

FEATURE

LAWLESS WORLD: INTERNATIONAL LAW AFTER SEPTEMBER 11, 2001 AND IRAQ*

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I INTRODUCTION

Until recently, the subject of international law remained in the margins. It would not have been an area which would have detained many lawyers who trained at this Law School, at least in their day-to-day practice.

When I was invited to give this year's Melbourne Law School Alumni lecture, late in 2004, issues of international law were already much in the air, certainly in Britain, and also in Australia. The *Convention relating to the Status of Refugees*,¹ the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*² and the legality of the war in Iraq are issues that were receiving considerable attention. But I doubt that anyone could have imagined that the run-up to Britain's May 2005 General Election would be defined by arcane issues of international law: did the authorisation to use force against Iraq under Security Council *Resolution 678*³ of 1991 revive in March 2003? Was the British Prime Minister entitled to determine that Iraq was in material breach of its

* This article is based on the Law School Alumni Lecture, delivered at the University of Melbourne Law School on 15 June 2005, and on the Mischon Lecture given in London on 12 May 2005.

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¹ Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

² Opened for signature 16 March 1998, 37 ILM 22 (entered into force 16 February 2005) ('*Kyoto Protocol*').

³ SC Res 678, UN SCOR, 55th sess, 2963rd mtg, UN Doc S/RES/678 (29 November 1990).

Security Council obligations? Did the British Prime Minister mislead his Cabinet and Parliament by failing to make available his Attorney-General's legal advice of 7 March 2003?

For many, the defining and iconic moment in the British election may well be the eloquent concession speech given by Reg Keys, whose son was killed on active duty in Iraq. With the Prime Minister standing directly behind him, Mr Keys explained what had caused him to engage in active politics:

If the war had been just I would have been grieving and not campaigning. If weapons of mass destruction had been found in Iraq then I would not have come to Sedgefield, to the Prime Minister's stronghold, to challenge him on its legality.⁴

Who would have imagined that a leading British newspaper such as *The Guardian* would send a reporter off to Fishpool Street in the town of St Albans to enquire of each resident whether the publication of the Attorney-General's advice would affect his or her vote?⁵ Or that the more populist *Mail on Sunday* would commission and then publish opinion polls on the legality of the war, and the public's views as to the likely reasons for the Attorney-General's apparent change of mind?⁶

Yet it is now clear that Iraq and issues of legality — both the substance of the legal advice and the circumstances in which it was given — did have a significant impact on the outcome of the election, causing Labour to lose between 20 and 30 parliamentary seats. Not necessarily because of a great attachment to the legal issues themselves, but because of the manner in which political and legal issues became interwoven with the question of integrity and trust.

How did this come about? No doubt the full story will take time to be revealed. There will be twists and turns. Surprises will emerge. Final judgment will have to be suspended. What we do know is that Iraq and international law became an issue in the British election because of an unlikely conjunction of circumstances and individuals: the election of an American President with an abiding scepticism of global rules; the extraordinary and awful events of 11 September 2001 in New York and Washington; the supposed 'special

⁴ Reg Keys, 'Reg Keys for Sedgefield Campaign Concession Speech' (Speech delivered at Sedgefield, County Durham, UK, 6 May 2005) available at <<http://www.keysforsedgefield.org.uk>> at 1 October 2005.

⁵ Sandra Laville, 'Legality of War: On the Doorstep: So, Residents of Fishpool Street, Is It a Smoking Gun or a Damp Squib?', *The Guardian* (Manchester, UK), 29 April 2005, 3.

⁶ See Jonathan Oliver, 'Blair Lied to Us over Iraq War, Say Half of All Voters', *The Mail on Sunday* (London, UK), 1 May 2005, 2. The opinion poll referred to included the following questions and responses:

- Was it legal for Mr Blair to go to war with Iraq? (legal: 34 per cent; illegal: 48 per cent; don't know: 18 per cent);
- Did Lord Goldsmith change his mind ...
 - as a result of Downing Street pressure? (47 per cent);
 - as a result of new legal evidence? (16 per cent);
 - he didn't change his mind and always believed the war was legal (12 per cent);
 - don't know (25 per cent).

The poll was carried by BPIX and involved a survey of 1874 adult voters between 28–30 May 2005.

relationship' between the United States and Britain; and, in Britain, the replacement of Cabinet with a new quasi-presidential form of decision-making. What are the consequences of all this? Is the international legal order weakened or strengthened?

II THE DEVELOPMENT OF INTERNATIONAL LAW — THE BEGINNINGS OF A RULES-BASED SYSTEM

Like every story this one needs some background. In this case it begins in August 1941, on a warship off the coast of Newfoundland, at a meeting between US President Franklin Delano Roosevelt and British Prime Minister Winston Churchill. It is a time of great challenge for Britain and the US, yet these two men decide that what they need to do they need to do is draw up a blueprint for the new international order once the Nazis have been vanquished. What is needed is a new rules-based system, to replace the existing arrangements that allowed a state do whatever was not expressly prohibited by international law. Since not much was prohibited, there was a great deal states could do. They could wage war without restriction. They could commit genocide against their own populations. They could torture detainees. That was the world of the 1930s.

Roosevelt and Churchill set out to change that. They drafted a one page document — the *Atlantic Charter*⁷ — by which they intended to make known, as they put it, 'certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world'.⁸ The *Atlantic Charter* was short and visionary and identified eight principles, revolving around three key pillars reflected in the *Charter of the United Nations*: a general obligation on states to refrain from the use of force, except in self-defence or where the UN Security Council or a regional body has authorised them to use force;⁹ a commitment to human rights, to maintain the 'inherent dignity'¹⁰ and the 'equal and inalienable rights'¹¹ of all members of the human family; and an undertaking to promote economic liberalisation through the adoption of free trade rules and related international obligations in the fields of foreign investment and intellectual property.

These three pillars have remained in place for the last 60 years. Underlying them was a commitment to the international rule of law. Roosevelt and Churchill committed themselves to recasting the eight principles of the *Atlantic Charter* into binding legal instruments. And this they did, with later assistance from Truman and Attlee and Australian Prime Minister Robert Menzies. In a remarkable period between 1941 and 1949 the modern system of international law was put in place through a series of far-reaching treaties which have now received very broad acceptance. In the spring of 1945, 51 states agreed on the creation of the UN at San Francisco, crystallising in law the modern rules governing the use of force and promoting human rights. That was followed by

⁷ Signed by Franklin Delano Roosevelt and Winston Churchill, 14 August 1941, as reproduced in Philippe Sands, *Lawless World* (2005) 240.

⁸ *Ibid.*

⁹ Articles 41–2.

¹⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, preamble, UN Doc A/RES/217A (III) (10 December 1948) ('*Universal Declaration*').

¹¹ *Ibid.*

the UN General Assembly's *Universal Declaration of Human Rights*¹² — Eleanor Roosevelt's baby — which in turn led to the *International Covenant on Civil and Political Rights*¹³ and the *International Covenant on Economic, Social and Cultural Rights*,¹⁴ to regional treaties like the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,¹⁵ and to the *Human Rights Act 1998* (UK) which incorporated the *European Convention on Human Rights* into English law, a singular achievement of the Prime Minister's first government.

