



THE IRAQ WAR

and
International Law

Edited by Phil Shiner and
Andrew Williams

THE IRAQ WAR AND INTERNATIONAL LAW

The decision by the US and UK governments to use military force against Iraq in 2003 and the subsequent occupation and administration of that State have brought into sharp focus fundamental fault lines in international law. The decision to invade, the conduct of the war and occupation, and the mechanisms used to administer the country all challenge the international legal community, placing it at a crossroads. When can the use of force be justified? What are the limits of military operations? What strength does international criminal law possess in the face of such interventions? How effective is the international regime of human rights in these circumstances? What role does domestic law have to play? How the law now responds and develops in the light of these matters will be of fundamental global importance for the 21st century, and an issue of considerable political and legal concern. This book explores this legal territory by examining a number of issues fundamental to the future direction of international law in the war's aftermath. Consideration is also given to the impact on UK law. Both practical and academic perspectives are taken in order to scrutinise key questions and consider the possible trajectories that international law might now follow.

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PHIL SHINER AND ANDREW WILLIAMS



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PREFACE

Even before it commenced, the Iraq War of 2003 provoked unparalleled legal attention. For many, the role and applicability of international law became the focus of comment and indeed resistance. Whether the war was legal or not was the basis for heated and protracted political and social debate. After the conflict ended and the occupation of Iraq began, the legal questions did not cease. If anything they increased significantly. Not only was the use of force still in issue (and made more acute through the failure to uncover any weapons of mass destruction hidden by the Saddam Hussein regime) but matters relating to the conduct of warfare and occupation, the treatment of civilians, the role of private security contractors, the awarding of commercial contracts for the reconstruction of the country, the trials of members of the Baa’thist regime, all engaged critical analysis. They also incited legal actions that challenged the behaviour and decisions of governments through domestic law. In the UK, fundamental matters relating to human rights and international humanitarian law, as well as international law more generally, began to be tested in the courts. Many remain unresolved.

The multifaceted nature of this extraordinary legal upheaval was the inspiration for this book. Its specific genesis can be traced to a legal inquiry organised by Peacerights, a non-governmental organisation concerned with these issues, in 2003 that brought together a number of the present contributors to analyse the conduct of the war from a legal perspective. Since then, several of the authors have been engaged in cases that have created legal shockwaves which are continuing to be felt. Some actions have yet to be concluded as UK law confronts crucial questions of international law and its varied dimensions. As a result the legal environment is developing at a fast pace. Those chapters which address some of the issues arising could already be supplemented by further analyses of judgments. But the commentary provided, which generally reflects the position as at the end of 2007, remains acutely relevant.

As with all books of this kind, thanks are due to numerous people who have assisted in the process of editing and reviewing the various contributions that are included here. In particular, we would like to thank the Joseph Rowntree Charitable Trust for providing generous assistance to the editors (in association with Professor Christine Chinkin) in respect of a research project entitled ‘Law for Peace’ of which this book represents an important part. We would also like to thank Peacerights for their continued support. Finally, thanks are due to Richard Hart and Mel Hamill at Hart Publishing for their encouragement and professionalism in bringing this book to life.

Phil Shiner
Andrew Williams

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Chapter 4, 'How will the European Court of Human Rights deal with the UK in Iraq?', by Bill Bowring, appeared in his previously published work *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Abingdon, Routledge Cavendish, 2008) and Chapter 10, 'Responsibility for Troops abroad: UN mandated forces and issues of human rights accountability,' by Keir Starmer, appeared in (2008) 3 *European Human Rights Law Review*, 318.

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1

The Iraq War and International Law: By Way of an Introduction

ANDREW WILLIAMS

I. A New Era for International Law?

Epochs of law are hard to define or justify. Identifying a moment or an event or a sequence of both that can be proclaimed validly as provoking a fundamental shift in the design and application of law is a matter of perspective and argument. At the national level, the value of such a designation is dubious. For such a field as international law, which perhaps possesses lesser claims to the status of ‘law’ and is subject to so much debate and contrary projection, the possibility is even more problematic. The vagaries of events, and responses in the name of international law, suggest that neat demarcations attached to time are suspect. This is so particularly if one proclaims, as does Louis Henkin, that international law and politics are one and the same.¹ But, of course, that has not prevented analysts from identifying systemic changes that incite the development of ‘eras’. These in turn are assumed to help understand the role of international law in the affairs of states.² In particular, authors, variously, point to the Treaty of Westphalia, the end of the First World War, the devastation of the Second World War and the revelation of the Holocaust, and the end of the Cold War and the experience of globalisation, as each prompting suggestions that international law has been transformed as a result.³

One of the central questions for this book is whether the Iraq War (and its aftermath) is emblematic of a similar shift. And superficially, current world commentary might lead us to believe that the Iraq War is indeed indicative of a new epoch.⁴ Across many fronts of international legal discourse there is more than

¹ Henkin pursues this argument in the context of international law in ‘International Law: Politics, Values and Functions’ (1989) 216 *Recueil des Cours* 22.

² See, for instance, A Cassese, *International Law* (Oxford, OUP, 2nd edn, 2005) (‘Cassese’), who talks of historical ‘stages’ of international law.

³ For one notable attempt, see the now classic work of WG Grewe (M Byers tr), *The Epochs of International Law* (New York, Walter de Gruyter, 2000).

⁴ The extraordinary intellectual response in Europe particularly can be seen in D Levy, M Pensky and J Torpey (eds), *Old Europe, New Europe, Core Europe; Transatlantic Relations after the Iraq War*

a suspicion that fault lines of international law have been exposed and more created as a result of the war's prosecution and the subsequent occupation of Iraq. Norms that previously had been taken for granted in international human rights law, in the laws of war, in the law governing the use of force, in the laws of occupation, were challenged in significant ways by a number of states, either directly or via subtle and not so subtle forms of complicity, under US tutelage. Some have spoken of the abuse of legal standards, which have been developed over decades since the end of the First World War. They have declared that this represents the subversion—even inversion—of those standards: exception now becoming the norm, the norm becoming the exception.⁵ Thus, in the framework of international laws structured around the tripartite forms of *jus ad bellum*, *jus in bello* and *jus post bellum* (in which we might incorporate international human rights law for the sake of argument here),⁶ each field has been subjected to fundamental questioning. The prohibition on the use of force has been reconsidered on the basis of a subjective notion of self-defence. The restrictions on the conduct of warfare have been re-evaluated as a result of deepening technology and a limitless promotion of the philosophical doctrine of 'double effect'. And the protection of human rights has been made subject to politico-security interests that deny any meaningful investigation or redress for breach. In each area, law appears as a vital issue in both the justification and critique of state action. The suggestion, then, is that a new framework is being fashioned, based on revised standards and norms, even values, that seek to reflect, if not guide, and judge international actors. Whether this is indicative of 'a new world order whose law is not yet visible,' as Ulrich Preuss asks, remains to be seen.⁷

But is such a perception of 'shift' accurate? And what would it signify, in any event? Can we really say that this one conflict, minor at least in its duration and in the direct military casualties suffered during a campaign officially lasting only a few weeks, is indicative of a realignment of international law?⁸ Many would no doubt wish to see a more appropriate watershed, if any, in the single-event atrocity of 11 September 2000.⁹ Others would look to the whole 'war on terror',

(London, Verso, 2005). From a more legalistic perspective, see the American response in the *Agora* collection in (2003) 97 *AJIL*.

