29<sup>th</sup> sess, 2319<sup>th</sup> plen mtg, UN Doc GA/RES/3314 (XXIX) (1974). It should be noted that Sir Robert Jennings, in his dissenting opinion, stated that ‘to say that the provision of arms, coupled with “logistical or other support” is not armed attack is going much too far’: at 543.

<sup>88</sup> *Ibid* [115].

<sup>89</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), art 8 (‘Draft Articles on State Responsibility’). See also Greenwood, above n 42, 24.

<sup>90</sup> Michael Glennon, ‘The Fog of Law: Self-Defence, Inherence and Incoherence in Article 51 of the *United Nations Charter*’ (2002) 25 *Harvard Journal of Law and Public Policy* 539.

<sup>91</sup> SC Res 1368, UN SCOR, 56<sup>th</sup> sess, 4370<sup>th</sup> mtg, UN Doc S/RES/1368 (2001) [3].

<sup>92</sup> SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (2001) preamble, [5].

<sup>93</sup> *Ibid* [2(c)].

<sup>94</sup> *Ibid* preamble.

threshold has been lowered.<sup>95</sup> The outrage felt by the international community as a result of the September 11 terrorist attacks resulted in the UN expressing a 'zero-tolerance' policy for terrorism and for states that allow the plans of terrorists to be brought to fruition. Therefore, it is arguable that in an extremely short period of time, the rules relating to state responsibility have undergone a major change. In the current world order, it seems that for a state to be held responsible for a terrorist attack, it is no longer necessary to show a level of active support for terrorist activities; passive support will suffice. Therefore, the 'Bush theory' — that the mere harbouring of terrorists is sufficient to render a state responsible for the activities of terrorists — is probably now supported by international law.

There is clear evidence linking Iraq with various forms of terrorism. Documents uncovered by UNSCOM indicate the extensive nature of Iraqi support for terrorism. An example is Saddam Hussein's pledge to donate US\$25 000 to the families of suicide bombers who conduct successful attacks on Israel.<sup>96</sup> There is also some evidence linking Iraq with al-Qaeda, the terrorist group thought to be responsible for various attacks on the US, including the September 11 attacks. This evidence includes reports indicating that Iraq smuggled both conventional and non-conventional weapons to members of al-Qaeda and verification that numerous meetings took place between Iraqi officials and al-Qaeda leaders.<sup>97</sup> Further, US intelligence information indicated that Iraq and al-Qaeda discussed matters concerning safe havens and reciprocal non-aggression.<sup>98</sup> In addition, in April 2003, documents were found that revealed an al-Qaeda envoy was secretly invited to Baghdad in March 1998.<sup>99</sup> Given the strong post-September 11 stance that the international community has taken against states that support terrorism, it seems that even if Iraq's support of al-Qaeda was passive rather than active, this would be sufficient to impute state responsibility.<sup>100</sup>

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<sup>95</sup> Anthony Arend, 'International Law and Rogue States: The Failure of the Charter Framework' (2002) 36 *New England Law Review* 735, 746.

<sup>96</sup> See Posteraro, above n 71, 166; Mohammed Daraghmeh, 'Iraq Raises Suicide Bomber Payments', *Associated Press Newsfeed*, 4 April 2002.

<sup>97</sup> Posteraro, above n 71, 157, 164. See also Barton Gellman, 'US Suspects Al Qaeda got Nerve Agent from Iraqis: Analysts: Chemical May Be VX, and Was Smuggled via Turkey', *The Washington Post* (Washington DC, US), 12 December 2002, A1; Gary Schmitt, 'Why Iraq?', *The Weekly Standard* (Washington DC, US), 29 October 2001, 13; Jeffrey Goldberg, 'The Great Terror', *The New Yorker* (New York, US), 25 March 2002, 52, 68.

<sup>98</sup> Letter from George Tenet, Director of US Central Intelligence to Senator Bob Graham, Chairman of the Senate Select Committee on Intelligence, 7 October 2002 <<http://www.globalsecurity.org/wmd/library/news/iraq/2002/iraq-021007-cia01.htm>> at 1 October 2003.

<sup>99</sup> Inigo Gilmore, 'Secret Iraqi Papers Reveal Link with bin Laden', *The Age* (Melbourne, Australia), 28 April 2001, 1.

<sup>100</sup> It should be noted that it is an extremely contentious issue whether there were links between Iraq and al-Qaeda. Many people strongly believe that no such link existed. For example, in August 2002 former UN Weapons Inspector Scott Ritter stated that '[t]here are no facts to back up claimed connections between Iraq and Al Qaeda': Pitt and Ritter, above n 33, 47. Further, it has been stated that 'British intelligence agencies have persistently dismissed attempts by White House hawks to link Saddam to al-Qaeda': 'Doubts on Iraq Links to al-Qaeda', *The Age* (Melbourne, Australia), 30 April 2003, 15.

### 3 *Conclusion*

In September 2002 US President George W Bush stated:

The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination.<sup>101</sup>

In his 2003 State of the Union address, President Bush asserted that:

Today, the gravest danger in the war on terror, the gravest danger facing America and the world, is outlaw regimes that seek and possess nuclear, chemical, and biological weapons. These regimes could use such weapons for blackmail, terror, and mass murder. They could also give or sell those weapons to terrorist allies, who would use them without the least hesitation.<sup>102</sup>

These two statements illustrate the extent to which the US regards WMD and terrorism as being the paramount threats of our time. It is for this reason that the US and its allies cited the possession of WMD and links to terrorism as justifying the use of force against Iraq, under the doctrine of self-defence. Whilst the evidence that Iraq possessed WMD is not conclusive, and the evidence linking Iraq to al-Qaeda is somewhat equivocal, this article proceeds on the basis that, prior to its invasion of Iraq, the US had a reasonable apprehension that Iraq possessed WMD and that Iraq supported terrorist activities against the US such that it could be held responsible for those activities.

## C *The Law of Self-Defence*

### 1 *Introduction*

Article 51 of the *UN Charter* states that '[n]othing in the present *Charter* shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'.<sup>103</sup> The notion that self-defence is an inherent right (a *droit naturel*) is steeped in naturalist doctrine. Preservation of the self has long been viewed as a natural right of the state.<sup>104</sup>

However, the fact that self-defence is an inherent right does not mean that it is an autonomous right. The right does not exist outside the law but is defined and limited by the law.<sup>105</sup> Whilst there are limits relating to the exercise of collective, as opposed to individual, self-defence, the collective nature of the use of force against Iraq is not especially contentious. Therefore the author will not explore these particular limits. Perhaps the most well-known articulation of the main limits to the use of force in self-defence appear in the 1841 letter written by US Secretary of State Daniel Webster to Henry Fox, British Minister in

<sup>101</sup> George W Bush, 'Introduction' in US National Security Council, above n 6.

<sup>102</sup> Bush, 'State of the Union Address', above n 5.

<sup>103</sup> *UN Charter* art 51.

<sup>104</sup> Oscar Schachter, 'Self-Defense and the Rule of Law' (1989) 83 *American Journal of International Law* 259, 259.

<sup>105</sup> *Ibid* 277.

Washington DC.<sup>106</sup> The letter was written following an incident during the Canadian rebellion, where the British attacked a docked US ship thought to have supplied arms to Canadian rebels. Webster stated that it is for the state claiming self-defence 'to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.<sup>107</sup> Thus the requirements of necessity and proportionality in relation to self-defence in international law were established.

Before considering whether the aforementioned requirements were satisfied in the 2003 war against Iraq, it is necessary to consider the meaning of the phrase in art 51, 'if an armed attack occurs'.<sup>108</sup> This phrase is not defined in the *UN Charter* and is therefore the subject of much controversy and debate. The US used the doctrine of 'state responsibility' to justify legally the use of force against Afghanistan — at that time ruled by the Taliban regime — in response to the terrorist attacks of September 11. By establishing links between the Taliban and al-Qaeda, the US was able to claim that there had been an 'armed attack' by the Taliban against the US.<sup>109</sup> Nevertheless, the matter was complicated by the fact that the US and most other states did not recognise the Taliban as the government of Afghanistan. Greenwood has stated that this complication 'makes no substantial difference. There is no doubt that the Taliban regime was the de facto government in Afghanistan at the relevant time and that the State of Afghanistan bore responsibility for its actions.'<sup>110</sup> Given that Saddam Hussein's regime was the de jure, as well as de facto, government of Iraq, the establishment of links between Iraq and al-Qaeda would have given rise to a strong argument supporting the legality of the use of force against Iraq if the situation had simply involved an attack by al-Qaeda and a proportionate US response.

However, for the use of force to constitute self-defence, 'there must not be an undue time-lag between the armed attack and the invocation of self-defence'.<sup>111</sup> Thus, even if conclusive evidence exists linking Hussein's Iraq with al-Qaeda, in light of the amount of time that passed between the September 11 attacks and the use of force against Iraq, it is difficult to argue that the use of force against Iraq was a response to those attacks. The use of force against Iraq was instead based on the fear of future terrorist attacks. Likewise, any threat posed by WMD in the hands of Saddam Hussein related to the possibility that such weapons would be

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<sup>106</sup> *The Caroline (Exchange of Diplomatic Notes between United Kingdom of Great Britain and Ireland and the United States of America)*, Letter from Lord Ashburton to Mr Webster (28 July 1842) (1841–42) 30 *British and Foreign State Papers* 195, 196 ('*The Caroline*').

<sup>107</sup> *The Caroline*, Letter from Mr Webster to Mr Fox (24 April 1841) (1841–42) 29 *British and Foreign State Papers* 1129, 1138.

<sup>108</sup> *UN Charter* art 51.