The day after the *Universal Declaration* was adopted, the General Assembly agreed on the world's first human rights treaty, the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁶ It was followed by other specialised human rights treaties, such as the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,¹⁷ which obliged its parties to prosecute or extradite torturers¹⁸ and which, in 1998, did away with Senator Pinochet's right to claim immunity before the English courts.¹⁹ By 1948 the Allies had also agreed on other new rules to stop individuals doing nasty things in the name of the state: the *Nuremberg Charter*²⁰ gave birth to a new field of international criminal law. This would eventually lead to the Yugoslav²¹ and Rwandan tribunals²² and then — also in 1998, it turns out that was a big year for international law — to the *Rome Statute of the International Criminal Court*.²³ In the same post-war period, the US and Britain

¹² Ibid art 5.

¹³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, preamble (entered into force 23 March 1976) ('ICCPR').

¹⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

¹⁵ Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

¹⁶ Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

¹⁷ Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture*').

¹⁸ Ibid arts 4–8.

¹⁹ See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

²⁰ *Charter of the International Military Tribunal*, annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 280.

²¹ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, adopted by *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993).

²² *Statute of the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN DOC S/RES/955 (8 November 1994).

²³ Opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

led international efforts to negotiate the four *Geneva Conventions*²⁴ on the law of armed conflict, including *Geneva Convention III* on the treatment of prisoners of war ('POWs'). This is the same instrument that was to become the centre of so much attention in relation to events in Guantánamo, Afghanistan and Abu Ghraib.²⁵

Developments in international law were no less far-reaching in the economic field: the Bretton Woods Agreements created the World Bank and the International Monetary Fund in 1944.²⁶ In 1947 agreement was reached on the *General Agreement on Tariffs and Trade*²⁷ — the *GATT* — the world's first global free trade rules and the parent of today's World Trade Organization. By any standard, these were remarkable achievements in a very short period of time.

The new rules-based system initiated by the *Atlantic Charter* was not altruism at play. It reflected a view that international rules would promote Anglo-American interests, serve as a bulwark against the Soviet model, and emphasise values to be marshalled against Nazi and fascist threats. But the simple point is that international rules were seen as creating opportunities, not imposing constraints. The *Atlantic Charter* had an immediate and far-reaching impact. Writing in his autobiography, Nelson Mandela describes the *Atlantic Charter* as reaffirming his faith in human dignity: 'some in the west saw the *Charter* as empty promises', he wrote,

but not those of us in Africa. Inspired by the *Atlantic Charter* and the fight of the Allies against tyranny and aggression, the ANC created its own charter ... which called for full citizenship for all Africans, the right to buy land and the repeal of all discriminating legislation.²⁸

Over the next 60 years the principles set forth in the *Atlantic Charter* defined a new international order. A great number of international agreements have been adopted since then, touching on issues that affect each and every one of us very directly. Trade. Investment. Commerce. Air transport. Oceans. Boundaries. Human rights. The great majority of these rules are not controversial. They work efficiently and well. They establish the minimum standards necessary for cooperation in an increasingly interdependent world. The emergence of this great body of rules reflects a silent global revolution, and most people are blissfully

²⁴ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively '*Geneva Conventions*').

²⁵ See Jessica Howard, 'The Torture Papers: The Road to Abu Ghraib' by Karen Greenberg and Joshua Dratel (eds) (2005) 6 *Melbourne Journal of International Law* 189.

²⁶ *Articles of Agreement of the International Monetary Fund*, opened for signature 22 July 1944, 2 UNTS 39 (entered into force 27 December 1945); *Articles of Agreement of the International Bank for Reconstruction and Development*, opened for signature 22 July 1944, 2 UNTS 134 (entered into force 27 December 1945).

²⁷ Opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).

²⁸ Nelson Mandela, *Long Walk to Freedom* (1994) 110.

unaware quite how much international law there is. This does raise serious issues about accountability and legitimacy in international law-making — it is a matter of real concern that in Britain treaties are generally not debated by many legislatures, unless they concern an issue of European Community law. By all accounts there was no parliamentary debate about the WTO agreements. But these are issues for another time.

Nor would I wish to leave you with the impression that I am starry-eyed about international rules, or to suggest that global rules can sort out all the wrongs of the world. Plainly they cannot. Events over the last 60 years demonstrate that. There are a great number of rules which require attention.

And certainly the world has changed greatly in the period since the UN was created. The number of states has grown from around 50 to around 200; a result of decolonisation. The range of issues requiring international cooperation — and hence international legislation — has also grown, to include problems like the environment, tourism and consumer safety. New international actors have emerged: the monopoly of states has diminished and international organisations, non-government organisations, corporations and individuals are demanding a role in ways that present profound challenges for an international legal order constructed on the assumption that the global order revolved around states alone. Failed states, peripatetic travellers, permeable national borders, malign non-governmental actors like al Qaeda and other terrorist groups, and the proliferation of weapons of mass destruction ('WMD') are but some of the issues that pose very real challenges to the established international legal order. Do they require us to revisit the basis of the post-World War II legal settlement? President Bush has made the argument; so has the British Prime Minister, most recently in a speech he gave in Sedgefield in March 2004;²⁹ so too has the Australian Prime Minister.

III THE ADEQUACY OF THE EXISTING RULES

Are the existing rules adequate? That question has been asked with increasing frequency since September 11. It is said by some that the international legal order is no longer up to the task it was designed to address in the period after World War II. It is said that the rules governing terrorism, wars and rogue states are inadequate. And it is said that the international rules threaten American security and sovereignty.

To be sure, those who make this claim most frequently and loudly are often associated with the neo-conservative elements that dominated the agenda of George W Bush's first Administration. In the months before September 11 it was clear that the Bush Administration was committed to remaking the international rules, to limiting or killing off the rules that were seen to be too constraining. Many members of this group had been in office in the first Bush Presidency, and they regrouped during the Clinton Administration. Plans were set out in various manifestos. I commend to you, in particular, the *Statement of Principles of the*

²⁹ See Tony Blair, 'The Threat of Global Terrorism' (Speech delivered at Sedgefield, County Durham, UK, 5 March 2004) available at <<http://www.number10.gov.uk/output/Page5461.asp>> at 1 October 2005 .

Project for a New American Century,³⁰ to get a flavour of what was being proposed in the late 1990s (although you may also want to take a look at <www.bushcountry.org>).³¹ Tapping on a rich vein of American exceptionalism, the key targets include international law and the rules which had allowed the detention of Senator Pinochet, the *Rome Statute*,³² the *Kyoto Protocol*,³³ and various arms control treaties. Each of these treaties would, it was argued, constrain America, undermine sovereignty, and threaten US national security.