⁵ A number of essays explore this theme in A Bartholomew (ed), *Empire's Law* (London, Pluto Press, 2006) ('Bartholomew').

⁶ To see international human rights law as a product of war is at least arguable, given its modern genesis in the witnessing of primarily the Second World War but also the Vietnam War and indeed the Cold War. It might be argued that *jus post bellum* is restricted to the limited application of international humanitarian law to post-conflict situations but a wider interpretation is also plausible. But, of course, this is a matter that deserves greater attention and a work of its own.

⁷ UK Preuss, 'The Iraq War: Critical Reflections from "Old Europe"' in Bartholomew, n 5.

⁸ This is not to underplay the scale of the suffering that has intensified and endured beyond the military invasion up to the overthrow of the Baath regime. A number of sources claim that the true casualties of the war and its aftermath extend into the hundreds of thousands.

⁹ See, for instance, D McGoldrick, *From '9/11' to the Iraq War 2003* (Oxford, Hart, 2004) ('McGoldrick').

Introduction

on Guantánamo Bay and the web of related detention centres uncovered by Dick Marty, among others, as symptomatic of a blatant challenge to international law.¹⁰ Of course, one can argue plausibly that there is at least a relationship between these events and actions and the Iraq invasion and occupation, if only in the psyche of those engaged.

But has it been the occasion of the Iraq War, more than any act or acts of terrorism and its responses, that has suggested international law was no longer going to operate effectively to provide the parameters for state reaction to perceived threats? Could we not make the same claim in relation to the action against Afghanistan, for instance? The latter, however, was protected ultimately by the international community's unwillingness to see it as anything other than a proportionate response to 9/11. Or, at worst, a legitimate exercise of self-defence: individual in the case of the USA, collective for those of its allies. Similarly, all the legal and political action taken to counter international terrorism could be protected, at least initially, by the umbrella of established international law. Even though the 'war on terror' and the situation in Afghanistan may well be shown to have since gone far beyond such comforting protection, the Iraq War was always (and remains) qualitatively different. It was undertaken without the approval of the international community, without popular support in many regions of the world and without the legal structures and precedents to give it backing. Unlike the NATO intervention in Kosovo, no one could play the humanitarian card with any degree of honesty. Certainly, no one could claim that it represented a 'turn to ethics'.¹¹

Of course, the mere fact that the Iraq War was controversial does not mean that it is the progenitor of a new era for international law. We must not treat the event out of its political and historical context. As Martti Koskenniemi has been telling us for some time now, certain negative characteristics of contemporary international law have been developing over an extended period of time. His identification of the forces of 'fragmentation', 'deformalisation' and 'Empire' have all been presented as indicative of restraints on a world move towards a form of international rule of law.¹² Undoubtedly, it is within Koskenniemi's appreciation of 'Empire' that the Iraq War might be located. But this might not provide sufficient weight to the influence of the conflict on political and legal positions regarding the 'right' of international law to have a determining role in the conduct of states outside their borders.

Consequently, if we look a little more carefully at the different approaches or projects in relation to international law vis-à-vis the Iraq War, we might

¹⁰ See Special Rapporteur D Marty, 7 June 2007 Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report: Explanatory memorandum'.

¹¹ See M Koskenniemi "'The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law' (2002) 65 *MLR* 159 ('Koskenniemi, "Protest"').

¹² M Koskenniemi, 'Global Governance and Public International Law' (2004) *Kritische Justiz* 241.

gain a greater sense of whether this conflict is indicative of a new era in the making. If they do indicate increasing contestation on fundamental legal matters we must consider seriously the importance of such a movement. There are perhaps five approaches we can examine, although no doubt others might be conceived.

First, we have the approach that places reliance on international law as though it were a fully formed rule system able to guide analysis and judgement on, and even construct, state practice or that of other actors on the international stage. Those supporting such an approach have been struggling to sustain their position. As this is based on a belief that there exists a 'practically complete' international law, where 'the basic architecture of the international legal system is already established' and 'most of the fundamental rules, principles, and institutions of public international law are already in place',¹³ there is inevitable difficulty when these principles seem to hold little sway in world events. Of course, the approach of reliance denies that any purported change in the law has been constructed legitimately. It contends that those rules and principles merely need to be applied to states and their practices in order to be subjected to the rigours of the law. But this inevitably incites the critique that if state practice has reached the point where law becomes ineffective then the purpose and legitimacy of the law must be questionable. Or worse. As Christine Gray suggests following the US-led action against Afghanistan post 2001, 'instant customary law' being an 'authoritative re-interpretation' of the UN Charter, becomes possible.¹⁴ In other words, recent state practice might be changing those rules and principles deemed fundamental by some international lawyers. Cassese, for one, disputes this but the fact that international law is perceived as capable of amendment through state practice opens up the argument for reformulation.¹⁵ If this is true then the failure consistently to condemn the USA and its 'coalition of the willing' regarding Iraq must test severely those whose position is one of reliance on the international law that has emerged strongly since the end of the Cold War. It might even speak of a silent, permissive consensus being assumed, which eventually finds acceptance through the UN Security Council mandating the Coalition to act as a multi-national force in Iraq supposedly to support the fledgling democratic government recently elected. Nonetheless, various authors have maintained that the perpetrators of breaches of perceived norms of international law in Iraq and other locations present a challenge that could and should be resolved through the application of law. For them, the law is robust and merely needs to be given proper attention and application in order to demonstrate its strength. The aim is to give effect to 'what is right' by the application of law.

¹³ V Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in M Byers (ed), *The Role of Law in International Politics* (Oxford; OUP, 2000).

¹⁴ C Gray, 'The Use of Force and the International Legal Order' in M Evans (ed), *International Law* (Oxford, OUP, 2nd edn, 2006) ('Evans').

¹⁵ Cassese objects to Gray's suggestion, in Cassese, n 2, at 475.

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Second, there are those who apply a slightly different approach. They look to reconcile international law with new world circumstances. The aim is not to rely on law (as though the interpretation of the law were fixed and transparent) but to reconcile it with practice while retaining the basic tenets of the law. In essence, legal texts are then read and deployed so as to justify action. This is nothing new, of course. But with the Iraq War and its aftermath, we are perhaps witnessing a more consistent attempt to interpret international law so as to support the agenda and will of powerful states. The attention paid to establishing the legality of the war before the conflict, by Ruth Wedgwood in the USA¹⁶ and Christopher Greenwood in the UK, as well as the UK Attorney-General's opinion¹⁷ accompanied by the moulding of international law standards to the 'new' circumstances (the rules of the game have changed but the game is still being played), are representative of this approach.¹⁸ Similarly, the attempt by various US government lawyers to represent international law as enabling certain interrogation practices or even extraordinary rendition is a case in point.¹⁹ So too the British government's determination to limit the jurisdiction of key human rights texts so as to avoid their application vis-à-vis Iraq and uphold a vision of restricted accountability. We have also seen it manifest itself in the attention paid to the legality of the operation of the war, with legal advisers reportedly at every point, what Air Marshal Burrridge has referred to as 'heavy lawyering'.²⁰ Such a 'project of reconciliation', as it might be termed, clearly threatens the ethos of international law that was established after the end of the Second World War and reinforced since the end of the Soviet era. In particular, the attempt to reconcile those fundamental principles regarding the use of force, impunity, torture and respect for human rights with changing political or economic objectives has to be treated with circumspection at the least.