<sup>109</sup> Michael Byers, 'Terrorism, Use of Force and International Law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 401, 408. It should be noted that, given that the 11 September 2001 attacks had been completed by the time the US used force against Afghanistan, some have viewed the use of force as an example of reprisal as opposed to self-defence. Others have regarded it as an act of anticipatory self-defence aimed at preventing future terrorist attacks: see Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego International Law Journal* 7, 23.

<sup>110</sup> Greenwood, 'International Law and the Pre-Emptive Use of Force', above n 109, 24.

<sup>111</sup> Yoram Dinstein, *War, Aggression, and Self-Defense* (3<sup>rd</sup> ed, 2002) 184.

used in the future. Therefore, it is necessary to consider whether the use of force against Iraq was legally justified as anticipatory self-defence.

## 2 *Is Anticipatory Self-Defence Lawful?*

The doctrine of anticipatory self-defence concerns the right of a state, in certain circumstances, to resort to force in self-defence before an armed attack has commenced.<sup>112</sup> Prior to the formation of the *UN Charter*, anticipatory self-defence was permitted under international law.<sup>113</sup> Grotius recognised the right to anticipatory self-defence in 1625, and Webster's famous declaration of the requirements of self-defence, set out above, was actually made in reference to a case of anticipatory self-defence.<sup>114</sup> However, given that art 51 of the *UN Charter* is silent as to whether self-defence includes anticipatory self-defence, the phrase 'if an armed attack occurs' in art 51 has given rise to vigorous debate pertaining to the lawfulness of pre-emptive strikes.

According to one view, anticipatory self-defence is not lawful. The actual wording of art 51, 'if an armed attack occurs', indicates that for the use of force to be lawfully invoked, an armed attack must first occur.<sup>115</sup> According to Brownlie, 'the ordinary meaning of the phrase precludes action which is preventative in character'.<sup>116</sup> Further, given that some of the key objectives of the UN are 'to maintain international peace and security'<sup>117</sup> and to minimise the unilateral use of force, it stands to reason that self-defence, as an exception to the prohibition on the use of force, should be narrowly construed.<sup>118</sup> Indeed, discussions that took place amongst the framers of the *UN Charter* indicate an intention to exclude anticipatory self-defence from the exception allowing for the use of force in self-defence.<sup>119</sup>

Proponents of the view that anticipatory self-defence is not lawful frequently cite international reaction to the Israeli bombing of an Iraqi nuclear reactor under construction at Osiraq in 1981 as evidence that there is no rule under customary international law supporting the doctrine of anticipatory self-defence. Israel justified the attack by stating that the reactor would be used to manufacture weapons for the purpose of attacking Israel. The Security Council unanimously passed a resolution strongly condemning 'the military attack by Israel in clear

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<sup>112</sup> Alison Duxbury, 'Self-Defence and Iraq' (Paper presented at the Law Institute of Victoria and Amnesty International Seminar, Melbourne, Australia, 2 December 2002).

<sup>113</sup> Glennon, 'Preempting Terrorism', above n 70, 24.

<sup>114</sup> Michael Scharf, 'Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons through Sanctions, Use of Force, and Criminalization' (1999) 20 *Michigan Journal of International Law* 477, 490.

<sup>115</sup> Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (1<sup>st</sup> ed, 1994) 676.

<sup>116</sup> Ian Brownlie, *International Law and the Use of Force by States* (1963) 275.

<sup>117</sup> *UN Charter* art 1(1).

<sup>118</sup> Simma et al, *The Charter: A Commentary* (1<sup>st</sup> ed, 1994), above n 115, 676.

<sup>119</sup> Franck, above n 72, 59.

violation of the *Charter of the United Nations* and the norms of international conduct'.<sup>120</sup>

An example of the international community condemning the use of force in response to the threat of terrorism may be found in its condemnation of the 1986 US bombing raid in Libya. After numerous terrorist attacks were perpetrated against US service personnel — in which Libya was clearly implicated — the US launched air-strikes against terrorist related targets in Libya. The US claimed that the strikes were necessary to prevent future terrorist attacks.<sup>121</sup> However, whilst a Security Council resolution condemning the attack was defeated, the General Assembly did pass a resolution condemning the strikes.<sup>122</sup>

The opposing view (and, it is submitted, the correct view) is that anticipatory self-defence is lawful. Many proponents of this view contend that art 51 was not intended to invalidate prior customary international law, which permitted anticipatory self-defence.<sup>123</sup> Bowett has stated that 'it was never the intention of the *Charter* to prohibit anticipatory self-defence'<sup>124</sup> since '[n]o state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardise its very existence'.<sup>125</sup> McDougal has stated that the use of force is permitted where a state 'regards itself as intolerably threatened by the activities of another'.<sup>126</sup> In his dissenting opinion in *Nicaragua*, Judge Schwebel expressed his view on the issue, even though it was not directly related to the case. He stated:

I do not agree with a construction of the *United Nations Charter* which would read Article 51 as if it were worded: 'Nothing in the present *Charter* shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs ...' I do not agree that the terms or intent of Article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of Article 51.<sup>127</sup>

The 1967 Six Day War, during which Israel responded with force to threats posed by Egypt, Jordan, Syria and Iraq, is an example of a situation where the

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<sup>120</sup> *Resolution 487*, SC Res 487, UN SCOR, 36<sup>th</sup> sess, 2288<sup>th</sup> mtg, UN Doc S/RES/487 (1981) [1]. It should be noted that since the passing of this resolution, the argument that with hindsight the Israeli strike was justified, has been propounded: see, eg, W Michael Reisman, 'International Legal Responses to Terrorism' (1999) 22 *Houston Journal of International Law* 3, 18. In fact, there are some reputable scholars who supported the legality of the Israeli intervention in Iraq at the time that it occurred: see, eg, Anthony D'Amato, 'Israel's Air Strike upon the Iraqi Nuclear Reactor' (1983) 77 *American Journal of International Law* 584.

<sup>121</sup> Duxbury, above n 112. It should be noted that whilst the US claimed anticipatory self-defence, this is often cited as a case of retorsion.

<sup>122</sup> *Resolution 41/38*, GA Res 41/38, UN GAOR, 41<sup>st</sup> sess, 78<sup>th</sup> plen mtg, UN Doc A/RES/41/38 (1986).

<sup>123</sup> Roberts, above n 84, 512–13.

<sup>124</sup> Derek Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 *American Journal of International Law* 1, 4.

<sup>125</sup> Derek Bowett, *Self-Defence in International Law* (1958) 191–2.

<sup>126</sup> Myres McDougal, 'Comments on Address by Louis Henkin: Force, Intervention, and Neutrality in Contemporary International Law' (1963) *American Society of International Law: Proceedings of the 57<sup>th</sup> Annual Meeting* 163, 164. It is the author's view that not all WMD are equally intolerable and that a state is only potentially 'intolerably threatened' where high-grade WMD are produced.

<sup>127</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [173] (Dissenting Opinion of Judge Schwebel).

majority of the international community seemed to accept Israel's right to anticipatory self-defence, or at the very least failed to condemn it. In this instance, a combination of factors rendered it reasonable for Israel to conclude that an armed attack was imminent and to respond by using force. These factors included the peremptory expulsion of the UN peacekeeping force from the Sinai, the massing of forces along Israel's borders, the closure of the Straits of Tiran, and inflammatory rhetoric calling for the elimination of Israel.<sup>128</sup>

In 1998, following the bombings of US embassies in Tanzania and Kenya, the US launched missiles against terrorist training camps in Afghanistan and against a Sudanese pharmaceutical plant that the US maintained was a chemical weapons facility associated with Osama bin Laden.<sup>129</sup> The US claimed that the strikes were necessary to 'deter and prevent the repetition of unlawful terrorist attacks on the United States and other countries'.<sup>130</sup> At first, international criticism was muted, indicating a level of acceptance for the principle of anticipatory self-defence where the impending threats involved terrorism and WMD. Significant international criticism of the bombing of the Sudanese plant only emerged when evidence surfaced casting doubt over whether the facility was in fact a chemical weapons plant and whether there was actually a connection between the plant and Osama bin Laden. Thus the criticism of the world community was directed at the assertion that the Sudanese facility was a chemical weapons facility, and not directed at the US contention that it had a right under art 51 to strike a chemical weapons plant and terrorist training camps for the purpose of preventing future attacks.<sup>131</sup> It is telling that neither the UN Security Council nor the UN General Assembly formally condemned the US action.<sup>132</sup>

There is clearly some confusion as to what constitutes an 'armed attack' for the purposes of art 51 of the *UN Charter*. It is interesting to note that in many instances where the international community has rejected a claim of anticipatory self-defence, it has done so out of a belief that one of the core requirements of necessity and proportionality was not met, rather than on the basis that an 'armed attack' had not occurred. For example, many of the states that declared that the Israeli attack on the Iraqi construct at Osiraq was illegal took this view based on the fact that there was no 'imminent' threat, rather than based on the belief that anticipatory self-defence is illegal per se.<sup>133</sup> It is the author's view that international law 'is not a suicide pact, especially in an age of uniquely

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<sup>128</sup> Davis Brown, 'Use of Force against Terrorism after September 11<sup>th</sup>'. *State Responsibility, Self-Defense and Other Responses* (2003) 11 *Cardozo Journal of International and Comparative Law* 1, 39.

<sup>129</sup> Osama bin Laden is the leader of al-Qaeda, the group believed to be responsible for various terrorist attacks including the 1998 bombing of US embassies and the 11 September 2001 terrorist attacks against the US.

<sup>130</sup> Letter from the US Permanent Representative to the UN to the President of the Security Council, 20 August 1998, UN Doc S/1998/780 (1998) 2.

<sup>131</sup> Scharf, above n 114, 494.

<sup>132</sup> Jack Beard, 'America's New War on Terror: The Case for Self-Defence under International Law' (2002) 25 *Harvard Journal of Law and Public Policy* 559, 564.