Within weeks of taking office in January 2001 President Bush had set a new agenda: the *Kyoto Protocol* and the *Rome Statute* were 'unsigned', a protocol on biological weapons scuppered, and a new policy of 'à la carte multilateralism' put in place: you pick and choose the bits of international law you like and get rid of the rest. John Bolton was appointed as one of President Bush's senior foreign policy advisers, Under Secretary for Arms Control and International Security at the US Department of State. He would oversee Iran's compliance with its nuclear obligations under the *Treaty on the Non-Proliferation of Nuclear Weapons*.³⁴ This is the same John Bolton who had, a few years earlier, declared that treaties were only political and 'not legally binding'.³⁵ And very early on a small group of neo-conservative lawyers were parachuted into key positions at the US Justice Department and the Pentagon. Although their views were not widely shared, particularly among career civil servants and the military, they would come to dominate decision-making.

The point I make is a simple one: even before September 11 the conditions were in place for an assault on Roosevelt's vision of an international order based on new rules. From this perspective, September 11 presented a terrific opportunity to promote the 'anti-international law' project. Little time was lost. Within days of the attacks on the World Trade Center and the Pentagon, lawyers in the Bush Administration had been charged with putting in place the new legal rules which were necessary to prosecute the response. On the key legal issues there was no consultation with allies, not even Britain.

An early decision was taken to characterise the response to al Qaeda and international terrorism as a 'war on terrorism'. This had the effect of taking it outside the scope of the ordinary criminal law and into the rules of armed conflict. But these rules placed limits on what you could do to detainees. POWs could not be questioned. Acting unilaterally in a manner that was wholly inconsistent with the requirements of the *Geneva Conventions*, the Administration determined that individual detainees would be placed outside the constraints of the law. The Guantánamo detention facility, on land leased from

³⁰ Project for the New American Century, *Statement of Principles of the Project for a New American Century* (1997) <<http://www.newamericancentury.org/statementofprinciples.htm>> at 1 October 2005.

³¹ Library of Congress, Minerva, *September 11 Web Archive* (2004) <http://wasearch.loc.gov/sep11/2001*sa_/bushcountry.org> at 1 October 2005.

³² Above n 23.

³³ Above n 2.

³⁴ Opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) ('*Nuclear Non-Proliferation Treaty*').

³⁵ John Bolton, The Federalist Society of Law and Public Policy Studies, US, *Is International Law Really Law?* (1997) <<http://www.fed-soc.org/Publications/practicegroupnewsletters/internationalnews/in020101.htm>> at 1 October 2005.

Cuba, was chosen because Administration lawyers had advised that its location outside US territory would preclude redress under US constitutional law and international law.³⁶ Guantánamo was created as a ‘legal black hole’, as the English Court of Appeal later described it.³⁷

It is striking that those lawyers in the Administration who conjured up this scheme were conscious that international rules placed constraints on what could be done, not least in relation to conditions of detention and interrogation. The legal advices that have come into the public domain recognise the existence of the international rules but not their well-established consequences.³⁸ The country that had done more than any other to put in place a new rules-based system was using September 11 to ditch some of those rules. International law was now part of the problem, not the solution. 2002 was not a good year for international law, although quite how bad it was did not become clear until much later, when the legal advice started leaking out into the public domain.

The neo-conservative lawyers who ventured to speak publicly did not pull their punches. White House General Counsel Alberto Gonzales determined that *Geneva Convention III*, which covers the treatment of POWs, simply did not apply to al Qaeda or Taliban because their members were unlawful combatants.³⁹ The International Committee of the Red Cross — guardian of the rules — has consistently refused to accept this claim.⁴⁰ The Administration’s view is novel and ditches past US practice, generating a sharp response from US military lawyers who saw straight away that abandoning the rules would leave the US military highly exposed.⁴¹ The new US view was based on the belief that international terrorism had created a new paradigm. Gonzales famously declared that this new paradigm ‘renders obsolete *Geneva’s* strict limitations on questioning of enemy prisoners and renders quaint some of its provisions’.⁴² Over at the Justice Department, Jay Bybee, a political appointee as Assistant Attorney-General, was asked to advise on the standards of conduct required by the 1984 *Convention against Torture*, as implemented by US federal law. His memorandum of 1 October 2002⁴³ is probably the very worst piece of legal

³⁶ See generally Patrick Philbin and John Yoo, ‘Memorandum for William J Haynes II, General Counsel, Department of Defense: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba’ (28 December 2001) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 29–38.

³⁷ *Abbasi v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598, [22] (Lord Phillips MR) (*‘Abbassi’*) (there are a number of spellings of this case, the one used here reflects that used in a majority of sources).

³⁸ Philbin and Yoo, ‘Memorandum for William J Haynes II’, above n 36, 29–38.

³⁹ See Alberto Gonzales, ‘Memorandum for the President: Decision re Application of the *Geneva Convention* on Prisoners of War to the Conflict with Al Qaeda and the Taliban’ (25 January 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 118, 118–21.

⁴⁰ Ben Barber, ‘Rumsfeld Assails Critics of POW-Status Decision; Decries Their “International Hyperventilation”’, *The Washington Times* (Washington DC, US), 9 February 2002, 1.

⁴¹ Editorial, ‘Mr Gonzales’s Testimony’, *The Washington Post* (Washington DC, US), 7 January 2005, A18.

⁴² Gonzales, ‘Memorandum for the President’, above n 39, 119.

⁴³ Jay Bybee, ‘Memorandum to Alberto Gonzales, Counsel to the President: Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A’ (1 August 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 172, 214.

advice (if it can be called that) that I have ever seen. It was apparently prompted by Central Intelligence Agency questions about what to do with captives alleged to be top-ranking al Qaeda terrorists who had turned ‘uncooperative’. Dispensing with all known canons of treaty interpretation, Mr Bybee concluded that the concept of ‘torture’ covers only the most extreme acts, limited to severe pain which is difficult for the victim to endure: ‘Where the pain is physical’, he writes in his legal memorandum, ‘it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure’.⁴⁴ Anything less will not be torture. It is therefore allowed. Where the pain is mental, then it ‘requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder’.⁴⁵ There is no support whatsoever in international law for such an interpretation. John Yoo was a US Deputy Assistant Attorney-General to Attorney-General John Ashcroft, charged with advising on the effect of rules such as the *Geneva Conventions*, the 1984 *Convention against Torture*, and the *Rome Statute*. He could not have been clearer in May 2002: ‘What the Administration is trying to do is create a new legal regime’.⁴⁶

Indeed. But it was doing so unilaterally, without consultation, and without regard to what the treaties required. It goes against the very essence of the collective, rules-based arrangements that the US, Britain and Australia wanted to put in place in the 1940s. The period between September 11 and the summer of 2004 will, I expect, come to be seen as a low point for America’s engagement with international law. And Britain and Australia have colluded. Within the US the media went to sleep, so did the Democrats, so did most international lawyers. Anyone who was willing to speak out could not find a platform. Anyone within government — and there were many — who tried to speak up for the established rules was overridden. The argument that the rules served American interests got short shrift.⁴⁷

The tide only began to turn in the spring of 2004, after a diligent group of journalists uncovered pictures of abuse at Abu Ghraib. With those discoveries there emerged into daylight a series of legal opinions — including the Bybee Memorandum — which showed how far some of the lawyers in the Administration at the very highest levels were willing to go to override US and international rules. A quiescent Congress began a series of hearings, grilling Deputy Secretary of Defense Paul Wolfowitz, who after much dissembling accepted that putting a bag over someone’s head for 72 hours was not humane.⁴⁸

⁴⁴ Ibid 213–14.