Third, we also have those who look to a fundamental reformation of international law, making their starting assumption that international law, or some of its significant components, is critically flawed and requires reform. The aim appears to be not to undertake marginal alteration of the law's rules and structures but rather to engage in wholesale change through new or reconstructed instruments

¹⁶ See, for instance, R Wedgwood, 'The Fall of Saddam Hussein; Security Council Mandates and Preemptive Self-Defense' (2003) 97 *AJIL* 579.

¹⁷ *Guardian* (London 18 March 2003) <http://www.guardian.co.uk/uk_news/story/0,3604,916396,00.html>. See also Attorney-General, 'Iraq: Resolution 1441' (Note to the Prime Minister of 7 March 2003) <<http://www.number10.gov.uk/output/Page7445.asp>>.

¹⁸ T Blair, 'Doctrine of the International Community' (Speech at the Economic Club, Chicago, 24 April 1999) <<http://number10.gov.uk/output/page1297.asp>>. See also, Prime Minister's speech of 5 March 2004 <<http://www.number10.gov.uk/output/Page5461.asp>>.

¹⁹ See M Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law, (2007) 75 *George Washington Law Review* 1333.

²⁰ See Air Marshal Burrridge, Oral Evidence taken before House of Commons Defence Committee, 11 June 2003, response to Q290 referring to 'heavy lawyering' applied to targeting: 'I feel extremely comfortable with the construct we use embracing legal advice ... we train our lawyers as operational lawyers, so they do get lots of practice at how to deal with targets, so they learn to do it quickly'.

or institutions. Such a project embraces contrary positions. Those who seek to reform international law and its institutions, including the UN, might wish to do so in order to ensure that the experience of the Iraq War is neither repeated nor set as a precedent for the actions by other states. Similarly, reform may be to legitimate the actions taken vis-à-vis the Iraq intervention and even present them as a worthy precedent. Dominic McGoldrick points to the US presumption that reform was necessary in order to recognise the new political environment it had promoted. The embellishment of a doctrine of pre-emptive self-defence and a right to take action in the face of a UN Security Council hampered by an 'unreasonable' veto have been touted as changes in principle that will be necessary to make international law less flawed. McGoldrick warned that the 'challenge for the US is to remedy what it sees as the defects of the current system without destroying the credibility and effectiveness of the system itself'.²¹ But, of course, this presupposes that international law continues to possess a single, systemic character. On the contrary, however, Koskeniemi and the ILC have considered that 'fragmentation' of international law is becoming the norm, suggesting that a unitary system has already been replaced by numerous systems. If that is true then McGoldrick's warning for US (and UK) policy regarding international law might be missing the point. For a reform strategy that seeks to split areas of law (deliberately rather than through evolving fragmentation) and manipulate those that are perceived restrictive of the exercise of power is one that does not depend on a credible and legitimate 'complete' system. Indeed, through the encouragement and management of a fragmented law, certain areas can be isolated from others: some to be supported and enforced, others to be left in the political hinterland. So, for instance, the emerging system of international criminal law can be undermined by retaining impunity for US citizens and promoting individual trials through dubious legal processes (such as that in Iraq) without affecting the management of a world economic system. The latter does not depend on the former. Reform, then, becomes a project of 'divide and rule'. The rule of international law becomes a disparate principle, changing from field to field. It matters not, then, about the integrity of the 'whole', provided that the effectiveness of the parts can be manipulated as required.

In response to much of the above approaches, we can discern a fourth approach. This is one of tactical resistance. Such a project appears on the face of it to be based on a reaction to state practice, aiming to resist it by using international law and its institutions as well as domestic processes of law, advocacy networks and civil society activism in all its multiple forms.²² It is predicated on a presumption that international law in its current guise may be inadequate and serving the

²¹ McGoldrick, n 9, at 121.

²² The activities of the significant human rights organisations, such as Amnesty International and Human Rights Watch, as well as more informal groupings of activists and academics, such as Peacerights (see <<http://www.peacerights.org/>>) have complemented individual litigation initiatives such as in *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 and *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

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interests of injustice (howsoever that might be defined) but needs to be enforced. The resistance, through the auspices of international law, to the Iraq War and the US and UK actions before, during and after the conflict, point to a movement intent on using law as a weapon without becoming wedded to its current form and content. This reflects the desire to rely on certain precepts of international law held to be of great significance, particularly the pre-eminence of peaceful resolution of conflicts and respect for human rights, while refusing to be bound by its institutional processes. So, resistance through the law finds itself appropriate at international, regional and—crucially—domestic levels. Such a project might therefore reflect characteristics of those seeking reliance and/or reform. However, its perceived presence through civil society has its own particular nature. It is responsive to changing conditions. Consequently, a heightened form of resistance through and by international law could be indicative of a new era developing.

Fifth, and finally, we might consider the development of a project of rebellion. This encompasses those determined to rebel against international law and its institutions by framing action both inside and outside its parameters, establishing alternative methods for resolving conflict and achieving justice. And yet again, such a project might have its nefarious purpose, as well as a seemingly 'good' justification. Given the obscure nature of justice in an international context, it is hardly surprising that commentators will want to adapt their approach to international law depending on the interests it is perceived as serving. Thus the act of rebellion occurs in the light of an existing system that requires avoidance rather than confrontation. This could well be conceived in the interests of 'power' as well as 'people'. So we see in the instance of the Iraq War the attempts by some to suggest that international law does not serve the aims of certain states engaged in a perpetual war against terror. We also see attempts by civil society to fashion alternative methods for doing justice and making clear the need for judgement that is not based on traditional international legal texts, however just they might be in theory. Peoples' Tribunals abound with the specific aid of the internet and the coordinated 'street' activity of 'concerned citizens'.²³ At heart, the belief that a rebellion against the centrality of the state in international law is necessary. The Iraq War makes this all the more poignant, in part reflecting the views of international lawyers such as Philip Allott and Iain Scobbie.²⁴ The individual is placed at the centre of a response to the powerful, making us all responsible for the actions of states.

The presence and strength of these five approaches (or projects), pursued in academia, in legal practice and in politics, that might be detected in substantial

²³ A whole host of peoples' tribunals appeared in relation to the Iraq War. Notable examples included the Brussels Tribunal, the World Tribunal on Iraq in Istanbul in 2005 and the Legal Inquiry into alleged war crimes in the Iraq War in London in 2003 (for the latter, see <<http://www.peacerights.org/documents/A%20IRAQ%20REPORT%20Final.doc>>).

²⁴ See P Allott, *Eunomia: New Order for a New World* (Oxford, OUP, 1990) and I Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law' in Evans, n 14.

contestation provoked by the Iraq War, suggests that we might indeed be entering a new era of international law. At least, a strong argument can be made to this effect.

But what would be the consequence of such an evaluation? Does the diagnosis matter? Yes, particularly if it suggests that we have entered a crucial period of instability of international law, one in which, contrary to Vaughan Lowe's assertion, the values, rules, techniques and structures are open to negotiation if not manipulation. Judgements and decisions made within this crisis, for such is the character of significant instability, will determine the shape and direction of international law and relations for the foreseeable future. The instability caused by the competing projects or approaches, played out in political institutions, in courts both municipal and international, and in academic discourse, may serve to undermine key precepts of peace and human rights and the rule of law that many previously took to be sacrosanct.²⁵ Particularly since the end of the Cold War, and ironically through the first Gulf War, it was possible to envisage a future for international law that was clearly founded on these three pillars.