<sup>133</sup> Condrón, above n 81, 137–8. See, eg, statements made by the representatives of Nigeria Sierra Leone, Uganda and the UK expressing the view that there was no imminent threat: Anthony Arend, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993) 78–9.

destructive weaponry'.<sup>134</sup> To claim that a state is required at all times to absorb the first blow in an age of terrorism and WMD, where that first blow could be swiftly delivered and could of itself eliminate the state, is absurd. Therefore, it is submitted that anticipatory self-defence is permissible pursuant to art 51 of the *UN Charter*. The remaining question is whether the 2003 use of force against Iraq falls within the legal limits of the doctrine.

### 3 *Did the 2003 War against Iraq Fall within the Legal Limits of Anticipatory Self-Defence?*

Assuming that the US had a reasonable apprehension that Iraq possessed WMD and supported terrorism, and assuming that a potential terrorist attack would constitute an 'armed attack' by Iraq,<sup>135</sup> it is necessary to consider whether anticipatory self-defence could be employed as a legal justification for the use of force against Iraq. To fall within the traditional legal limits of anticipatory self-defence, the US action must have been both proportionate and necessary.<sup>136</sup>

#### (a) *Proportionality*

In the case of anticipatory self-defence, the notion of proportionality refers to whether the use of force is proportional to the objective to be achieved. In other words, the measures taken in self-defence must be limited to what is necessary to prevent the potential attack.<sup>137</sup> In the war against Iraq the objective was to eliminate the threat of WMD, and the threat of those weapons falling into the hands of terrorists. Clearly, these threats, if carried out, would have resulted in unfathomable injury and suffering. In *Nicaragua* the ICJ suggested that the provision of aid to terrorists by a state would not justify attacks on that state's ports and oil installations.<sup>138</sup> However, this case was decided before the threat of WMD in the hands of terrorists was ensconced in the collective mind of the international community.

Since 11 September 2001, there appears to be a shift developing in state practice and belief which allows for the loosening of the proportionality doctrine in the context of international terrorism.<sup>139</sup> It is suggested that if one accepts that the Hussein regime was proliferating WMD and supporting terrorist groups, one must accept that the most effective way to eliminate these threats was to institute regime change within Iraq.<sup>140</sup> As Greenwood states in relation to the US intervention in Afghanistan,

<sup>134</sup> Louis Beres, 'The Permissibility of State-Sponsored Assassination During Peace and War' (1992) 5 *Temple International and Comparative Law Journal* 231, 239.

<sup>135</sup> In other words, that the doctrine of state responsibility can be made out.

<sup>136</sup> *The Caroline* (1841–42) 29 *British Foreign and State Papers* 1129, 1137–8; (1841–42) 30 *British and Foreign State Papers* 195, 195–6. See also Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (2<sup>nd</sup> ed, 2002) 805.

<sup>137</sup> Brown, above n 128, 38.

<sup>138</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [237].

<sup>139</sup> Michael Bonafede, 'Here, There, and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism after the September 11 Attacks' (2002) 88 *Cornell Law Review* 155, 162.

<sup>140</sup> The suggestion that that the use of surgical strikes may have constituted a means of eliminating the primary threat without resorting to the extreme mechanism of regime change should be noted.

'[a]lthough the effect of United States allied intervention in Afghanistan ... led to the overthrow of the Taliban regime and its replacement by a new government, it is difficult to see how the intervention could have succeeded without going that far'.<sup>141</sup>

Indeed, it is difficult to see how the US intervention in Iraq could have succeeded in ridding Saddam Hussein's regime of WMD and severing the links between Iraq and terrorism without overthrowing that regime.<sup>142</sup>

(b) *Necessity*

The requirement of necessity embodies both the notion that the threat must be imminent and the notion that there is no effective alternative to the use of force.

(i) *Imminence*

The notion that, for a state legally to respond to a threat, that threat must be one of imminent danger, is an integral part of the law of self-defence. It is arguable that the requirement of necessity was not met, as Iraq posed no immediate threat to the US.<sup>143</sup> As Greenwood has stated in relation to the US bombing raid in Libya:

If there was no threat of an imminent attack and the United States was merely trying to counter attacks which it considered likely to occur at some unspecified time in the future, the raid would not have been a lawful exercise of self-defence.<sup>144</sup>

It seems that in the 2003 war against Iraq, as with the Israeli bombing of the Iraqi nuclear reactor in 1981, the use of force was employed to counter attacks that the US deemed likely to occur at an unspecified time in the future, and was not employed to counter an imminent threat.

Yet the notion of imminence itself warrants further consideration. It is unclear at what point a state of concern possessing WMD or sponsoring terrorism poses an imminent threat. In an age where modern methods of intelligence can provide convincing proof of a state's hostile intent before an armed attack actually occurs,<sup>145</sup> does a state have to wait until missiles with chemical warheads are on the launching pad for the danger to be deemed imminent?<sup>146</sup> Does a state have to remain inactive in the face of evidence pointing towards a future terrorist attack until the attack is deemed sufficiently imminent?

At present, the law is in a state of flux. It is clear that the notion of 'imminence' is crucial to the doctrine of self-defence. Yet it must develop in accordance with the times. The notion of 'imminence' must adequately address the dual threat of WMD and terrorism. It is highly arguable that the enormity of the devastation resulting from successfully delivered WMD, and the speed at which such weapons can be delivered, merits a weakening of the threshold of

<sup>141</sup> Greenwood, 'International Law and the Pre-Emptive Use of Force', above n 109, 25.

<sup>142</sup> It is beyond the scope of this article to deal with the issue of proportionality as it applies in the context of international humanitarian law.

<sup>143</sup> Duxbury, above n 112.

<sup>144</sup> Christopher Greenwood, 'International Law and the United States' Air Operation against Libya' (1987) 89 *West Virginia Law Review* 933, 946.

<sup>145</sup> Glennon, 'Preempting Terrorism', above n 70, 26.

<sup>146</sup> Arend, above n 95, 750.

reasonable foreseeability. Perhaps, rather than being a test based on objective knowledge, the test for imminence should be based on the reasonable subjective belief of the state in question. Such a subjective approach would arguably be more suitable to a realistic assessment of the catastrophic threat posed by WMD in the hands of terrorists than an objective approach. Unless the notion of imminence changes to such an extent that an attack can be deemed imminent where an individual state reasonably believes that a threat exists, irrespective of the views of other states, and irrespective of whether there is evidence of an actual plan to attack, the 2003 use of force against Iraq cannot be regarded as a response to an imminent attack.

(ii) *No Alternative to the Use of Force*

It seems that the US did not exhaust all peaceful avenues for resolving the perceived problem of Iraq's WMD before resorting to the use of force. It is clear that, since the Gulf War, Iraq has breached numerous UN Security Council resolutions and has consistently failed to cooperate with inspections regimes. Thus it is unsurprising that, prior to the US invasion, Iraq was not fully and actively cooperating with UNMOVIC. However, in his 14 February 2003 briefing to the UN Security Council, UNMOVIC Executive Chairman Hans Blix stated that:

it seemed from our experience that Iraq had decided in principle to provide cooperation on process, most importantly prompt access to all sights and assistance to UNMOVIC in the establishment of the necessary infrastructure. This impression remains, and we note that access to sites has so far been without problems, including those that had never been declared or inspected, as well as to Presidential sites and private residences.<sup>147</sup>

Even if the US had a reasonable apprehension that Iraq possessed WMD, in light of this report it is difficult to argue that the US was left with no choice but to invade Iraq. However, where the threat of terrorism is concerned, it is not clear what alternative to the use of force existed. Given the covert nature of the relationship between Iraq and al-Qaeda, conventional political solutions were not available to aid in extinguishing the al-Qaeda threat that the US reasonably apprehended was emerging from within Iraq.<sup>148</sup>

(c) *Conclusion*

Whilst the use of force was arguably proportionate to the objective to be achieved, the use of force against Iraq was not necessary. All peaceful means for eliminating the threat posed by WMD were not exhausted. However, it seems that given the nature of the threat of terrorism, conventional political solutions were not available to combat the risk of future terrorist attacks. Unless the notion of 'imminence' changes to such an extent as to be made out based on the reasonable subjective apprehension of a state that a threat exists, the use of force against Iraq cannot be regarded as a response to an imminent attack. The logical

<sup>147</sup> UN SCOR, 58<sup>th</sup> sess, 4707<sup>th</sup> mtg, UN Doc S/PV.4707 (2003) 3.

<sup>148</sup> It is arguable that the use of force against states that harbour terrorists may be the only way in which a victim state can defend itself against a terrorist attack: see, eg, Michael Glennon, 'The Fog of Law: Self-Defence, Inherence and Incoherence in Article 51 of the *United Nations Charter*' (2002) 25 *Harvard Journal of Law and Public Policy* 539, 550.

conclusion is that the war against Iraq did not fall within the ambit of the requirements of anticipatory self-defence as currently understood. Nevertheless, it is also true to say that, given the continuing evolution of the law of anticipatory self-defence, particularly since 11 September 2001, the war against Iraq was not as clearly illegal in 2003 as it would have been in an earlier era.

#### D *The Emergence of a New Doctrine?*

Few would disagree with the notion that the law must keep pace with social and political changes. Nevertheless, how to develop the law of self-defence in a way that addresses the current threats from WMD and terrorism remains a point of contention. Some have propounded the view that an effective way of addressing current threats is for states to enter into agreements with other states to address specific concerns. For example, former UNSCOM Executive Chairman Richard Butler has proposed that:

certainty of enforcement [of treaty obligations] can be achieved if the following steps are taken: First, the permanent members of the Security Council must agree and solemnly declare to the world that they will always act together to remedy any situation identified by a credible report on the violation of ... treaties [relating to WMD]. Second, this must mean that they will undertake never to use or to threaten to use their veto in such circumstances.<sup>149</sup>

The concept of states working together to address international concerns is clearly attractive. However, it seems somewhat unrealistic to assume that a permanent member of the UN Security Council would refrain from exercising its right to veto a Security Council resolution authorising the use of force against the threat of WMD or terrorism if it regards the use of such a veto as being in its national interest.