⁴⁵ Ibid 214.

⁴⁶ Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005) 153–4.

⁴⁷ See Colin Powell, ‘Memorandum to Counsel to the President and Assistant to the President for National Security Affairs: Draft Decision Memorandum for the President on the Applicability of the *Geneva Convention* to the Conflict in Afghanistan’ (26 January 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 122, 124; Letter from John Ashcroft to the President, 1 February 2002, in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 126.

⁴⁸ See Emily Rust, Sean Loughlin and Richard Shumate, CNN, *Pentagon Leaders Pressed on Interrogation Techniques* (14 May 2004) <<http://www.cnn.com/2004/ALLPOLITICS/05/13/abuse.interrogation>> at 1 October 2005.

Later on that summer, a majority of the US Supreme Court stepped in to open the door to legal rights for the detainees at Guantánamo⁴⁹ — thus rendering Guantánamo Bay, in the words of Justice Antonin Scalia (in dissent), ‘a foolish place to have housed alien wartime detainees’.⁵⁰

By the autumn of 2004 it had become apparent that ignoring international law was not a cost-free exercise. US authority had been undermined. Other states were beginning to rely on US arguments. Is the damage irreversible?

IV AUSTRALIA AND BRITAIN — FOLLOWING THE TOUGH GUYS

Allow me to park that question for a moment, and turn to the effect, in Britain and Australia, of American thinking on international law. In a certain sense there is a direct line linking the new American approach to international law and the way in which Iraq became an election issue in Britain. I say this because it now appears that it was American legal arguments that helped to convince the Attorney-General to conclude that a reasonable case could be made to proceed to war in Iraq without an explicit resolution by the Security Council. These arguments in turn affected the debate in Australia.

Whereas the US media was largely silent about international legal issues in the period between September 11 and the summer of 2004, the British media (and to a lesser extent the Australian media) had given considerable attention to international law issues.⁵¹ As early as January 2002 — as soon as it was known that a number of the Guantánamo detainees were Australian and British nationals — media attention focused on the interplay of rights under the *Geneva Conventions* and human rights law.⁵² Further attention was generated by *Abbassi*, brought by some of the British detainees to the English courts, challenging the failure of the British Government to take sufficient steps to

⁴⁹ *Rasul v Bush, President of the United States*, 124 S Ct 2686 (2004).

⁵⁰ *Ibid* 2706.

⁵¹ See, eg, Editorial, ‘There Is a Legal Way Out of This ...’, *The Guardian* (London, UK), 14 September 2001, 22; Marcel Berlins, ‘One Week On’, *The Guardian* (London, UK), 18 September 2001, 16; Michael O’Connor, ‘Base Response on Justice, not Revenge’, *The Australian* (Sydney, Australia), 20 September 2001, 13; Geoffrey Roberston, ‘Justice Must Be Seen to Be Done to America’s Prime Suspect’, *The Sydney Morning Herald* (Sydney, Australia), 29 September 2001, 27; Ewen MacAskill ‘Legal Warning on War Aims’, *The Guardian* (London, UK), 4 October 2001, 2; Clare Dyer, ‘When the Force Is with You — On What Legal Basis Can States Justify Going to War?’, *The Guardian* (London, UK), 9 October 2001, 16; Keith Suter, ‘How to Start a War’, *The Daily Telegraph* (Sydney, Australia), 16 October 2001, 27; Thom Yorke, ‘This Theatre of the Absurd: Campbell Hounded the BBC Simply for Doing Its Job’, *The Guardian* (London, UK), 31 January 2004, 24; Editorial, ‘Guantánamo Suspects: International Justice’, *The Guardian* (London, UK), 21 February 2004, 21.

⁵² See, eg, Richard Norton-Taylor and Luke Harding, ‘Restraint Urged over Prisoners — “Kill Them” US Criticised for “Belligerent” Language’, *The Guardian* (London, UK), 24 November 2001, 9; Cynthia Banham and Gay Alcorn, ‘Australia’s Terrorist Faces Life in Prison’, *The Sydney Morning Herald* (Sydney, Australia), 13 December 2001, 6; Geoffrey Robertson, ‘Australia Must Tell US that David Hicks Is a POW’, *The Sydney Morning Herald* (Sydney, Australia), 16 January 2002, 10; Bruce Wilson, ‘Rules Ignored in Quest for Revenge’, *The Daily Telegraph* (Sydney, Australia), 17 January 2002, 9; Hugo Young, ‘We Will Not Tolerate the Abuse of War Prisoners’, *The Guardian* (London, UK), 17 January 2002, 18; Richard Norton-Taylor, Ewen MacAskill and Julian Borger, ‘UK Dilemma over Treatment of Captives — Red Cross Inspection as Minister Damns “Monstrous” Camp X-Ray’, *The Guardian* (London, UK), 18 January 2002, 4.

ensure that the US respected the detainees' rights under international law.⁵³ The English Court of Appeal rejected the Government's argument that these issues were not justiciable. Although the Court was not willing to order the British Government to take any particular steps, its invocation of international law and criticism of the US actions were direct and unambiguous:

What appears to us objectionable is that Mr Abbassi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.⁵⁴

The Court concluded that Mr Abbassi was being detained arbitrarily in a 'legal black hole' in breach of fundamental human rights and basic principles recognised in English law and international law.⁵⁵ The judgment added to political pressure. It reaffirmed the central importance of international law and it gave a green light to those who considered that the British Government should be held to account by reference to the very standards of international law which it had done so much to put in place. The principles apply equally in Australia. Two years later, on 16 December 2004, the House of Lords gave judgment on the Government's derogation from the *Human Rights Act 1998* (UK), adopted shortly after September 11.⁵⁶ The United Kingdom was the only one of 44 Council of Europe members to enter a derogation, a matter for which it has been criticised in some quarters. But at least it did so, unlike the US, which simply ignored the requirements of the *American Convention on Human Rights*⁵⁷ and the *ICCPR* in relation to Guantánamo. In *Belmarsh*, the Law Lords relied on a number of principles of international law in ruling that the indefinite detention without charge of non-UK nationals at Belmarsh Prison in London was discriminatory and unlawful.⁵⁸

The judicial decisions in *Abbassi* and *Belmarsh* signalled the courts' commitment to ensure that Britain respected its international obligations. They reflected a rejection of the belief that al Qaeda and September 11 had given rise to a new paradigm, and they indicated a high level of interest by the media in international law issues. Even as political debate was raging over the treatment of detainees at Guantánamo and Belmarsh, the British and Australian Prime Ministers were grappling with the hurdles that international law had put before their desire to remove Saddam Hussein from power. A great deal of material is now in the public domain. No doubt more will come. The picture that emerges indicates that from the earliest days after September 11, the planning for the war was focused on the very issues of international law that became so central in the closing days of the election campaign. Interest in the international law issues was not, however, universal. Elements across the political spectrum joined in declaiming the chattering classes' obsession with the niceties of international

⁵³ *Abbassi* [2002] EWCA Civ 1598.