But, of course, it was never as simple as that. Practice often suggested ambiguity and ambivalence in this respect. So, for instance, pathetic vacillation and hand-wringing over the massacres and violence in Rwanda and the former Yugoslavia were accompanied by the radical development of international criminal tribunals for both locations. Within a short period of time, norms that had been constructed in the pained memory of the Holocaust were both undermined by the failure to undertake interventionist action and reinforced by juridical innovation. Similarly, 'power' embedded in capital and state machinery remained framed by interest rather than ethics. Nonetheless, there was considerable evidence to suggest that there existed at least some meaningful counterweight to these forces through international law's domain.²⁶

The question now is whether the Iraq War and its legal responses have closed the door on these suspiciously modest roles for international law and have transported it back into a state of flux, where exception takes the place of norm and where powerful states can propose that they are incapable of doing 'wrong'. Much as Carl Schmitt might have argued, judgement then becomes without consequence, even inconsequential (in the sense that it has no value). States cannot be accused of breach of any moral control, the argument might continue, because there is no place for moral judgement when it comes to state behaviour. That is reserved for individuals and perhaps their own applicable legal system. International law thus offers little except a possible tool for use by hegemonic

²⁵ Martti Koskenniemi has alluded to such a crisis as potentially following the Iraq War (although he also questions whether it could be the product of informal globalisation and indeed general disappointment about international law) in 'What Should International Lawyers Learn from Karl Marx' (2004) 17 *Leiden Journal of International Law* 229.

²⁶ See, for instance, Koskenniemi, 'Protest', n 11.

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power, whether based around spheres of influence or, in the case of the USA, the whole world, whenever and wherever it suits.

If this is indeed a correct analysis, then the movement towards a new era poses significant threats and opportunities that are not just of the margins. The threats manifest themselves in the erosion of one of the central planks of modern international law—namely the outlawing of aggressive war—and in the systemic breach of human rights both within and beyond those jurisdictions that had prided themselves on human rights universality as the basis for limiting state sovereignty. At every turn, these threats are directed against any meaningful processes of accountability for states or any avenues for judgements that possess consequences for state or personal liability. We might then interpret this as an entry into a period of ‘conflictual co-existence’, being a transformation of the ironical ‘peaceful co-existence’ after the Cuban crisis that Pierre-Marie Dupuy has ascribed to Wolfgang Friedman’s analysis of the 1960s.²⁷ Conflict, not peace, dictating the shape of international law would leave us not with a return to a ‘Cold War’ but rather with a ‘perpetual war’. Such a war can never be won because the enemy exists, for right or wrong, in some people’s minds. An international law that retains its preference for states is almost helpless here. Those projects of reliance and reform, even of resistance, will only perpetuate this error.

There might be a different perspective, however. Opportunities arise in a crisis that gives birth to a new era not only to resist general and particular threats to justice, but also to shape law so as to reinforce key values such as respect for the rule of law, human rights and peace. In other words, there are prospects for more than simply opposition. Whether this necessitates the advocacy for a constitutionalisation of international law, through some form of Kantian project for perpetual peace, depends on one’s philosophical perspective. Koskenniemi has proposed such a venture. Others, such as Iain Scobbie, theorise on the possibility. Whether they are workable has at least to be considered.

Overall, therefore, the identification of a new era posed by the Iraq War as emblematic of movements towards a reinvention of international law warrants serious scrutiny. This book is, at heart, an attempt to join in such a process of examination, if only to make the question more audible.

II. The Purpose and Structure of The Book

The purpose of this book, then, is twofold. First, it is to assist in the assessment of whether international law has indeed entered a new era as a result of the prosecution of the Iraq War and its aftermath. Second, it is to begin the difficult task

²⁷ P-M Dupuy, ‘International Law: Torn between Coexistence, Cooperation and Globalization; General Conclusions’ (1998) 9 *European Journal of International Law* 278.

of determining what kind of response is now possible vis-à-vis international law. Where are the battlefields for ‘justice’? What are the threats? And how might practice engage with international law at state and inter-state levels as well as domestic level, as a means of pursuing justice for the victims of violence and power?

The book has therefore brought together a range of analyses of the legal questions relating to the Iraq War to assist in any assessment that a new epoch is upon us. They do not present a total picture. However, together they indicate that the Iraq War merits serious consideration as a catalyst for the development of international law. In which direction it might proceed, will undoubtedly depend on the outcome—politically and legally—of the issues contested.

This returns us to the three areas of international law mentioned as of fundamental concern at the beginning of this introduction; namely *jus ad bellum*, *jus in bello* and *jus post bellum*. The contributions are organised generally around these themes and each, to a greater or lesser extent, contrives to relate stories of the five approaches outlined above. So in chapter two, as regards *jus ad bellum*, Phil Shiner examines the issue of accountability through the lens and medium of international law as applied in the UK context. Even though his focus is on legal actions conducted in the UK jurisdiction, the point of his analysis has much wider application. It suggests that international law has become increasingly integrated into the search for some kind of adjudication in relation to the actions of a state. Even though the traditional demarcation between domestic and international law varies from jurisdiction to jurisdiction, in those states such as the UK where external behaviour has been outside the law, there is now increasing pressure to respect the norms of international law. The judiciary may still be resistant to such an application but the story Shiner tells is optimistic. A reliance on certain foundational norms of international law is for him a matter of principle for the UK as a whole. If legal actions highlight that obligation, whether individually they are successful or not, then international law still serves a purpose and deserves to be reinforced at every opportunity. The heartrending tales that underlie the actions should not be forgotten in such a mission, of course. The nature of litigation at least allows for them to be repeated, reheard and re-examined. They give a focal point for a specific sense of injustice that can turn to international law to construct a meaningful and powerful response. But one should not forget that these stories also reveal an attempt by certain states, particularly the UK, to reconcile international law to suit predetermined political objectives. Shiner uncovers the less than glorious attempts by the UK government and its legal advisers to play with international law concepts and texts, with little respect for the body of the law constructed painstakingly over decades by international lawyers and courts.

Dan Joyner offers a different perspective in chapter three. He takes as a point of departure that the conflict in Iraq was essentially driven by a response to weapons of mass destruction (WMD). Many would disagree about this presumption. Since at least Pierre-Joseph Proudhon there has been a tendency to see, as he did, that ‘if political motives may be regarded as an apparent cause of war, then economic

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needs are the secret and first cause of it'.²⁸ Various commentators have indeed seen oil as the underlying cause of war. The battle for effective control over a vital resource would not be the first war prompted by an important natural resource. And there is much literature, including that of Stefan Talmon in this volume and elsewhere, that questions the economic exploitation of Iraq after the war was concluded. Nonetheless, it is at least plausible that WMD provoked a fear worthy of military intervention. Certainly the rhetoric would suggest that this was an issue that consistently preoccupied the alliance since first called into action in 1990 after the invasion of Kuwait. One must recall that it was the focus of UN Security Council Resolution 687. The Saddam Hussein regime was left in power provided that the matter of WMD was dealt with. Could it be said that over time this became a redundant concern? Joyner assumes not and places the conflict within antiproliferation strategies. Whether this interpretation is undermined, given the widely reported dissatisfaction of the US and UK intelligence communities that their available information could not have justified a belief that Iraq posed a threat in relation to WMD, there may be a precedent for future excursions on this ground. The concurrent concerns about North Korea and Iran warrant particular note in this respect.