It is submitted that the traditional law of self-defence allows for the proportional use of force against a state of concern, such as Iraq which proliferates WMD and supports terrorism, if the threat of imminent danger is posed by that state, and there is no longer an option for peacefully resolving the dispute. The law has lagged behind reality in its conception of 'imminence'. In an age of terrorism and WMD, to expect a state to wait until there is a 'necessity of self-defence, instant, overwhelming, leaving ... no moment for deliberation'<sup>150</sup> before it resorts to the use of force in self-defence is to expect a state to be complicit in its own demise. This is the framework in which the emerging paradigm shift is taking place. The notion of 'imminent threat' is clearly changing. If other states move towards the views and practices of the US and its allies, the mere reasonable subjective apprehension of the possession of WMD and harbouring of terrorists by a state of concern may be sufficient to constitute an 'imminent threat'. Yet even if the world is witnessing the emergence of a custom of this nature, it has clearly not yet crystallised. Therefore, according to the law as it stands, the 2003 use of force against Iraq cannot be legally justified according to the doctrine of self-defence.

<sup>149</sup> Richard Butler, *Saddam Defiant: The Threat of Weapons of Mass Destruction and the Crises of Global Security* (2000) 253.

<sup>150</sup> *The Caroline*, Letter from Mr Webster to Mr Fox (24 April 1841) (1841–42) 29 *British and Foreign State Papers* 1129, 1138.

## V WAS THE USE OF FORCE AGAINST IRAQ LEGAL PURSUANT TO THE DOCTRINE OF HUMANITARIAN INTERVENTION?

### A Introduction

Whereas the right of self-defence refers to a state's right to ensure its own peace and security, it has been suggested that a linkage has emerged between the violation of human rights and threats to international peace and security, thereby translating human rights abuses into such threats.<sup>151</sup> Given that the maintenance of international peace and security is arguably the primary purpose of the UN,<sup>152</sup> this linkage lends support to the notion that international law is evolving so as to allow for humanitarian intervention in certain circumstances. In his 2003 State of the Union address President Bush stated:

And tonight I have a message for the brave and oppressed people of Iraq: Your enemy is not surrounding your country — your enemy is ruling your country. And the day he and his regime are removed from power will be the day of your liberation.<sup>153</sup>

Thus the US and its allies used the doctrine of humanitarian intervention as part of their justification for the 2003 use of force against Iraq.

Like the law of self-defence, the law relating to humanitarian intervention is currently shifting to reflect the changing values of the international community. Harris points out that since the inception of the *UN Charter* and prior to 1991, states were reluctant to invoke the doctrine of humanitarian intervention.<sup>154</sup> However, the end of the Cold War and the rise to power of Saddam Hussein proved catalysts for change.<sup>155</sup> In reference to the 1999 NATO intervention in Kosovo, Cassese states that

this particular instance of breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace.<sup>156</sup>

Similarly, Wedgwood has stated that the war in Kosovo may

mark the emergence of a limited and conditional right of humanitarian intervention, permitting the use of force to protect the lives of a threatened population when the decision is taken by what most of the world would recognize as a responsible multilateral organization and the Security Council does not oppose the action.<sup>157</sup>

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<sup>151</sup> Yassin El-Ayouty, 'International Action on the Doctrine of Humanitarian Intervention: The Case of Southern Iraq (1991–1992)' (1996) 68 *New York State Bar Journal* 12, 12.

<sup>152</sup> *UN Charter* art 1(1).

<sup>153</sup> Bush, 'State of the Union Address', above n 5.

<sup>154</sup> David Harris, *Cases and Materials on International Law* (5<sup>th</sup> ed, 1998) 919.

<sup>155</sup> *Ibid.*

<sup>156</sup> 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, 29.

<sup>157</sup> Ruth Wedgwood, 'Editorial Comments: NATO's Kosovo Intervention — NATO's Campaign in Yugoslavia' (1999) 93 *American Journal of International Law* 828, 828.

Cassese outlines a number of developments in international law which he views as contributing to the emerging paradigm shift under which humanitarian intervention is becoming a legal exception to the prohibition on the use of force. These developments include the increasing concern of the international community for human rights, the acceptance of the notion that obligations to respect human rights are *erga omnes*, and the reality that the international community is increasingly intervening in internal conflicts where human rights abuses are at issue.<sup>158</sup> In addition, Cassese alludes to the emerging idea that large-scale and systematic atrocities may give rise to an aggravated form of state responsibility to which other states or organisations may respond. However, Cassese is careful to qualify his depiction of this principle by specifying that when atrocities are being committed that ‘shock the conscience of all human beings’, peaceful means must always, where possible, take precedence over forceful means.<sup>159</sup>

### B *The Case against Iraq*

Before considering the changing nature of humanitarian intervention under international law, it is necessary to consider briefly why humanitarian intervention was raised as a justification for the 2003 war against Iraq. The cruel and brutal nature of the Iraqi regime is indisputable. For more than three decades, the Hussein regime implemented a system of oppression that included widespread arbitrary arrests, indefinite detention without trial, torture, rape, large-scale ‘disappearances’ and ‘prison cleansing’.<sup>160</sup> The Iraqi government engaged in arbitrary and widespread use of the death penalty and extra-judicial executions for both political and other means.<sup>161</sup> In fact, since the overthrow of the Hussein regime, mass graves have been discovered containing the remains of thousands of people.<sup>162</sup> Penalties for criminal offences included amputation, branding, and other forms of mutilation.<sup>163</sup> Whilst the victims of the regime’s human rights abuses were many and varied, Iraqi Kurds and Shi’a Muslims were singled out for persecution.

The persecution of Iraqi Kurds has been constant and systematic since the 1980s. In 1988 Iraq implemented a plan systematically to annihilate the Kurdish population.<sup>164</sup> In March 1988 a chemical attack on the city of Halabja caused the death of thousands of Kurds and injured tens of thousands.<sup>165</sup> Kurdish doctors believe that ‘up to ten percent of the population of northern Iraq — nearly four

<sup>158</sup> Cassese, ‘*Ex iniuria ius oritur*’, above n 156, 26.

<sup>159</sup> *Ibid* 26–7.

<sup>160</sup> Bureau of Democracy, Human Rights and Labor, Department of State (US), *Iraq: Country Reports on Human Rights Practices — 2001* (2002) <<http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8257.htm>> at 1 October 2003; Human Rights Watch, *Iraq: The Death Penalty, Executions, and ‘Prison Cleansing’* (Briefing Paper, March 2003) <<http://www.hrw.org/background/mena/iraq031103.htm>> at 1 October 2003. ‘Prison cleansing’ involved the execution of many detainees without trial.

<sup>161</sup> Human Rights Watch, *Iraq: The Death Penalty, Executions, and ‘Prison Cleansing’*, above n 160.

<sup>162</sup> ‘Iraqis Scour Mass Grave for Relatives’, *The Age* (Melbourne, Australia), 15 May 2003, 13.

<sup>163</sup> Joint Intelligence Committee, above n 76, 48.

<sup>164</sup> Posteraro, above n 71, 159.

<sup>165</sup> *Ibid* 158.

million people — have been exposed to chemical weapons.<sup>166</sup> The horrendous long-term effects of these chemical attacks are only beginning to surface.<sup>167</sup> Following the Gulf War in 1991, the Iraqi regime responded to a Kurdish uprising by murdering or imprisoning thousands of people.<sup>168</sup> Further, according to the UN Commission on Human Rights' Special Rapporteur for Iraq, since 1991 more than 94 000 Kurds have been expelled to areas under Kurdish control.<sup>169</sup> As well as attempting to eradicate the Kurds physically, the Iraqi government also launched a strategy to deny the Kurds their ethnic and cultural heritage.<sup>170</sup> Thus it is accurate to state that 'Hussein and his subordinates have slaughtered thousands of Kurds and left those who survived weak, diseased, infertile, and deprived of their identity and heritage'.<sup>171</sup>

Equally infamous as the persecution of Iraqi Kurds is the persecution of Shi'a Muslims who, like the Kurds, were the victims of an ethnic cleansing campaign.<sup>172</sup> During the 1980s, more than half a million Shi'a Muslims were expelled from Iraq.<sup>173</sup> In response to riots following the Gulf War the Iraqi regime killed thousands of Shi'a Muslims.<sup>174</sup> In addition to physical oppression, severe restrictions on religious rights represented a clear attempt to eliminate the religious and cultural identity of Shi'a Muslims.<sup>175</sup> The Marsh Arabs have been subjected to an even greater level of persecution than ordinary Shi'a Muslims. In addition to discriminatory legislation, mass arrests, enforced 'disappearances', forced transfers, the murder of unarmed civilians, torture and executions, the marshlands where they live have been drained, causing an ecological catastrophe and resulting in the destruction of their homeland.<sup>176</sup>

### C *The Legality of Humanitarian Intervention*

#### 1 *Introduction*

In its 2001 report entitled *The Responsibility to Protect*, the International Commission on Intervention and State Sovereignty ('ICISS') addressed the issue of 'when, if ever, it is appropriate for states to take coercive — and in particular military — action, against another state for the purpose of protecting people at risk in that other state'.<sup>177</sup> One question relating to the 2003 use of force against Iraq is whether the US and its allies were legally justified, on the grounds of humanitarian intervention, in using force against Iraq in the absence of a Security

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<sup>166</sup> Goldberg, above n 97, 57.

<sup>167</sup> Posteraro, above n 71, 159.

<sup>168</sup> Joint Intelligence Committee, above n 76, 45.

<sup>169</sup> As cited *ibid*.