⁵⁴ *Ibid* [66].

⁵⁵ *Ibid* [107].

⁵⁶ *A v Secretary of State for the Home Department* [2005] 3 All ER 169 ('*Belmarsh*').

⁵⁷ Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

⁵⁸ *Belmarsh* [2005] 3 All ER 169, 212–3 (Lord Bingham); 217 (Lord Nicholls); 231–3 (Lord Hope); 237–8 (Lord Scott); 261–2 (Baroness Hale).

law. An editorial in Britain's *Sunday Telegraph* newspaper did not mince words: 'the "legality" or otherwise of the war is a non-subject ... the whole of issue "international legality" is a giant irrelevance'.⁵⁹ And at the other end of the spectrum, in *The Observer*, David Aaronovitch in a commendable critique of my book *Lawless World* argued that I was focusing on the wrong question: 'We should not ask whether the Iraq invasion was "legal" — we should ask whether it was "good"'.⁶⁰ What is clear is that issues of legality in relation to Iraq have catalysed a debate on the proper function of international law. That cannot be a bad thing.

The British and Australian Governments did not adopt the position that international law was irrelevant in deciding whether to go to war. In the US, the general view was that if war was legal under the *US Constitution* then that was good enough. 'International law? ... I don't know what you're talking about, about international law', President Bush said in December 2003.⁶¹ From the earliest days, however, the British Prime Minister was plainly concerned to ensure that any actions taken against Iraq would be consistent with the UK's international obligations.

A *Riding Pillion on the Road to War*

It is now clear that as early as March 2002 the British Prime Minister had committed himself to support President Bush's military adventure. On 18 March 2002 Sir David Manning, Blair's foreign policy adviser, had written to the Prime Minister confirming that he had told National Security Advisor Condoleezza Rice: 'you would not budge in your support for regime change'.⁶² The minute of a key meeting chaired by the Prime Minister on 23 July 2002 reports him as saying: 'If the political context were right, people would support regime change'.⁶³ The document will make it difficult to counter the claim that regime change was the object.

However, the meeting of 23 July 2002 was told by the Attorney-General that 'the desire for regime change was not a legal base for military action'.⁶⁴ He added that self-defence and humanitarian intervention — the use of force to stop a massive and systematic violation of fundamental rights — 'could not be the base in this case'.⁶⁵ On established principles of international law that left just one possible option — to argue that war was authorised by the UN Security Council. The minute recording the 23 July 2002 meeting concluded with the

⁵⁹ Editorial, 'A Legal Fiction', *The Sunday Telegraph* (London, UK), 29 February 2004, 24.

⁶⁰ David Aaronovitch, 'A War of Words', *The Observer* (London, UK), 6 March 2005, 25.

⁶¹ Acronym Institute for Disarmament Diplomacy, *I Don't Know What You're Talking about, about International Law — Bush on the Decision to Restrict Iraq Reconstruction Contracts, December 11* (2003) <<http://www.acronym.org.uk/docs/0312/doc07.htm>> at 1 October 2005.

⁶² Gaby Hinsliff, 'Blair in Firing Line on Iraq Leak', *The Observer* (London, UK), 19 September 2004, 4.

⁶³ This incident is described in *Lawless World* but the memorandum was only published for the first time in full by *The Sunday Times* on 1 May 2005: Memorandum from Matthew Rycroft to David Manning, 23 July 2002, as reproduced in *The Sunday Times* (London, UK), 1 May 2005, 7.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

following statement: ‘We must not ignore the legal issues’.⁶⁶ It also added: ‘the Attorney-General would consider legal advice with Foreign and Commonwealth Office/Ministry of Defence legal advisers’.⁶⁷ That was July 2002. The process of consideration took nearly nine months, with many twists and turns.

The impending legal difficulties had already been spotted; amongst the papers before the participants at the meeting on 23 July 2002 — which included the British Defence Secretary, Foreign Secretary and Attorney-General — was a legal memorandum which had been prepared by the Foreign Office lawyers three months earlier, in March 2002. This identified the one possible justification in international law for using force against Iraq. In January 1991 Security Council *Resolution 678* had authorised the use of force against Saddam, to get his forces out of Kuwait.⁶⁸ A few weeks later, with that objective achieved, *Resolution 687* suspended the authorisation to use force, and the Security Council imposed a cease-fire.⁶⁹ By *Resolution 687* the Security Council also imposed on Iraq an obligation to disarm. The Foreign Office memorandum of March 2002 raised the possibility that the authorisation to use force under *Resolution 678* could ‘revive’ if Saddam’s Iraq was determined to be in material breach of its disarmament obligations under *Resolution 687*. Assuming the authorisation to use force could ‘revive’, the key questions were: who decides that Iraq is in material breach so as to allow the original authorisation to revive? Is material breach to be determined by the Security Council? Or, if the Council fails to act, or chooses not to act, can one or more states determine the existence of a material breach by Iraq? The question goes to the heart of the international legal order: is decision-making collective, or can states act unilaterally?

The Foreign Office memorandum was crystal clear in its conclusion: ‘In the UK’s view ... it is for the Council to assess whether any such breach of [the Security Council] obligations has occurred’.⁷⁰ And it went on: ‘The US have a rather different view: they maintain that the assessment of breach is for individual member states. We are not aware of any other state which supports this view’.⁷¹

Against that background, in November 2002 the Security Council adopted the now famous *Resolution 1441*.⁷² This gave Saddam Hussein a final opportunity to meet his disarmament obligations under *Resolution 687*. It sent the UN inspectors back to Iraq, under the direction of Hans Blix. But it left open the question of what precisely would happen once Mr Blix had reported. There were two views. On one view — adhered to by the great majority of states — a further Security Council resolution would be required to determine that Saddam was in further material breach of his obligations under *Resolution 1441* and to authorise force. On another view — the minority view — the Security Council was only

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Above n 3.

⁶⁹ SC Res 687, UN SCOR, 56th sess, 2981st mtg, UN Doc S/RES/687 (3 April 1991).

⁷⁰ Foreign and Commonwealth Office Legal Advice Memorandum, March 2002, as reproduced as ‘Foreign and Commonwealth Office Legal Advice’ (*The Sunday Times*, UK), 19 June 2005 available at <<http://www.timesonline.co.uk/article/0,,2087-1654697,00.html>> at 1 October 2005.

⁷¹ Ibid.

⁷² SC Res 1441, UN SCOR, 57th sess, 4644th mtg, UN Doc S/RES/1441 (8 November 2002).

required to discuss the issue, so that UN members would be free to decide for themselves whether a material breach had occurred so as to justify the use of force.