The book then turns to the particulars of accountability with regard to the conduct of the war. Inevitably, this brings into the foreground matters of international humanitarian law (IHL) and the possible application of international criminal law (ICL). The latter arises principally because of the UK's acceptance of the jurisdiction of the International Criminal Court (ICC). So, in chapter four Nick Grief rehearses some of the specific practices during the invasion which posed significant questions under IHL. The issue of the use of cluster munitions was clearly one of those that provoked significant concern both before and after the campaign. Although the UK government under Gordon Brown has now appeared to embrace the possibility of restricting or even banning some of these types of weapons—an ironic twist at this juncture—no such international move was contemplated prior to the war. Grief also examines those other instances where tactics were questionable in terms of IHL and ICL combined. He then proceeds to consider the response of the Chief Prosecutor of the ICC to various complaints made to him regarding these events in Iraq. Grief pays particular attention to the unaddressed matter of 'complementarity' in the Prosecutor's decision not to investigate further. He draws attention to the difficulty faced by an international tribunal such as the ICC and its need to balance what it can do feasibly given the resources it has at its disposal and the desire to do justice when atrocities have been committed. The principle of complementarity purportedly allows the Prosecutor to rely on the ability and willingness of states to deal with their own 'rotten apples'. The problem comes when those apples are symptomatic

²⁸ P-J Proudhon, 'On the Primary Cause of War' (P O'Rourke and HP. Kainz trs) from 'La Guerre et la Paix recherchés sur le principe et la constitution du droit des gens' in H Kainz (ed), *Philosophical Perspectives on Peace: An Anthology of Classical and Modern Sources* (London, Macmillan Press, 1987).

of a system that pays scant regard to observance of established principles of IHL and international human rights law.

The Prosecutor's communication on Iraq is then considered in wider context by the following two chapters. In chapter five, Andrew Williams provides a deconstruction which attempts to understand whether the communication is a reflection of the state of ICL as a whole or merely an aberrant expression of its perceived fundamental precepts. There can be little doubt that the Chief Prosecutor at the ICC would have had to assume an extremely brave—foolhardy, some would say—stance even to consider investigating further the role of the UK in the Iraq War. But that might not be the point. More relevant might be the interpretation that the Prosecutor was constrained not only by a sense of political realism but also by the whole construction of international criminal law as it has developed. In other words, the precepts of this branch of international law dictated that a refusal to investigate was his only option. If that is the case then the Iraq War could be instrumental in forging an ICL that reinforces a limited accountability, one partial and perhaps discredited.

In chapter six, William Schabas continues the analysis of the Chief Prosecutor's response. His thesis, however, rests more clearly on a view of an ICL that is ripe for interpretation. In particular, Schabas is intent on drawing into the open the semi-interred crime of aggression. Too easily, perhaps, the Chief Prosecutor was able to ignore this crime on the basis that it lay outside the mandate of the ICC. However, Schabas questions this position. He contends that the context of possible illegality should have had a bearing on the review of activity within the conduct of hostilities. In particular, the designation of military targets that were associated with an illegal aim of regime change could and should have been assessed. Schabas's chapter is therefore, in essence, an attempt to re-question the relationship between *jus ad bellum* and *jus in bello*. He offers an interpretative approach to ICL that might be seen as reformist in nature.

The book then turns to a series of issues relating to the post-conflict occupation of Iraq. Some have termed this '*jus post bellum*', although it can be contained within the whole corpus of IHL.²⁹ First, then, in chapter seven, Christine Chinkin raises a fundamental question as to the liability of states under international law for the actions of their partners in an interventionist enterprise. Put boldly, she asks whether the UK can be held responsible for the activities of the USA in Iraq. This enquiry may well, as an unintended consequence, upset the logic of intervention by states through collective action that has developed since the end of the Cold War both in terms of 'humanitarian' action and in peacekeeping. In other words, the experience of the Iraq War, and the subsequent occupation, might well induce changes in international law that make states pause before becoming embroiled in collective ventures for even the most humanitarian of reasons. Chinkin explores the particular levels of responsibility in issue and concludes that

²⁹ See, for a more philosophical review of occupation matters, G Bass, 'Jus Post Bellum' (2004) 32 *Philosophy and Public Affairs* 384.

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states should be drawn into evaluating legal responsibility in addition to those political and moral concerns that might otherwise dominate concern.

In chapter eight, Stefan Talmon continues with this theme of responsibility but with particular emphasis on the role of the Coalition Provisional Authority (CPA) that ruled in Iraq for a period after the War. On the face of it, this institution might appear to be unique and therefore of little relevance for general assessments on the state and development of international law. But the detailed examination that Talmon provides demonstrates that international responsibility in increasingly common joint operations involving a 'plurality of actors' requires an approach that must reflect the need to hold participants accountable for internationally wrongful acts, howsoever they are packaged. In other words, there is a necessity to look behind the façade, if justice is to be done, to key precepts of international law. Thus, even if the CPA turns out to be a single, not-to-be-repeated construction, the underlying principles of international law should be applied to participating states regardless.

The book then turns to those domestic and regional human rights mechanisms that have been, or may be, deployed in relation to the conduct of forces beyond their immediate jurisdictions. The Iraq War has led to a number of questions being asked about the ability of national systems to hold governments to account for apparent breaches of human rights as well as international humanitarian standards. The general focus of two of these contributions is on the experience in the UK. So in chapter nine Rabinder Singh examines the whole issue of justiciability, or rather non-justiciability, which has been gradually undergoing a process of reassessment by the English courts. Where, historically, matters of foreign affairs lay outside the concern of the courts, Singh now demonstrates that there should be no 'forbidden territory' when it comes to human rights violations. At heart, this is a plea for a reinvigoration of the rule of law, with respect for human rights a fundamental and over-arching condition. This is, as Singh says, an orthodox view, one that has been obscured from time to time when political sensibilities appear to have been affected by legal review in the courts. Nonetheless, it highlights both the desire to rely on the law (international as well as domestic) and those lines of resistance that should be contemplated and available when it comes to assessing governmental action wherever it might take place. Singh's detailed analysis of the relevant case law in this respect demonstrates his thesis. In particular, recent cases that have assessed (and are continuing to assess) UK government policy, practices and decisions regarding the Iraq War and its aftermath have brought together the dual question of the rule of law in a domestic context and an international rule of law that also might place respect for human rights, as well as peace and security, putatively at least, at its core. The review of such matters before the English courts warrants significant attention for international as well as domestic lawyers, for it is one of the vital locations where the interpretation of international law is being conducted.

Keir Starmer, then, in chapter ten, continues this theme of interaction between human rights, international law, domestic law and notions of 'security'. By analysing

the legal implications, as tested before the English courts and the European Court of Human Rights (ECtHR), of UN Security Council delegation of powers to (or authorisation of action by) states to undertake enforcement actions, he questions the ability of domestic law to make sense of international legal regimes. Focusing on recent cases, Starmer addresses a number of key questions. First, while the ICJ has established that international humanitarian law and international human rights law co-exist, what if there is conflict between the two? How are courts at the domestic and regional levels (in the case of the ECtHR) to deal with such an issue? Second, how are questions of state responsibility to be resolved where states are operating supposedly under a Security Council mandate but commit unlawful acts outside the terms of that mandate? Which court has jurisdiction? And is there a real danger of an implied immunity arising because no court considers it has jurisdiction to scrutinise the state's unlawful actions? Third, where states act under Security Council chapter VII resolutions, how are domestic human rights systems to respond to breaches of obligations of relevant human rights instruments? What are the constraints on state parties acting pursuant to that authorisation? These and other questions are discussed by Starmer while leaving the reader under no illusion that they have not necessarily been answered by academic commentators let alone the courts.