<sup>170</sup> Posteraro, above n 71, 160–1.

<sup>171</sup> *Ibid* 161.

<sup>172</sup> UN SCOR, 58<sup>th</sup> sess, 4701<sup>st</sup> mtg, UN Doc S/PV.4701 (2003) 17.

<sup>173</sup> Human Rights Watch, *The Iraqi Government Assault on the Marsh Arabs* (2003) <<http://www.hrw.org/backgroundner/mena/marsharabs1.htm>> at 1 October 2003.

<sup>174</sup> Joint Intelligence Committee, above n 76, 46.

<sup>175</sup> Bureau of Democracy, Human Rights and Labor, Department of State (US), *Iraq: A Population Silenced* (2002) <<http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm>> at 1 October 2003.

<sup>176</sup> Human Rights Watch, *The Iraqi Government Assault on the Marsh Arabs*, above n 173.

<sup>177</sup> ICISS, *The Responsibility to Protect* (2001) vii.

Council resolution. In presenting his annual report on the work of the UN to the General Assembly in 1999, UN Secretary-General Kofi Annan powerfully articulated the quandary:

To those for whom the greatest threat to the future of international order was the use of force in the absence of a Council mandate, one might ask in the context of Rwanda: If a coalition of States had been prepared to act in defence of the Tutsi population, but had not received prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States could take military action outside the established mechanisms for enforcing international law, one might ask: Was there not a danger of such intervention undermining the security system created after the Second World War, and of setting dangerous precedents for future interventions?<sup>178</sup>

Thus an analysis of the legality of humanitarian intervention involves an analysis of the balance that international law strikes between the doctrines of sovereignty and peace on the one hand, and the doctrines of human rights protection and justice on the other. It seems that, where there is a conflict between the two, the balance is shifting away from sovereignty and towards human rights protection.

## 2 *A Non-Legal Perspective*

Whilst the doctrine of humanitarian intervention gives rise to numerous complex questions regarding legality, perspectives on the legality of humanitarian intervention are in part shaped by moral, philosophical and practical considerations. Consequently, an analysis of the legality of humanitarian intervention must include a discussion of these factors.

### (a) *Justifications For a Doctrine of Humanitarian Intervention*

In the aftermath of World War II, the international community confronted the reality that human rights abuses had been perpetrated on a scale never seen or experienced before. With the formation of the UN, a system of collective security was established to ensure that the world would never again bear witness to another Holocaust. However, many of those who propound the legitimacy of humanitarian intervention base their arguments on the premise that, whereas the Security Council is empowered to authorise humanitarian intervention in cases of fundamental breaches of human rights, it cannot be relied upon to do so.<sup>179</sup> The 1994 genocide in Rwanda is simply one example of the failure of the Security Council to protect the vulnerable. For proponents of humanitarian intervention, such intervention, whilst arguably legally justified, has its basis in moral and philosophical convictions. As D'Amato states, 'there are times of severe moral duty where any nation that has the requisite military force should step up and prevent the slaughter'.<sup>180</sup>

<sup>178</sup> UN GAOR, 54<sup>th</sup> sess, 4<sup>th</sup> plen mtg, Agenda Item 10, UN Doc A/54/PV.4 (1999) 2.

<sup>179</sup> Barry Benjamin, 'Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities' (1992) 16 *Fordham International Law Journal* 120, 140–1.

<sup>180</sup> Anthony D'Amato, 'There is No Norm of Intervention or Non-Intervention in International Law' (2001) 7 *International Legal Theory* 33, 35.

For some, there is no conflict between the notion of sovereignty and the doctrine of humanitarian intervention. Scholars such as Luban and Teson subscribe to the Kantian belief that individuals, rather than states, should be the subjects of international law and that a state's legitimacy rests upon the way in which it protects and enforces the natural rights of its citizens.<sup>181</sup> Others view justice as a cause for which it is worth sacrificing other fundamental values. In the words of St Augustine, saving 'the innocent from certain harm' is a cause for which the pursuit of justice may override the reluctance to use force.<sup>182</sup> Likewise, in weighing up competing values Arntz states that 'however worthy of respect the rights of sovereignty and independence of states may be, there is something even more worthy of respect, namely the law of humanity or of human society that must not be violated.'<sup>183</sup> This argument has been taken even further by those who emphasise the legitimacy of humanitarian intervention, irrespective of its legality. For example, Lillich states, '[s]urely to require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress blackletter [law] at the expense of far more fundamental values'.<sup>184</sup>

(b) *Rationales for Opposing a Doctrine of Humanitarian Intervention*

Just as the view that humanitarian intervention is legal is supported by a number of moral, philosophical and practical rationales, so too is the orthodox contention that humanitarian intervention is illegal. Those who oppose the notion of humanitarian intervention frequently contend that humanitarian intervention is an asymmetrical right that allows powerful nations to maintain their dominance and infringe upon the sovereignty of the weak.<sup>185</sup> It allows the powerful to gain more power and a greater capacity to abuse that power.<sup>186</sup> Given that all states commit human rights violations to some extent, sanctioning humanitarian intervention could give powerful states a permanent excuse to intervene in the affairs of weaker states.<sup>187</sup> According to Human Rights Watch, 'a common concern is that military intervention might become a pretext for military adventures in pursuit of ulterior motives.'<sup>188</sup> As Falk states, '[h]umanitarian factors are rarely, if ever, decisive in shaping an interventional decision of any

<sup>181</sup> See, eg, Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988) 15.

<sup>182</sup> St Augustine of Hippo, 'Against Faustus the Manichean XXII. 73–79' in Ernest Fortin and Donald Kries (eds), *Augustine: Political Writings* (Michael Tkacz and Donald Kries trans, 1994) 220.

<sup>183</sup> Rolin-Jacquemys, 'Note sur la Théorie du Droit d'Intervention' (1876) 8 *Revue de Droit International et de Legislation Comparée* 675, quoted in 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, 220.

<sup>184</sup> Richard Lillich, 'Forcible Self-Help by States to Protect Human Rights' (1967) 53 *Iowa Law Review* 325, 344.

<sup>185</sup> Jianming Shen, 'The Non-Intervention Principle and Humanitarian Interventions under International Law' (2001) 7 *International Legal Theory* 1, 10.

<sup>186</sup> Michael Ignatieff, 'Whose Universal Values? The Crises in Human Rights', extracted in Henry Steiner and Philip Alston, *International Human Rights in Context* (2<sup>nd</sup> ed, 2000) 657.

<sup>187</sup> T Modibo Ocran, above n 10, 11.

<sup>188</sup> Human Rights Watch, 'Introduction' in *World Report 2000* (2000) <<http://www.hrw.org/wr2k/Front.htm>> at 1 October 2003.

magnitude.<sup>189</sup> The 2003 use of force against Iraq is arguably a case in point. Saddam Hussein's regime had been committing grave human rights abuses for over a decade, yet it was only when the US perceived Iraq as a threat to its security that the intervention took place, with rhetoric of humanitarian intervention aiding the US in garnering international support.

The selective application of humanitarian intervention has also been raised as a cause for concern on the ground that it undermines the fundamental principle of equality before the law.<sup>190</sup> After all, whereas NATO 'saved' the people of Kosovo, the people of Tibet have yet to be 'liberated'. Further, whilst purporting to protect certain human rights, humanitarian intervention may violate other human rights. For example, Western nations acting under the guise of humanitarian intervention may be viewed as 'imperial policemen', imposing their culture upon the people they purport to liberate.<sup>191</sup> Once again, this very issue is of concern in the context of the post-war reconstruction of Iraq. Thus it seems that, whilst the notion of humanitarian intervention clearly appeals to one's conscience and sense of justice, there are also well-founded moral, philosophical and practical reasons supporting its illegitimacy.

### 3 *The UN Charter*

#### (a) *The View that Humanitarian Intervention is Legal*

There are many who claim that, as well as being legitimate, humanitarian intervention is also legal. Those who claim humanitarian intervention is legal frequently cite the purposes of the *UN Charter*.<sup>192</sup> Article 1(3) states that a purpose of the UN is 'to achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Indeed, the *Charter's* preamble 'reaffirm[s] faith in fundamental human rights'. Article 13(1)(b) empowers the General Assembly to assist 'in the realization of human rights', and art 55(c) calls on the UN to promote 'universal respect for, and observance of, human rights and fundamental freedoms'. Article 62(2)

<sup>189</sup> Richard Falk, 'The Complexities of Humanitarian Intervention: A New World Order Challenge' (1996) 17 *Michigan Journal of International Law* 491, 504.

<sup>190</sup> Dino Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention' (1998) 19 *Michigan Journal of International Law* 1005, 1026.

<sup>191</sup> Ignatieff, above n 186, 657.

<sup>192</sup> Whilst there are many instruments besides the *UN Charter* that emphasise the importance of protecting human rights, this section focuses on the *Charter*, because arguments that negate the legality of humanitarian intervention frequently focus on the words of the *Charter*, as opposed to other international instruments. Further, *UN Charter* art 103 states that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present *Charter* and their obligations under any other international agreement, their obligations under the present *Charter* shall prevail.' Thus the *UN Charter*, as well as the obligations arising under it, are deemed a 'higher law' vis-a-vis all other treaty commitments of UN member states: Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1, 5. Examples of instruments other than the *Charter* that focus on the protection of human rights are the *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (1948) and the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

empowers the Economic and Social Council to ‘make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all’ and art 68 enables the Council to ‘set up commissions ... for the promotion of human rights’.<sup>193</sup> In light of these provisions, it is clear that the *UN Charter* is concerned with the protection of human rights, and it is certainly arguable that in certain cases humanitarian intervention is consistent with the objectives of the *UN Charter*.<sup>194</sup>

Whilst those denying the legality of humanitarian intervention frequently cite art 2(4) of the *UN Charter* to justify their position, it is arguable that a careful reading of art 2(4) in fact allows for the use of force in cases of humanitarian intervention. 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, or in any other manner inconsistent with the Purposes of the United Nations.