Even after *Resolution 1441* the Foreign Office lawyers agreed that a second and explicit Security Council resolution was needed. *Resolution 1441* was not enough. The Foreign Secretary, Jack Straw, disagreed. The matter went to the Attorney-General. For reasons that are not clear, he did not give the Prime Minister his advice until 7 March 2003, even though the Ministerial Code of Conduct requires that the Attorney-General be consulted 'in good time before the Government is committed to critical decisions involving legal considerations'.⁷³ Why the advice was left so late is not known, although some suspect that the Prime Minister would have known that early advice may not have been entirely helpful. In any event, the passage of time allowed the Attorney-General to make an important trip to Washington, in February 2003, to ascertain the views of that country's legal advisers. The fact that such a trip was made is interesting. I have asked whether he also made trips to Beijing or Moscow or Paris, and if not why not. In any event, the trip to the US seems to have had a certain effect. The advice of 7 March 2003 makes a number of references to the views of the US Administration, and also to 'the strength and sincerity' of those views.⁷⁴ On the crucial issue — whether *Resolution 1441* can revive the authorisation in *Resolution 678* without a further resolution — the Attorney-General accepts that a reasonable case can be made 'having regard to ... the arguments of the US Administration which I heard in Washington'.⁷⁵

B *A Change of Mind*

The advice of 7 March is the only formal written advice produced by the Attorney-General. It runs to 13 pages. It was sent to the Prime Minister, and then passed on to the Foreign Secretary and Defence Secretary. It was not shown to the Cabinet. That too is curious, and apparently inconsistent with the Ministerial Code of Conduct.⁷⁶ What the Cabinet was given instead — on the morning of 17 March 2003, just three days before the war began — was a much shorter document of just 337 words. That is the document that was published later that same day by the Attorney-General as an answer to a parliamentary question.⁷⁷

It is the differences between the two documents — the advice of 7 March and the answer to the parliamentary question of 17 March 2003 — that raise serious questions, questions which have not yet been answered

The 7 March advice was highly equivocal. It accepts that, in principle, the authorisation to use force under *Resolution 678* could revive, but concludes that a lawful war without explicit Security Council authorisation would be no more

⁷³ UK Cabinet Office, *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers* (2005) [6.22] available from <http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code> at 1 October 2005 ('Ministerial Code of Conduct').

⁷⁴ Lord Goldsmith, Attorney-General, Attorney-General Note to the PM (7 March 2003) [23] available at <<http://www.number-10.gov.uk/output/Page7445.asp>> at 1 October 2005 ('7 March Advice').

⁷⁵ *Ibid* [28].

⁷⁶ UK Cabinet Office, above n 73, [6.3].

⁷⁷ UK, *Written Answers to Questions*, House of Lords, 17 March 2003, vol 646, pt 65, column WA2 (Lord Goldsmith, Attorney-General).

than ‘reasonably arguable’.⁷⁸ And that ‘reasonably arguable’ case would only be sustainable ‘if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity’.⁷⁹ The advice is certainly not a green light for war; as the Attorney-General put it, ‘a “reasonable case” does not mean that if the matter ever came before a court I would be confident that the court would agree with the view’.⁸⁰ Those words speak very powerfully.

I do not share even that equivocal conclusion, and I do not know of many outside the US who do. I have always believed that the war was illegal. *Resolution 678* was limited to removing Saddam’s forces from Kuwait. It was never considered to be a basis for his overthrow. That was the view of Colin Powell and John Major.⁸¹ Putting it at its simplest, the dominant view amongst states and international lawyers is that since the cease-fire was adopted by the Security Council then it must be for the Security Council to bring the ceasefire to an end. It is a view with which the Attorney-General appears (in an introductory part of his 7 March advice) to agree: adopting the language of the Foreign Office he says early on his advice that ‘I am not aware of any other state’ which supports the US view that the assessment of an Iraqi breach is a matter for individual states.⁸² Yet later, in his summary, he appears to reach a different view, through a process of reasoning which seems to be not entirely clear.⁸³ The conclusion is problematic, not least because it seems to signal the death of collective security and will make Security Council members far more wary in the future. I find it difficult to imagine that the Attorney-General would necessarily have come to the same conclusion if he had been asked a different question: could Turkey or Iran decide that on their own that Saddam was in breach of his obligations and then decide unilaterally to use force?

But even if I disagree even with so equivocal a conclusion, I accept entirely that the 7 March advice is a careful, balanced and reasonable document. It sets out the issues in a proper and fair way and considers the arguments for and against. It reaches a plausible conclusion to the question: what is the best possible argument you can come up with to justify the war in law?

That said, I can quite see why the military would have taken a look at the 7 March advice and concluded that it was not a sufficient basis for war. Presumably that is the reason why the document was not shown to the British Cabinet, or to Parliament. And why the Government did not want the document to be put into the public domain, even if it knew that the claim to confidentiality or privilege was weak (if it existed at all) in the face of overwhelming public interest in publication. The Prime Minister knew that it would obtain the same reaction as that of Sir Michael Boyce, Chief of the Defence Staff.⁸⁴

Following the military’s apparent rejection of the equivocal advice, a new document was prepared. The catalytic event seems to have been a meeting on 13 March 2003 at 10 Downing Street between the Attorney-General and Lord

⁷⁸ Goldsmith, ‘7 March Advice’, above n 74, [30].

⁷⁹ *Ibid* [29].

⁸⁰ *Ibid* [30].

⁸¹ Sands, above n 46, 190.

⁸² Goldsmith, ‘7 March Advice’, above n 74, [9].

⁸³ *Ibid* [26]–[31].

⁸⁴ See Sands, above n 46, 196–7.

Falconer and Baroness Morgan, neither of whom had responsibilities for the obtaining of government legal advice. Four days later a clear and unequivocal document supporting the legality of the war miraculously appeared before the Cabinet. The second document cannot be said to be a summary of the first. An ambiguous and equivocal 13 page advice became an unambiguous and clear one page 'view' in favour of legality without a further Security Council resolution and without reservation. How did that happen?

The two documents merit careful comparison. On 17 March the Attorney-General unequivocally tells the Cabinet and the House of Lords that 'a material breach of *Resolution 687* revives the authority to use force under *Resolution 678*'.⁸⁵ No hesitation there. But just 10 days earlier the Attorney-General was unable to go beyond arguing that a 'reasonable case' could be made that *Resolution 1441* could 'in principle' revive the authorisation to attack Iraq. For any Minister to say — as has been said at the very highest levels of government — that this does not amount to a change of view takes us into Orwellian territory. There was a change of view. The crucial question is: why did it occur? On the answer to that question hinges the reputations of the British Attorney-General and the Prime Minister.

There are three possible reasons for a change of view. It could be because the views on the law had become that much clearer, or because some new fact had emerged, or because of extraneous pressures.

No new legal argument emerged in the 10 day period. It is established that the legal issues addressed by the Attorney-General had been fully aired a year earlier, by the Foreign Office legal advisers. No lawyer I have spoken with since the full advice was published believes it likely that the reservations of 7 March could all simply disappear to reveal a final view of so high a degree of certainty.

C *The Shock of the New*

What possible new fact might have emerged? After the publication of *Lawless World* the Foreign Secretary argued that the crucial new fact was the collapse of the negotiations for a second resolution.⁸⁶ This is a bootstraps argument of stunning audacity: it says, in effect, that a second resolution was not needed because it could not be obtained. Happily that argument has not been revived.