The potential approach by the European human rights system to alleged human rights abuses in Iraq is also considered by Bill Bowring in chapter eleven. Using the analogy of the treatment by the ECtHR of cases involving Russian and Turkish operations, he considers the likelihood of the court addressing effectively the relationship between IHL and human rights law. The central question, perhaps, underlying his investigation is how robust the European Convention system may be in dealing with fundamental abuses perpetrated in times of military conflict. The possibility for resistance against such violations, wherever they may occur, through legal processes in the European context does hinge on the answer that might be produced by the ECtHR. For, if that body makes a habit of determining that it has no jurisdiction to consider these matters, because of either the principle of extra-territoriality or lack of attributability to an individual state party to the Convention, then the prospects for achieving some kind of judgment on many human rights violations will be much reduced. Bowring is relatively optimistic, however, that the court does possess the tools to make a contribution to achieving some kind of accountability. Whether it has the courage to apply them remains to be seen.

The final two chapters in the book offer a chance to reflect more generally on the future of international law. They act as mutual counterpoints. The first of these, by Sir Nigel Rodley, reviews the state of international law following the Iraq War through a generally optimistic lens. The threats that have been posed to international law by the behaviour of powerful states, notably the USA and the UK in tandem, have served to emphasise the value of an international law that possesses ethical strength. Rodley argues that such challenges as have ensued should, and indeed have, encouraged a vigilance concerning the abuse and/or manipulation

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of established international legal precepts. In other words, there is less danger now that the gradual undermining of central principles relating to respect for human rights, international peace as well as security, and non-interference in the affairs of sovereign states, will go unnoticed or without organised response. This would not necessarily prevent abuses of these principles recurring but it might establish a politics of concern that was not evident before the Iraq War. Certainly, the public response in Spain, the UK and, to a lesser extent, the USA, to the need to protect principles with greater vigour through public and legal action has been significant.

Jayan Nayar in chapter thirteen is not so positive. His idiosyncratic approach to both international law in general and the recent responses to the Iraq War in particular suggests that the very system is too flawed to be rescued. Instead, the only avenue is a form of rebellion. There is something of an echo here of Albert Camus. Camus's belief that rebellion could be a constant way of living recognised that whatever action one takes, 'the injustice and the suffering of the world will remain, and, no matter how limited they are, they will not cease to be an outrage'.³⁰ Consequently, those who look to international law as some form of solution to suffering, howsoever that might be occasioned, are likely to be disappointed. It is only through an embrace of peoples' action, peoples' law, in Nayar's terms, that there will ever be a radical challenge to the 'hope and despair' engineered by the promises of international law and its legal system(s). Of course, this may be a difficult message to accept, particularly for those who view the rule of law as of pre-eminent importance in the development of some form of global justice.

Together, then, this collection of essays is a contribution to the assessment of a putative crisis in international law. Whether a new epoch has emerged remains a vital consideration, if only to place us on guard against the possibilities for injustice and abuse that the Iraq War has presented.

³⁰ A Camus, *The Rebel* (London, Penguin, 1971) 267.

The Iraq War, International Law and the Search for Legal Accountability

PHIL SHINER

I. Introduction

It is one of the recurrent themes of this book that, in relation to the Iraq War of 2003 and its aftermath, the USA and the UK, with lesser players, took practical and effective steps not just to challenge international law but to change or manipulate it, where it stood in the way of their objective. The purpose of this chapter is to examine how certain legal actions, which related to the decision to go to war, in the UK courts have both highlighted the extent of this challenge and manipulation and, perhaps ironically, demonstrated the extent to which a search for accountability, employing the very foundations of international law under threat, may nevertheless still be possible. In this sense, the chapter is a story of revelation and resistance. Revelation, because the cases demonstrate the scope and depth of threat to international law. Resistance, because they represent one avenue taken in the struggle to attach responsibility to the regimes that have chosen to ignore fundamental values of peace and respect for human rights.

The legal actions considered here focus on issues arising from the plan to use force against Iraq: that is, the law of *jus ad bellum*. Of course, other chapters in this book address significant matters of concern that relate to the subsequent occupation of Iraq. Various actions have been instigated that involve accusations of breaches of *jus in bello* and international human rights norms.¹ There can be little doubt, however, that questions concerning the legality of undertaking the war have held centre stage in both the public and political arenas ever since the prospect of military action became apparent in 2002. The legal actions reviewed in this chapter explore the evolution of the public understanding of the arguments for and against the legality of the use of force in two parts. In each part, further detail and nuances are revealed.

¹ The focus of this chapter is on the struggle for legal accountability in the UK. It has to be acknowledged, however, that other legal challenges have taken place elsewhere, such as in the USA, the Netherlands, Germany, Canada and Ireland.

The first part examines legal resistance to the use of force prior to the war. This took the form of a pre-emptive legal inquiry held by civil society, widely reported in the media, and a pre-emptive legal challenge through judicial review in the High Court of England and Wales. These actions demonstrate how international law and its breach became crucial in the run-up to the invasion in the public judgement of the rights or wrongs of military action. The second part concerns the attempt, after the invasion and subsequent occupation, to review and have adjudicated upon the legality of the UK government's decision to issue military orders to invade Iraq. It centres on a further judicial review on behalf of the relatives of servicemen who had died in the conflict. Together, therefore, these parts relate how the search for legal accountability for instigating military action has been and remains a fundamental issue. This has significant implications for international law, both highlighting its importance as a potential moral counterweight to the actions of powerful states and as a source of inspiration for public challenge of government policy. Whether this has something to say about the nature of international law in the 21st century is explored in the conclusion to this chapter.

II. *Jus Ad Bellum* and Pre-emptive Challenges to the Use of Force in Iraq: The Peacerights Legal Inquiry and the *CND* Case

A. Public Debate and Legal Challenge

In the UK, as with other common law jurisdictions, there is a long line of authority on the question of justiciability. Until recently, courts would routinely find that issues of high foreign policy or defence policy (for instance, where the security of the realm is at issue) are simply not for courts but remain exclusively within the preserve of the executive. In this volume Rabinder Singh discusses the historical case law and makes clear the argument that post Human Rights Act 1998 in the UK there is no forbidden territory for judicial scrutiny if there are actual or potential violations of fundamental rights or freedoms in issue.² However, in early 2002, when the Iraq storm clouds began to gather, the prospects of a legal challenge to an executive decision pursuant to the Royal Prerogative to wage war looked slim. Indeed, in January 2002 the Court of Appeal had reiterated the relatively narrow scope of a court in this area. In the case of *Marchiori* Laws J held:

[I]t seems to me, first, to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government on matters of national

² R Singh, 'Justiciability in the Areas of Foreign Relations and Defence' (ch 9 in this book).