As has been explained above, humanitarian intervention can be interpreted as according with the purposes of the UN. Further, it has been argued that ‘a genuine humanitarian intervention does not result in territorial conquest or political subjugation’.<sup>195</sup> According to D’Amato, the rule that states must refrain from using force against the territorial integrity of another state means that ‘a state’s territory must be kept integral — that is, no parts of it may be forcibly separated and given over to another state’.<sup>196</sup> Thus it is arguable that, provided the territorial boundaries of the target state are maintained, humanitarian intervention does not constitute a breach of art 2(4).<sup>197</sup> It is also arguable that the political independence of a state refers to the right of the people of a state to political independence. On this view, a humanitarian intervention aimed at protecting the people would affirm the state’s political independence, rather than violate it.<sup>198</sup> Some have extrapolated this view to conclude that, even if the government of the target state is overthrown, the political independence of the target state is not threatened. This is because by oppressing its people, the government is viewed as having forfeited its legitimacy.<sup>199</sup>

(b) *The View that Humanitarian Intervention is Illegal*

The formulation of an argument supporting the contention that humanitarian intervention is legal may appeal to one’s sense of justice and compassion. However, it is arguable that such an approach does not accord with a commonsense construction of the *UN Charter*. Whereas the *Charter* does not

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<sup>193</sup> It should be noted that the articles listed here are not a comprehensive list of all the articles of the *UN Charter* that advocate the protection of human rights.

<sup>194</sup> Arend, above n 95, 748.

<sup>195</sup> Teson, above n 181, 131.

<sup>196</sup> D’Amato, above n 180, 39.

<sup>197</sup> Benjamin, above n 179, 141.

<sup>198</sup> Arend, above n 95, 749.

<sup>199</sup> Benjamin, above n 179, 141. This accords with the view of the ICISS that ‘sovereign states have a responsibility to protect their own citizens from avoidable catastrophe — from mass murder and rape, from starvation — but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states’: ICISS, above n 177, vii.

specifically mention humanitarian intervention, the twin notions of sovereignty and non-intervention are clearly inscribed therein. As Lillich has stated:

Two provisions make it very doubtful whether forcible self-help to protect human rights is still permissible under international law. In the first place, all states by Article 2(4) renounce 'the threat or use of force against the territorial integrity or political independence of any state' subject of course to the self-defence provision contained in Article 51. Secondly, Article 2(7) prevents intervention by the United Nations 'in matters which are essentially within the domestic jurisdiction of any state' except for the application of enforcement measures under Chapter VII.<sup>200</sup>

Article 2(4) is essentially a prohibition on the use of force. In fact, the *travaux préparatoires* suggest that art 2(4) was intended to operate as an absolute prohibition on the use of force.<sup>201</sup> As Brownlie has stated, 'it is extremely doubtful if ... [humanitarian intervention] has survived ... the general prohibition of resort to force to be found in the *United Nations Charter*'.<sup>202</sup> Thus the words of art 2(4) should be read in this context and should not be manipulated to reveal an exception to the prohibition that is not evident from a plain reading of the words. 'Political independence' is a broad term, the ordinary meaning of which does not simply refer to a state's government but encompasses a state's 'political integrity, dignity and sovereignty'.<sup>203</sup> Likewise, 'territorial integrity' does not only refer to the 'inalienability of a State's territory' but refers to the 'territorial sovereignty, dignity and inviolability of a State'.<sup>204</sup> In fact, the *travaux préparatoires* indicate that phrases such as 'territorial integrity' were added to art 2(4) to 'close all potential loopholes in its prohibition on the use of force, rather than to open new ones'.<sup>205</sup> Further, the preamble of the *Charter* affirms the UN's commitment 'to save succeeding generations from the scourge of war' and art 1(1) specifically stipulates that a purpose of the UN is 'to maintain international peace and security'. Whilst the protection of human rights is also a primary purpose of the UN, it is subsidiary to the purpose of limiting the use of force.<sup>206</sup> As Cassese states, '[u]nder the *UN Charter* system ... respect for human rights and self-determination of peoples, however important and crucial it may be, is never allowed to put peace in jeopardy'.<sup>207</sup> Thus it seems that the *UN Charter* prohibits humanitarian intervention in circumstances where there is no Security Council resolution authorising the use of force.<sup>208</sup>

<sup>200</sup> Richard Lillich, 'Intervention to Protect Human Rights' (1969) 15 *McGill Law Journal* 205, 210–11. Article 2(7) is not applicable to the subject matter of this article as the intervention in Iraq was a unilateral intervention, as opposed to a UN authorised intervention.

<sup>201</sup> Celeste Poltak, 'Humanitarian Intervention: A Contemporary Interpretation of the *Charter of the United Nations*' (2002) 60 *University of Toronto Law Review* 1, 8.

<sup>202</sup> Brownlie, above n 116, 342.

<sup>203</sup> Shen, above n 185, 26.

<sup>204</sup> *Ibid* 26–7.

<sup>205</sup> Jonathan Charney, 'Editorial Comments: NATO's Kosovo Intervention — Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 *American Journal of International Law* 834, 835. See also Simma, *The Charter: A Commentary* (2<sup>nd</sup> ed, 2002), above n 136, 123–4.

<sup>206</sup> Charney, above n 205, 835. See also Simma, *The Charter: A Commentary* (2<sup>nd</sup> ed, 2002), above n 136, 123.

<sup>207</sup> Cassese, '*Ex iniuria ius oritur*', above n 156, 25.

<sup>208</sup> Arend, above n 95, 748. See also Simma, *The Charter: A Commentary* (2<sup>nd</sup> ed, 2002), above n 136, 130–1.

## 4 Customary International Law

## (a) Overview

Whilst the *UN Charter* itself is a fundamental source of international law, it is also a living document that must be interpreted in light of developments in customary international law.<sup>209</sup> Thus it is necessary to consider whether developments in customary international law have resulted in a modification of the general prohibition on the use of force.<sup>210</sup> For actions to amount to custom under international law, they must constitute settled practice, there must be ‘evidence of a belief that this practice is rendered obligatory’ (*opinio juris*), and the practice must have been in place for a sufficient period of time.<sup>211</sup>

Past resolutions and declarations of the General Assembly demonstrate widespread international opposition to a rule allowing humanitarian intervention.<sup>212</sup> For example, despite India’s claim that its 1971 intervention in East Pakistan was humanitarian in nature, it was nonetheless condemned by a large majority of the members of the General Assembly.<sup>213</sup>

In *Nicaragua*, the ICJ stated that:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law ... [t]he existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice.<sup>214</sup>

Moreover, the prohibition on the use of force is not merely an ordinary custom, but reflects a norm of *jus cogens*.<sup>215</sup> As a norm of *jus cogens* — a norm of such importance from which no derogation is permitted — modification is only possible with the crystallisation of a subsequent norm of the same peremptory character.<sup>216</sup> Such a subsequent norm has not come into being.<sup>217</sup>

However, it appears that

a large and growing gap has been developing between international behaviour as articulated in the state-centred *UN Charter*, which was signed in 1946, and

<sup>209</sup> Peter Hilpold, ‘Humanitarian Intervention: Is There a Need for a Legal Appraisal?’ (2001) 12 *European Journal of International Law* 437, 443.

<sup>210</sup> *Ibid.*

<sup>211</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits)* [1969] ICJ Rep 4, [77]; and see generally [74]–[77]. Each of these elements is subject to various interpretations. For a detailed discussion of what constitutes a custom under international law: see Harris, above n 154, 23–45.

<sup>212</sup> Charney, above n 205, 837.

<sup>213</sup> Charney, above n 205, 836. See also *Resolution 2793*, GA Res 2793 (XXVI), UN GAOR, 26<sup>th</sup> sess, 2003<sup>rd</sup> plen mtg, UN Doc A/RES/2793 (XXVI) (1971). ‘The resolution called on both India and Pakistan to withdraw troops from the other’s territory but it was clearly directed against the Indian forces in East Pakistan. India strongly opposed the resolution but it was carried by 104 to 11’: Oscar Schachter, ‘International Law: The Right of States to Use Armed Force’ (1984) 82 *Michigan Law Review* 1620, 1629.

<sup>214</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [202].

<sup>215</sup> Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *European Journal of International Law* 1, 5.

<sup>216</sup> *Ibid.* 3.

<sup>217</sup> *Ibid.* 1.

evolving state practice since then, which now emphasizes the limits of sovereignty.<sup>218</sup>

Indeed, the Netherlands has specifically stated that there exists a ‘rule, now generally accepted in international law, that no sovereign state has the right to terrorise its citizens’.<sup>219</sup> Therefore, it is highly arguable that even if the *Charter*, as originally framed, did not contemplate humanitarian intervention as an exception to the prohibition on the use of force, such an exception is in the process of evolving in customary international law.

(b) *The Case of Kosovo*

The 1999 NATO intervention in Kosovo is frequently cited as the illustration of the evolution of a custom of humanitarian intervention. In response to a situation where the Security Council failed to pass a resolution authorising the use of force in the face of gross human rights abuses perpetrated by Serbia against Kosovo Albanians, NATO began air strikes in the name of humanitarian intervention.<sup>220</sup> In the words of UK Ambassador to the UN Sir Jeremy Greenstock, the use of force was ‘directed exclusively to averting a humanitarian catastrophe’.<sup>221</sup> Indeed, the states that participated in the military action, as well as other states, agreed that resort to force was a necessary response to ‘egregious breaches of human rights’.<sup>222</sup> In courageously tackling the issue of legality, the Netherlands specifically ‘pointed out that “the *Charter* is not the only source of international law”, thus implying that general norms may exist, or be in a nascent state, outside the *Charter*’.<sup>223</sup> The Non-Aligned Movement expressed no explicit or implicit condemnation of the NATO intervention,<sup>224</sup> and in a statement concerning the situation in Kosovo issued by a group of Latin American states, there was no explicit condemnation of the NATO action.<sup>225</sup> The general opinion of states may also be gleaned from the fact that the Security Council ‘defeated resoundingly a vote of censure of NATO’s intervention in Kosovo’.<sup>226</sup> Further, although he does not represent a state, it is clearly relevant that UN Secretary-General Kofi Annan implicitly endorsed the air strikes.<sup>227</sup>

<sup>218</sup> Gareth Evans and Mohamed Sahnoun, ‘The Responsibility to Protect’ (2002) 81(6) *Foreign Affairs* 99.