A second possible new fact is the emergence of new evidence on WMD that would allow the government to conclude unequivocally that Iraq was not complying with its obligations under *Resolution 1441* or cooperating with the UN weapons inspectors. On this issue the change as between the two documents is very great indeed. Not surprisingly it has been the subject of considerable attention. In his 17 March answer the Attorney-General says that it is 'plain' that Iraq has failed to comply.⁸⁷ But just 10 days earlier he had cautioned the Prime Minister 'to consider very carefully whether the evidence of non-cooperation and

⁸⁵ UK, *Written Answers to Questions of 17 March 2003*, above n 77.

⁸⁶ 'We sought a second resolution because we sought a consensus in the Security Council, and what changed between 7 and 17 March was this: it became very clear that that consensus was not possible': UK, *Parliamentary Debates*, House of Commons, 24 March 2005, vol 432, pt 61, column 1005 (Jack Straw, Foreign Secretary).

⁸⁷ UK, *Written Answers to Questions of 17 March 2003*, above n 77.

non-compliance by Iraq is sufficiently compelling'.⁸⁸ This seems to suggest that the Attorney-General did not consider that the material then available was 'sufficiently compelling'.⁸⁹ Yet on 15 March the Prime Minister wrote to the Attorney-General: 'it is indeed the Prime Minister's unequivocal view that Iraq is in further material breach of its obligations'.⁹⁰ No supporting evidence was provided.

What new evidence emerged between 7 and 17 March? As far as we know there was none which could support the case for war. To the contrary. Coincidentally, also on 7 March, Hans Blix provided his third and final report, to the effect that although Iraqi cooperation was not complete it was accelerating.⁹¹ In his 7 March advice the Attorney-General rightly describes Mr Blix's views as 'highly significant',⁹² yet it seems that those views were not given proper (if any) weight by the Prime Minister. Mr Blix told us on 27 April 2005 that it could not be said that the evidence of Iraqi non-compliance was 'compelling', even if it existed at all. And we know from the *Report of the Butler Review* — which was highly critical on the point — that the Joint Intelligence Committee was not asked by the Prime Minister to provide a further assessment of Iraqi WMD or cooperation after 18 December 2002.⁹³ On 15 March 2003 the Prime Minister certified that Iraq was in material breach of its WMD obligations.⁹⁴ It would be helpful if Mr Blair could explain on what basis he came to that conclusion.

The Attorney-General himself has identified a further — third — possible new fact, after the summary of his 7 March 2003 advice was leaked, a week before the 2005 election. He said that the 'military and the civil service needed me to express a clear and simple view whether military action would be lawful or not'.⁹⁵ Faced with this request the Attorney-General could have declined to go any further. It would have been entirely proper for him to respond by saying that the issues raised were, from his perspective, complex and not capable of being refined by stripping out the essential caveats. Hence his 13 page advice. Yet he chose another route.

It is this second document which has raised so many questions. In my view the public is entitled to know the full story about the chain of events which occurred between 7 March and 17 March 2003. The 7 March parliamentary answer was not legal advice, at least in the usual sense. It has the appearance of being an instrument of persuasion, in the same category as the dossiers on WMD. Without a proper explanation the answer to the parliamentary question is

⁸⁸ Goldsmith, '7 March Advice', above n 74, [29].

⁸⁹ Ibid.

⁹⁰ Letter from the Private Secretary to the Prime Minister to the Attorney General's Office, 15 March 2003, on file with the author.

⁹¹ Hans Blix, *Oral Introduction of the 12th Quarterly Report of UNMOVIC* (Speech delivered to UN Security Council, 7 March 2003) available at <<http://www.un.org/Depts/unmovic/SC7asdelivered.htm>> at 1 October 2005. See also Ewan MacAskill, 'Blix Insists There Was No Firm Weapons Evidence', *The Guardian* (London, UK), 28 April 2005, 2.

⁹² Goldsmith, '7 March Advice', above n 74, [29].

⁹³ Parliament of the UK, Committee for the Butler Review, *Review of Intelligence on Weapons of Mass Destruction* (2004) [364].

⁹⁴ Ibid [85].

⁹⁵ Lord Goldsmith, Attorney-General, *Iraq: Military Action* (2005) <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1068716801627>> at 1 October 2005.

bound to be seen as misleading, in the sense that it aimed to create the impression that war was clearly and unambiguously lawful. These issues are directly relevant here in Australia. On 18 March 2003 Prime Minister John Howard addressed the House of Representatives of the Parliament of Australia, justifying Australian support on the grounds that it was ‘in accordance with the legal authority for military action found in previous resolutions of the Security Council’.⁹⁶

In support of that view he expressly invoked — and tabled before the Australian Parliament — a document he described as ‘the summary legal advice provided to the British Government by its Attorney-General, Lord Goldsmith’.⁹⁷ His description is wrong. He tabled Lord Goldsmith’s view of 17 March 2003. Lord Goldsmith himself has said — on 26 February 2005, in response to the publication of my book — that his parliamentary answer ‘did not purport to be a summary of my confidential legal advice’.⁹⁸

Mr Howard also relied on a Memorandum of Advice to the Commonwealth Government prepared by Bill Campbell QC and Chris Moraitis, respectively of the Attorney-General’s Department and the Department of Foreign Affairs and Trade.⁹⁹ That Memorandum adopts precisely the same approach as Lord Goldsmith’s 17 March answer. It would be relevant to know whether those who prepared the Australian advice — as well as the Australian Prime Minister — were aware of Lord Goldsmith’s full legal advice, and whether they too, like Lord Goldsmith, received the benefit of American legal thinking in reaching their conclusion.

In any event, it is not right for Mr Howard to have told the Australian Parliament that the Australian legal advice was, as he put it, ‘consistent with that provided to the British Government by its Attorney-General’.¹⁰⁰ The Australian Memorandum of Advice is not consistent with Lord Goldsmith’s advice of 7 March 2003, the final written legal advice he gave the British Government.

It may be that these matters require further explanation.

V THE THINGS THAT MATTER

So why does all this matter, and where does it leave us and international law, for now and for the future? It is time to move on, many will say.

The events of the last three years matter, first and foremost, because they have significant consequences for international governance. We live in a complex, interdependent world in which social, political, economic and religious values and interests collide with increasing frequency over an ever greater set of issues. International law sets minimum standards of behaviour. Outside of bullying and force it is all we have to provide a framework for resolving those differences. Without international law we are back to the law of the jungle, the very world

⁹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2003, 12509–10 (John Howard, Prime Minister).

⁹⁷ *Ibid* 12510.

⁹⁸ Lord Goldsmith, Attorney-General, ‘Statement from the Attorney General, Lord Goldsmith’ (Press Release, 25 February 2005).

⁹⁹ See Bill Campbell and Chris Moraitis, ‘Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq’ (12 March 2003) as reproduced in (2003) 4 *Melbourne Journal of International Law* 178.

¹⁰⁰ Commonwealth, *Parliamentary Debates of 18 March 2003*, above n 96, 12510.

which Roosevelt and Churchill committed to change when they met off the coast of Newfoundland in August 1941. I want Britain and the US battling for international law, not against it.