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defence policy. Without going into other cases which a full discussion might require, I consider that there is more than one reason for this. The first, and most obvious, is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome. The defence of the realm, which is the Crown's first duty, is the paradigm of so grave a matter. Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions. Of course they may or may not be satisfied, and their satisfaction or otherwise will sound in the ballot box. There is, and cannot be, any expectation that the unelected judiciary will play any role in such questions, remotely comparable to that of government.³

On that basis, civil society representatives in the UK, intent on the peaceful resolution of conflict, were advised by lawyers that it would be difficult to challenge an executive decision to wage war, let alone a decision not yet taken. Accordingly, in early August 2002, the representatives met with academic and practising lawyers and it was decided that if the courts were not able to scrutinise a proposed decision to go to war in Iraq instead, in the best traditions of Peoples' Tribunals,⁴ civil society would hold its own legal inquiry. In October 2002 an inquiry was held in Gray's Inn, London.⁵ This inquiry had two important consequences. First, the initiative helped start a public debate about the legality of the war that continues today.⁶ Second, it succeeded in identifying at an early stage what was to be the key legal justification by the USA and the UK, namely the 'revival doctrine', and it assisted in focusing the minds of the public and lawyers as to why this doctrine did not provide a proper or even plausible legal justification. In both respects, the initiative contributed to the struggle for accountability for an aggressive war.

But is it true to assert that this inquiry assisted in starting the public debate about legality? A number of points can be made. First, international law had never featured so much in the public examination of a potential conflict. The Vietnam War provoked considerable discussion about legality, but only once its horrific effects had become apparent. The 1990 Gulf War had the benefit of a chapter VII authorisation by Resolution 678 and it is, perhaps, not surprising that there

³ *Marchiori v Environment Agency & Anor* [2002] EWCA Civ 3, 38.

⁴ The first well-known Peoples' Tribunal was the Russell Tribunal, an international body presided over by Bertrand Russell, established in 1966 to investigate and evaluate US foreign policy and military intervention in Vietnam. Lelio Basso, one of the members of the Tribunal, later worked to set up the Permanent Peoples' Tribunal. For recent work, see 'Permanent Peoples' Tribunal on Global Corporations and Human Wrongs, University of Warwick, 22–25 March 2000, Findings and Recommended Action'; (2001) 1 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_1/ppt> accessed 22 November 2007.

⁵ 'A Citizen's Inquiry Concerning the Legality of a Prospective Use of Force by the United Kingdom Against Iraq' 11 October 2002 <<http://www.peacerights.org/documents/JUDGEMENTOFFPROFESSORWARBRICK.doc>> accessed 22 November 2007.

⁶ See P Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London, Penguin, 2005) ('Sands'); see also M Danner, *The Secret Way to War: The Downing Street Memo and the Iraq War's Buried History* (New York, New York Review Books, 2006).

was little, if any, public debate about its legality.⁷ However, by November 2002, when the media examination of the pending invasion of Iraq began to intensify, there was no way of knowing whether there would be an authorisation again. Nevertheless various supporters of a war in Iraq made the case in public that a Security Council authorisation would be preferable as it would give the war a legitimacy it might otherwise lack.⁸ Further, although the UK government had participated in the NATO action in Kosovo, the question of the legality of the UK's role specifically did not take centre stage. This is notwithstanding the subsequent controversy in the legal world as to whether the doctrine of humanitarian intervention provided a third valid reason to use force.⁹

⁷ However, it should be noted that the UK public had no way of knowing that this foreign intervention was also of dubious legality. It is known now because of the following passage from the advice of the UK's Attorney-General of 7 March (fully discussed below) which states that he had 'taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But 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 this view': Attorney-General, 'Iraq: Resolution 1441' (Note to the Prime Minister of 7 March 2003) <<http://www.number10.gov.uk/output/Page7445.asp>> accessed 22 November 2007, para 30 ('Attorney-General's advice of 7 March 2003'). It might be thought that the public debate about the legality of these interventions might have been intense if this advice from his predecessors had been publicly known. Further, given the central importance of humanitarian intervention to the shift in foreign policy signalled by Tony Blair's 'Chicago Speech', one wonders what wider impact there might have been if these facts had been known: T Blair, 'Doctrine of the International Community' (Speech at the Economic Club, Chicago, 24 April 1999) <<http://number10.gov.uk/output/page1297.asp>> accessed 5 December 2007.

⁸ It now appears that although the debate was couched in terms of this legitimacy, the USA and the UK were apparently prepared to obtain this Security Council resolution by illegitimate means. On 13 January 2003 staff at the UK's GCHQ surveillance centre were ordered to cooperate with a US espionage mission on Security Council Member States after a request from the US National Security Agency. A leaked memorandum stated that the agency wanted to gather 'the whole gamut of information that could give US policymakers an edge in obtaining results favourable to US goals or to head off surprises' (in particular from the non-Permanent Members of the Security Council): memorandum cited in M Bright, E Vulliamy and P Beaumont, 'Revealed: US dirty tricks to win vote on Iraq war' *Observer* (London 2 March 2003) <<http://www.guardian.co.uk/Iraq/Story/0,,905937,00.html>> accessed 5 December 2007; see also M Bright and P Beaumont, 'Britain spied on US allies over war vote' *Observer* (London 8 February 2004) <<http://observer.guardian.co.uk/iraq/story/0,,1143672,00.html>> accessed 5 December 2007, memorandum available from <<http://observer.guardian.co.uk/iraq/story/0,,1143672,00.html>> accessed 5 December 2007. It is also worth noting that Clare Short publicly revealed in February 2004 that Britain had colluded in the bugging of the office of the UN Secretary-General, Kofi Annan: --, 'UK "spied on UN's Kofi Annan"' *BBC News* (London 26 February 2004) <http://news.bbc.co.uk/1/hi/uk_politics/3488548.stm> accessed 5 December 2007.

⁹ C Gray, *International Law and the Use of Force* (Oxford, OUP, 2004) ('Gray'); Editorial Comments: 'NATO's Kosovo Intervention' (1999) 93 *AJIL* 824; MJ Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York, Palgrave Macmillan, 2003); NJ Wheeler, 'Review: Humanitarian Intervention after Kosovo: Emergent Norm, Moral Duty or the Coming Anarchy?' (2001) 77 *Royal Institute of International Affairs* 1; NJ Wheeler, 'The Limits of Humanitarian Intervention from the Air: The Cases of Bosnia and Kosovo' in *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, OUP, 2000); R Thakus, *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship* (Tokyo, United Nations University Press, 2000); S Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford, OUP, 2002).

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Second, the inquiry led immediately to a High Court challenge by the Campaign for Nuclear Disarmament (CND) through judicial review that had a demonstrable impact on the legal debate. This can be seen most clearly in the damage done to the UK government's case for war by the eventual leaking of the full legal advice of the Attorney-General, and the centrality of CND's legal position in that opinion. The following extracts from the Attorney-General's full advice of 7 March 2003 make the point:

Given the controversy surrounding the legal basis for action, it is likely that the [International Criminal] Court will scrutinise any allegations of war crimes by UK forces very closely. The Government has already been put on notice by CND that they intend to report to the ICC Prosecutor any incidents which their lawyers assess to have contravened the Geneva Conventions ... It is also possible that CND may try to bring further action to stop military action in the domestic courts, but I am confident that the courts would decline jurisdiction as they did in the case brought by CND last November ... In short, there are a number of ways in which the opponents of military action might seek to bring a legal case, internationally or domestically, against the UK, members of the government or UK military personnel. Some of these seem fairly remote possibilities, but given the strength of opposition to military action against Iraq, it would not be surprising if some attempts were made to get a case of some sort off the ground. We cannot be certain that they would not succeed.¹⁰

Third, the legality debate can be tracked back in time by careful research. Prior to the start of September 2002 there is no public record of any debate about whether a prospective use of force against Iraq by the UK would be lawful. That is not surprising given that at this stage neither the Cabinet and Parliament nor the public knew, or could possibly have known, of the controversial revelations from the leaked 'Downing Street Memoranda'.¹¹ These made clear that the UK government, through its Prime Minister, had more or less committed itself to 'regime change' in partnership with the US government as early as April 2002. In preparation for the forthcoming inquiry held by Peacerights it made public an important legal opinion by Rabinder Singh QC and Janet Kentridge on 6 September 2002. This foreshadowed their lengthy skeleton argument to the inquiry and set out at considerable length three strong arguments. First, that the right of self-defence under UN Charter Article 51 would not justify the use of force against Iraq by the UK; second, that Iraq's alleged failure to comply with all or any of the existing 29 UN Security Council resolutions would not justify the use of force; third, that a further UN Security Council resolution would be required clearly to authorise such use of force. The opinion was the subject of live debate the following morning on the BBC Radio 4 *Today* Programme while Prime Minister, Tony Blair, was meeting with the US President, George Bush, at Camp David.¹² By 24 September 2002,

¹⁰ Attorney-General's advice of 7 March 2003, n 7, paras 33–5.