<sup>219</sup> Antonio Cassese, ‘A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*’ (1999) 10 *European Journal of International Law* 791, 795.

<sup>220</sup> It should be noted that the UN Security Council was paralysed as Russia made it clear that it would veto any Council resolution authorising the use of force: Henry Steiner and Philip Alston, *International Human Rights in Context* (2<sup>nd</sup> ed, 2000) 654.

<sup>221</sup> UN SCOR, 54<sup>th</sup> sess, 3988<sup>th</sup> mtg, UN Doc S/PV.3988 (1999) 12.

<sup>222</sup> Cassese, ‘A Follow-Up’, above n 219, 793. The view that the intervention in fact exacerbated the commission of human rights abuses in Kosovo should also be noted: Charney, above n 205, 840.

<sup>223</sup> Cassese, ‘A Follow-Up’, above n 219, 795, quoting UN SCOR, 54<sup>th</sup> sess, 4011<sup>th</sup> mtg, UN Doc S/PV.4011 (1999) 12.

<sup>224</sup> Christopher Joyner and Anthony Arend, ‘Anticipatory Humanitarian Intervention: An Emerging Legal Norm?’ (1999–2000) 10 *United States Air Force Academy Journal of Legal Studies* 27, 40.

<sup>225</sup> *Communiqué Issued on 25 March 1999 by the Rio Group*, annexed to Letter from the Permanent Representative of Mexico to the UN to the UN Secretary-General, 26 March 1999, UN GAOR, 53<sup>rd</sup> sess, UN Doc A/53/884 (1999).

<sup>226</sup> Franck, above 72, 65.

<sup>227</sup> Joyner and Arend, above n 224, 41.

However, whilst the NATO intervention in Kosovo has, with hindsight, been held up as the quintessential example of humanitarian intervention, it is interesting to note that at the time of the intervention NATO did not justify its actions in terms of humanitarian intervention. In fact, NATO did not justify the intervention on the basis of any specific rule of law.<sup>228</sup> Indeed, few of the states that participated in the military intervention in Kosovo definitively asserted a general legal right or obligation of humanitarian intervention to justify the use of force. The US repeatedly referred to 'humanitarian concerns' but never actually claimed the existence of a customary rule.<sup>229</sup> In fact, then US Secretary of State Madeleine Albright asserted that Kosovo was 'a unique situation *sui generis* in the region of the Balkans' and that it was important 'not to overdraw the lessons that come out of it.'<sup>230</sup> Similarly, in approving German participation in the NATO intervention, the Bundestag stressed that the intervention should not be viewed as a precedent to justify similar future interventions.<sup>231</sup> Consequently, whilst humanitarian intervention has become the retrospective catchcry used to justify the NATO intervention in Kosovo, it does not seem as though the intervening states in general viewed the intervention as being legally obligatory. Nevertheless, whilst in the case of Kosovo there may not have been a belief that humanitarian intervention was a legal necessity, the intervention was certainly regarded as being of moral necessity. According to Cassese:

There is room for the view that the birth of a customary rule must not always be ascertained by searching for *opinio iuris*, namely the conviction of states that they must behave in a certain manner because they are so obliged by a general legal norm. In many instances, the conduct of states is clearly in breach of existing law. Such states nevertheless consider it to be politically, economically or morally necessary to act in such manner. For these cases one may instead speak of *opinio necessitatis*.<sup>232</sup>

Thus whilst the element of *opinio iuris* may be lacking, the case of Kosovo is illustrative of a strong and widespread *opinio necessitatis*.<sup>233</sup>

(c) *Summation*

Since the inception of the *UN Charter*, states have claimed humanitarian intervention to justify breaches of the fundamental international law principles of sovereignty and non-intervention. Yet for the first time since the formation of the *UN Charter*, the NATO intervention in Kosovo represented an intervention by a recognised multilateral organisation in the affairs of another state for no obvious reason besides humanitarian concerns in the face of a paralysed Security Council. However, despite evidence of *opinio necessitatis* in the case of Kosovo, one cannot regard the psychological element of customary international law as having come to fruition, 'as it does not yet possess ... the requisite elements of

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<sup>228</sup> Charney, above n 205, 836.

<sup>229</sup> Byers, above n 109, 405.

<sup>230</sup> Press Conference with US Secretary of State Madeleine Albright and Russian Minister of Foreign Affairs Igor Ivanov (Singapore, 26 July 1999) <<http://secretary.state.gov/www/statements/1999/990726b.html>> at 1 October 2003.

<sup>231</sup> Simma, 'NATO, the UN and the Use of Force: Legal Aspects', above n 215, 13.

<sup>232</sup> Cassese, 'A Follow-Up', above n 219, 797.

<sup>233</sup> *Ibid* 797–8.

generality and non-opposition'.<sup>234</sup> Further, the fundamental element of state practice (*usus*) has clearly not been established.<sup>235</sup> Nevertheless, whilst it is premature to assert that there has been a crystallisation of a custom of humanitarian intervention, the NATO intervention in Kosovo is representative of the transformation currently taking place within international law. The focus on states is moving towards a focus on the individual and the focus on sovereignty is moving towards a focus on human rights protection.

## 5 Conclusion

The issue of whether humanitarian intervention is legal gives rise to many complex considerations. Even if one assumes that the establishment of a norm of humanitarian intervention is justified on moral, philosophical and practical grounds, one must nevertheless accept that humanitarian intervention is not clearly legal pursuant to the words of the *UN Charter*. This conflict has resulted in the posing of difficult philosophical questions. Cassese has asked:

should one sit idly by and watch thousands of human beings being slaughtered or brutally persecuted? Should one remain silent and inactive only because the existing body of international law proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of human compassion?<sup>236</sup>

An honest appraisal of the law reveals that the *UN Charter* probably does not allow for humanitarian intervention as an exception to the prohibition on the use of force. However, the NATO intervention in Kosovo is illustrative of the fact that state practice and belief are developing in such a way as to indicate the beginnings of a custom allowing for humanitarian intervention in certain circumstances.

### D *The Fundamental Criteria of a Future Norm of Humanitarian Intervention*

ICISS has supported the application of the doctrine of humanitarian intervention in exceptional circumstances that 'shock the conscience of mankind'.<sup>237</sup> However, according to ICISS, for humanitarian intervention to be an appropriate mechanism of resolving a situation where fundamental human rights are being violated, a number of criteria must be satisfied. First, the element of 'right authority' must be satisfied. Second, there must be 'just cause' to intervene. Third, the intervening state must intervene with the 'right intention'. Fourth, humanitarian intervention must be a measure of 'last resort'. Fifth, proportional means must be used and finally, there must be reasonable prospects of success.<sup>238</sup>

ICISS is clear in its view that whilst the preferable means of initiating a humanitarian intervention is with the authorisation of the UN Security Council

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<sup>234</sup> Ibid 798.

<sup>235</sup> Ibid 796. For an analysis endorsing the notion that there is no existing custom supporting the doctrine of humanitarian intervention, see also Simma, *The Charter: A Commentary* (2<sup>nd</sup> ed, 2002), above n 136, 130–1.

<sup>236</sup> Cassese, '*Ex iniuria ius oritur*', above n 156, 25.

<sup>237</sup> ICISS, above n 177, [4.10]–[4.14].

<sup>238</sup> Ibid [4.10]–[4.43].

— and if not the Security Council, then the General Assembly — it does not discount the possibility of a coalition of states engaging in a legitimate humanitarian intervention, even if that coalition does not constitute a recognised international organisation.<sup>239</sup>

ICISS has determined that, to justify a breach of the principle of non-intervention, there must be a large scale ‘loss of life’ or large scale ‘ethnic cleansing’.<sup>240</sup> These terms are broadly defined.<sup>241</sup> Therefore, it is submitted that in light of the facts set out above<sup>242</sup> and other evidence that clearly establishes the brutal nature of the Iraqi regime, the ‘just cause’ criterion can be made out as regards the use of force against Iraq.

However, it is doubtful whether the ‘right intention’ criterion can be made out, as the primary purpose of the war against Iraq was to remove the perceived threat of WMD and terrorism. US Deputy Defense Secretary Paul Wolfowitz has stated that, ‘for bureaucratic reasons, we settled on one issue, weapons of mass destruction, because it was the one ... everyone could agree on’.<sup>243</sup> Whilst it may have been a subsidiary purpose, the main purpose of the use of force against Iraq was not ‘to halt or avert human suffering’.<sup>244</sup> If the US was primarily concerned about halting human rights abuses in Iraq, it would not have knowingly allowed devastating human rights abuses to occur following the Gulf War.

Further, the US has not illustrated that ‘every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis’ was explored.<sup>245</sup> The covert nature of the relationship between Iraq and al-Qaeda meant that conventional political solutions were not available to extinguish the threat of terrorism. However, the same reasoning does not apply to the halting of human rights abuses which were relatively overt and, to a large extent, undeniable. The Kosovo crisis is an example of a situation whereby ‘peaceful means ... had been tried and exhausted by the various countries concerned, through the negotiations promoted by the states comprising the Contact Group for the Former Yugoslavia, and at Rambouillet, and later Paris’.<sup>246</sup> In contrast, the US has not shown that it engaged in extensive negotiations in an attempt to improve the human rights predicament in Iraq.