There will be occasions where the international rules are wholly inadequate, occasions when states may justifiably feel the need to dispense with the rules and go it alone. September 11 and the threat posed by al Qaeda do not, for the time being at least, provide such an occasion. Nor was the situation in Iraq in March 2003 such an occasion. The rules set forth in the *Geneva Conventions*, in human rights treaties and in the *UN Charter* in relation to the use of force did not need the treatment they have received.

It is dangerous indeed to begin to imagine a system of international governance in which some states — the large and powerful ones — feel that they can you pick and choose the international rules they like and discard those which they don't. Yet that has been the approach adopted by the Bush Administration, reflected in the notion of à la carte multilateralism. And it is an approach for which the British and Australian Governments have provided great support, maintaining a public silence on the excesses of Guantánamo and buying into a legal argument for war in Iraq which was denuded of any international support.

The approach degrades international law, and it makes it more difficult to rely on rules when others violate them. If you begin to tinker unilaterally with the international rules you don't like — on human rights, on the *Geneva Conventions*, on the use of force — then others may begin to tinker with the rules they don't like — on trade, on intellectual property, on the rights of foreign investors. If you send out a message that you consider the rules to be obsolete and incapable of meeting new paradigms, you prevent yourself from challenging others who then act in the same way. This is a serious problem right now in many areas, for example nuclear proliferation. Imagine how easy it is for those in Tehran to respond to allegations from the US or Britain or Australia that they are not complying with the requirements of the *Nuclear Non-Proliferation Treaty*.

These three Governments would do well to bear in mind the words of George Kennan, the great American diplomat, in his famous telegram from Moscow in 1946, anonymously signed X. He ended his warning of the Soviet threat with these words:

We must have courage and self-confidence to cling to our own methods and conceptions of human society ... [T]he greatest danger that can befall us in coping with this problem of Soviet communism is that we shall allow ourselves to become like those with whom we are coping.¹⁰¹

In Britain recent events matter for a second reason: governance at the national level. No doubt the full story is yet to emerge about the circumstances in which the legal advice on Iraq came late, and was then given, and was then replaced by a new view. But there is enough out there now to raise serious questions about the manner in which the British Prime Minister went about obtaining legal advice on the use of force and then presenting it to his colleagues in Cabinet.

After the May 2005 British election, the Prime Minister urged that a line be drawn on the issue of Iraq, that the time has come for all of us to move on. At

¹⁰¹ George Kennan, 'Excerpts from Telegraphic Message from Moscow of February 22, 1946' in George Kennan, *Memoirs* (1967) 547, 559.

one level he is right. The issue has been hugely divisive. There remain many challenges in post-conflict Iraq, irrespective of the rights or wrongs of what has happened in the run-up to March 2003. But Iraq was not a minor matter. It was a war in which tens of thousands of people died for an outcome which remains, to put it at its most generous, of uncertain consequence against a background of decisions taken in Washington and London on the basis of dubious intelligence and legal reasoning. I find it difficult not to share the sentiment expressed by Robin Cook in *The Guardian* on 7 May 2005:

The reason why Iraq remains a livid wound is that there has been no catharsis to close the account on an unpopular war based on false intelligence and launched with doubtful legality. No one who shared in the decisions ever took responsibility by resigning and some were even promoted ... It is difficult to understand what government figures mean when they say that we must listen to the message of the election if yet again there is no practical consequence to the verdict of the voters on Iraq.¹⁰²

The British Prime Minister has not taken any practical steps to help people move on. Important questions remain unanswered. Maybe there are good explanations of which we are unaware. In the meantime the principal architects of an illegal war — including the Prime Minister, the Foreign Secretary and the Attorney-General — remain in precisely the same posts they occupied during those crucial 10 days in March 2003.

With that state of affairs it is a little fanciful to hope that everyone can move on. The issues are bound to persist. Little surprise that there will be calls for enquiries, or that there will be renewed efforts at impeachment, or that there will be complaints to the Bar Council. Little surprise that there will be legal proceedings before the English courts initiated on behalf of the families of servicemen who have lost their lives. And little surprise if, at some point in the future, those most directly responsible for waging the war find themselves subject to Pinochet-style proceedings in foreign lands as they go about their travels, well after they are out of office.

That some of these scenarios are possible as a feature of modern international life, reflects the effectiveness and success of the rules that Britain, Australia and America put in place in the 1940s. We now have a system of international rules, and breaking them has consequences, domestically and internationally.

This brings me to my concluding remarks. It may be that you might divine that I am pessimistic about what is to come, and the future of international law. But I do not feel that way. Why not? Because the rules of international law which have been the subject of so unremitting an assault in the aftermath of September 11 have shown themselves to be remarkably robust. They have not crumbled or been washed away. They have their detractors, but in far larger numbers they have their supporters.

In the US, there remains much which is of serious concern. But it is striking that the Bush Administration has not succeeded in killing off the *Kyoto Protocol* or the International Criminal Court, or rewriting the *Geneva Conventions* or the *Convention against Torture*, or building any sort of consensus to support its

¹⁰² Robin Cook, 'Take a Long Hard Look at Yourself', *The Guardian* (London, UK), 7 May 2005, 22.

revised approach to the international rules governing the use of force. Quite the contrary. There are signs that the Bush Administration is rethinking its strategies and its policies. On 30 March 2005 it reversed position and dropped its outright opposition to the ICC, deciding not to veto a Security Council resolution referring the situation in Darfur to the ICC.¹⁰³ And privately, a number of senior Administration officials have recognised that the Administration may have made serious mistakes in its so-called ‘war on terrorism’ and in respect of Guantánamo, and that a more consensual and rules-based approach is needed if necessary cooperation from other states is going to be engaged.

And in Britain? There is a great deal more knowledge and debate about the rules of international law. The courts have gone very far in invoking international rules to protect fundamental rights in the aftermath of September 11. The election and the focus on Iraq have generated an important public debate. Even *The Sunday Telegraph* seems to have abandoned the line that international law is a gigantic irrelevance: the author of that editorial wrote a most entertaining piece at the start of May, dissecting the Attorney-General’s advice of 7 March and the surrounding spin, to the effect that abusing arguments of international law is seen as a useful stick for attacking governmental integrity.¹⁰⁴

So against this background, it seems to me that the spirit of the *Atlantic Charter* still abounds — that Australia, Britain and the US are bound to re-engage with their commitment to a rules-based system, that international law is alive and kicking, and that the world is not quite as lawless as some may wish. And although it may not be the only question to ask, the election showed that the question — is it legal under international law? — resonates for a great number of people in Britain. That is why the iconic image of Reg Keys’ brave speech in the early hours of the morning of 6 May 2005 will come to be seen as enduringly emblematic of the 2005 British General Election, and also of a great deal more.

¹⁰³ See generally *Resolution 1593*, SC Res 1593, UN SCOR, 60th sess, 5158th mtg, [1], UN Doc S/RES/1593 (31 March 2005).

¹⁰⁴ See Alasdair Palmer, ‘Regime Change is Illegal: End of Debate’, *The Sunday Telegraph* (London, UK), 1 May 2005, 24.