Moreover, whilst the military intervention in Iraq clearly stood ‘a reasonable chance of success’,<sup>247</sup> it is unlikely that the scale and intensity of the intervention would be regarded as ‘the minimum necessary to secure the humanitarian objective’,<sup>248</sup> especially given that a considerable number of Iraqis were killed

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<sup>239</sup> Ibid ch 6.

<sup>240</sup> Ibid [4.19].

<sup>241</sup> Ibid [4.18]–[4.31].

<sup>242</sup> See above Part V(B).

<sup>243</sup> Grattan, above n 75, 1.

<sup>244</sup> ICISS, above n 177, [4.33].

<sup>245</sup> Ibid vii.

<sup>246</sup> Cassese, ‘*Ex iniuria ius oritur*’, above n 156, 28. The view that flexible diplomacy to bring about the cessation of human rights abuses in Kosovo was not pursued should be noted: Richard Falk, ‘Editorial Comments: NATO’s Kosovo Intervention — Kosovo, World Order, and the Future of International Law’ (1999) 93 *American Journal of International Law* 847, 855.

<sup>247</sup> ICISS, above n 177, [4.41].

<sup>248</sup> Ibid [4.39].

and injured during Operation Iraqi Freedom.<sup>249</sup> In addition, as the US did not evince a clear commitment to resolving the human rights crises in Iraq by peaceful or less forceful means, it has not demonstrated that military intervention in Iraq was the mechanism of least gravity and intrusiveness necessary to bring human rights violations to a halt. Therefore, the US did not discharge its onus of illustrating that the intervention in Iraq was a genuine humanitarian intervention pursuant to the ICISS criteria. Consequently, it is reasonable to presume that even if a norm of customary international law providing for humanitarian intervention had already crystallised, the use of force against Iraq would not fall within the necessary criteria for establishing a legal humanitarian intervention.<sup>250</sup>

### E *A Different Conception of Humanitarian Intervention*

In his 2003 State of the Union address, President Bush proclaimed, '[i]f Saddam Hussein does not fully disarm, for the safety of our people and for the peace of the world, we will lead a coalition to disarm him'.<sup>251</sup>

Humanitarian intervention is traditionally understood to be 'coercive action against a state to protect people within its borders from suffering grave harm'.<sup>252</sup> In declaring that the use of force against Iraq would be a measure employed not just to protect US citizens and Iraqis, but to protect the citizens of the world, the US President was advancing a relatively novel approach to the traditional doctrine of humanitarian intervention. Such an extension of the traditional doctrine would result in the notion of humanitarian intervention including not just interventions to protect people within a state from suffering grave harm, but interventions to protect the global community from suffering grave harm. As discussed above, WMD can be speedily delivered and have the potential to inflict horrendous damage with a single strike. As such, the use of WMD by a state of concern or a terrorist group linked with such a state would potentially constitute a war crime as well as a crime against humanity.<sup>253</sup>

Article 7 of the *Rome Statute of the International Criminal Court* details the elements of various crimes against humanity.<sup>254</sup> The use of WMD by a state of concern, or a terrorist group linked with such a state, could potentially constitute the crimes against humanity of murder, extermination, torture, persecution, and other inhumane acts. Article 8 of the *Rome Statute* details the elements of various war crimes. The delivery of WMD by a state of concern or a terrorist group linked with such a state, in a situation of international armed conflict, could potentially constitute numerous war crimes, including wilful killing, inhumane

<sup>249</sup> Amnesty International, *Iraq: Civilians Under Fire* (2003) <<http://web.amnesty.org/library/print/engmde140712003>> at 1 October 2003.

<sup>250</sup> It should be noted that others, such as Antonio Cassese, have suggested criteria by which to measure the legality of a humanitarian intervention: Cassese, 'Ex iniuria ius oritur', above n 156, 30. However, it is unlikely that the use of force against Iraq would fall within most other recognised criteria.

<sup>251</sup> Bush, 'State of the Union Address', above n 5.

<sup>252</sup> Evans and Sahnoun, above n 218, [1].

<sup>253</sup> However it should be noted that the ICJ has stated that 'it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake': *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [97].

<sup>254</sup> Opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002) ('*Rome Statute*').

treatment, wilfully causing great suffering, attack of civilians and excessive incidental death, injury, or damage. It could also potentially constitute the war crimes of biological experiments, employing poison or poisoned weapons, and employing prohibited gases, liquids, materials or devices.

Given the gravity of the offences, it is conceivable that the mere reasonable subjective apprehension of a state that a state of concern possesses WMD and may use those weapons, or allow terrorists to access them, is enough to constitute a threat to international peace and security. For example, it is arguable that by invading Iraq the US responded to a threat to international peace and security based upon the reasonable belief of the US that Iraq possessed WMD and would use those weapons. On this basis it is contended that a change is taking place whereby the mere possession of WMD by a state of concern may in time be sufficient to constitute a threat to international peace and security which is serious enough to justify a military intervention aimed at protecting the international community and ensuring that the threat does not come to fruition.

After Kosovo, the world began to consider seriously the legality of a humanitarian intervention aimed at protecting the human rights of individuals within a state, where that state is responsible for the commission of grave human rights abuses.<sup>255</sup> After Iraq, the world must consider the possible future legality of a humanitarian intervention aimed at protecting individuals in any state, on any continent, from being subjected to the devastating consequences of successfully delivered WMD. Such a humanitarian intervention currently does not constitute a custom of international law, but the words and actions of the US and its allies go some way towards encouraging the development of such a custom.

#### F *Summation*

The US and its coalition partners employed the doctrine of humanitarian intervention as part of their justification for the use of force against Iraq. It is undeniable that the Hussein regime committed horrendous and wide-scale human rights violations. At the same time, a proper construction of the *UN Charter* indicates that, on balance, humanitarian intervention is illegal. However, whilst there are non-legal, as well as legal, justifications for maintaining the illegal nature of humanitarian intervention, the will of the international community seems to be moving towards an approach according to which human rights protection and justice prevail over sovereignty and peace. In conjunction with this shift in values, a shift in state practice and belief is also emerging, as evidenced by the NATO intervention in Kosovo. Consequently, it seems that as with the law of self-defence, the law relating to humanitarian intervention is currently undergoing a paradigm shift. A new rule of customary international law is beginning to emerge, allowing one or more states to militarily intervene in the affairs of another state where grave human rights abuses are being perpetrated within that state. Nevertheless, even if such a custom should crystallise, it is highly unlikely that the use of force against Iraq would fall within the criteria established by ICISS for a legitimate humanitarian intervention. However,

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<sup>255</sup> The NATO intervention in Kosovo was the major catalyst for the establishment of the ICISS, whose report supports the legality of humanitarian intervention within carefully defined criteria: ICISS, above n 177, vii–viii.

following the use of force against Iraq, the evolving custom of humanitarian intervention may be developing in such a way as to allow for a humanitarian intervention based on the reasonable subjective belief that a state of concern's possession of WMD poses a threat to international peace and security.

## VI CONCLUSION

In this article, three arguments have been advanced in support of the proposition that the 2003 use of force against Iraq by the US and its allies accorded with the body of international law known as *jus ad bellum*. Whilst there is some authority to support the first argument — that the use of force was authorised by existing UN Security Council resolutions — the dominant view is that such an argument is legally flawed, and that the use of force against Iraq was not authorised by existing UN Security Council resolutions.

The second argument — that the US resorted to the use of force in self-defence — is also flawed pursuant to prevailing understandings of the law of self-defence. However, as a result of increasing global concern relating to the growing threat of terrorism combined with WMD, international law is currently undergoing a paradigm shift. As the nature of the game is changing, so too must the rules. In time, the law may shift to such an extent that the reasonable subjective belief of a state that a threat exists may be sufficient to constitute an 'imminent threat' for the purposes of the law of self-defence. At present, this is not the law. Thus, the use of force against Iraq did not fall within the legal requirements of self-defence.

The third argument — that the use of force against Iraq constituted a humanitarian intervention — is perhaps the most controversial given that humanitarian intervention is not referred to in the *UN Charter* as being an exception to the general prohibition on the use of force. Nevertheless, as with the law of self-defence, international law relating to humanitarian intervention is currently undergoing a similar transformation as the orthodox framework is beginning to give way to a framework for the new century. A custom allowing for humanitarian intervention, as conventionally understood, seems to be evolving. It is unlikely that the use of force against Iraq would fall within the requisite criteria as formulated by ICISS. However, it is arguable that customary international law is evolving to such an extent as to allow for a humanitarian intervention based on the reasonable subjective belief of a state that a state of concern possesses WMD or supports terrorism so as to constitute a threat to international peace and security. Despite indications that this may become the law, at present it is not. Thus the use of force against Iraq was not legal pursuant to the doctrine of humanitarian intervention.

[W]e have evidence with some few plants, of their becoming, to a certain extent, naturally habituated to different temperatures; that is, they become acclimatised.<sup>256</sup>

Just as plants and animals must adapt to the changing nature of their environment in order to survive, the law must adapt to changing social, political and technological factors in order to remain relevant.

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<sup>256</sup> Darwin, above n 3, 112.

[I]t is well known to furriers that animals of the same species have thicker and better fur the further north they live; but who can tell how much of this difference may be due to the warmest-clad individuals having been favoured and preserved during many generations, and how much to the action of the severe climate?<sup>257</sup>

Whilst the use of force against Iraq was probably illegal according to the traditional understanding of international law, the law is in the process of changing. What remains undetermined is whether, ultimately, change will be propelled by US might or by a global consensus on what is right.

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<sup>257</sup> Ibid 107.