¹¹ Downing Street Memo: 'Iraq: Prime Minister's Meeting, 23 July' (23 July 2002) <<http://www.downingstreetmemo.com/memos.html>> accessed 22 November 2007.

¹² We now know from the Downing Street Memoranda that Blair had agreed to go to war by that weekend, and that he re-emphasised his support to the USA on this occasion.

when asked about the legal position and legal advice as to whether a further UN resolution would be necessary, the Prime Minister said: 'Of course, we will always act in accordance with international law'.¹³

For the next few weeks there were many assurances from representatives of the UK government that it would 'abide by', 'comply with' or 'act in accordance with' international law.¹⁴ Indeed, it was these assurances that the government would comply with international law that opened up the possibility of the subsequent legal challenge by CND.¹⁵ Naturally, it could be said that it was merely coincidental that the start of the legality debate was coterminous with the Peaceroights initiative, and the fact is that the government's full reasoning will remain a matter for public speculation until such time as there is an independent public inquiry into the matter. Nevertheless it seems reasonable to suggest that the initiative at least helped to start the public legality debate. The nature of this legal confrontation must now be explored.

B. The Use of Force and the Revival Doctrine¹⁶

By October 2002 there was academic legal debate about whether it could be lawful for a state, or group of states, to decide unilaterally (that is, without Security Council backing) that it, or they, could rely on UN Security Council Resolution 678, from the first Gulf War, to use force against Iraq subsequently and specifically in respect of its alleged failures to disarm pursuant to Resolution 687 and subsequent resolutions. This involved a determination by a state (or states) that Iraq's breaches of the ceasefire were sufficiently serious to justify a conclusion that the

¹³ The Prime Minister to Parliament, Hansard (House of Commons Daily Debates 24 September 2002) <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020924/debtext/20924-02.htm#20924-02_spm0> accessed 5 December 2007.

¹⁴ Its public statements included the following: 'If there is military action any participation in it by Her Majesty's Government would be strictly in accordance with international law' (the Prime Minister to Parliament, 24 September 2002); 'If there is military action, any participation in it by Her Majesty's Government would be strictly in accordance with our obligations in international law' (the Foreign Secretary to Parliament, 24 September 2002); 'I repeat, any decisions that we make in respect of military action will be made within the context of the body of international law' (the Foreign Secretary to Parliament, 7 November 2002); 'If force becomes necessary, any decisions made by Her Majesty's Government will be careful, proportionate and consistent with our obligations in international law' (the Foreign Secretary to Parliament, 25 November 2002).

¹⁵ One of the arguments deployed in CND was that as the Government had specifically stated that it would act in accordance with international law, whether it was to do so became a proper matter for judicial scrutiny: see *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839 (HL) 867C–F (Lord Hope); endorsed by Lord Steyn in *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL) 367E–H.

¹⁶ It should be noted that the case for the UK Government on the validity of this doctrine was to be the subject of a chapter in this book by its main architect, Professor Christopher Greenwood QC. Despite repeated assurances that his chapter would be submitted, in the end it was not. This is regrettable as, despite the passage of time revealing a more or less complete consensus among international lawyers that the doctrine was fundamentally flawed, it did deserve attention, not least because of the huge loss of Iraqi civilian life that flowed directly from the reliance on that advice.

ceasefire had been destroyed. At this stage the last piece of the 'revival doctrine' framework was not yet in place, namely Resolution 1441. However, the arguments by counsel at the Peacerights inquiry as to why the government could not rely on an implied authorisation, subsequently taken up and developed in his ruling to the inquiry by Professor Warbrick, are important and the fact that they were put in the public domain at an early stage helped. Further, many of these arguments formed the basis of the case for CND in the legal case discussed below. Thus, in tracing the evolution of public awareness of the government's case for the invasion, and how thin it turned out to be, it is important to see what the arguments were at this stage as to why a specific Security Council authorisation of force was required. The main points to be distilled from this legal argument can be summarised as follows:

1. The context of whether the use of force would or would not be lawful is the requirement of Article 2(4) of the UN Charter, described by the ICJ as a peremptory norm of international law, from which states cannot derogate.¹⁷
2. Post the end of the Cold War, the Security Council has shown that it is well prepared to authorise the use of force. At this time it had done so many times in the post Cold War years.¹⁸ The argument for implied authorisations is thus weakened.
3. When the Security Council wishes to authorise force it does so in clear terms, with a phrase such as 'all necessary means'.¹⁹ This again weakens the case for unilateral action, based on unilateral interpretation of other words and phrases in Security Council resolutions.
4. At the end of hostilities in the first Gulf War the Security Council passed Resolution 686. By paragraph 4 it expressly reserved the right to use force provided by Resolution 678. As Singh and Kentridge note:

However, Resolution 687, which marked the permanent ceasefire, uses no such term. This demonstrates a clear recognition that the right to use force requires express

¹⁷ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 190. Art 2(4) states: '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'.

¹⁸ See J Lobel and M Ratner, 'Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-Fires, and the Iraqi Inspection Regime' (1999) 93 *AJIL* 124 ('Lobel and Ratner'). These occasions were: Resolution 678, authorising states to 'use all necessary means' to uphold and implement earlier resolutions in cooperation with the Government of Kuwait; Resolution 770, authorising states to take 'all measures necessary' to enforce humanitarian assistance and enforce the no-fly zones in Bosnia; Resolution 794, authorising 'all necessary means to establish' as soon as possible a secure environment for humanitarian relief operations in Somalia; Resolution 929, authorising France to use 'all necessary means' to protect civilians in Rwanda; and Resolution 940, authorising 'all necessary means to facilitate the departure from Haiti of the military leadership': UNSC Res 678 (29 November 1990) UN Doc S/RES/678; UNSC Res 770 (13 August 1992) UN Doc S/Res/770; UNSC Res 794 (3 December 1992) S/RES/794; UNSC Res 929 (22 June 1994) S/RES/929; UNSC Res 940 (31 July 1994) S/RES/940.

¹⁹ See n 18.

terms if it is to be continued. The absence of any clear terms in any resolution after 686 leads to the conclusion that no such use of force was authorised.²⁰

5. The comparison of 686 with 687 on this point is important and critically undermines the argument that 687 only suspended the use of force from 678. As can be seen, just as the Security Council uses clear terms when it authorises force, so too it does when it suspends an authorisation as it did in 686, and did not in 687. It is noted that at no stage prior to the invasion did proponents of the 'revival doctrine' face up to the problem posed by 686. It is absent from Professor Greenwood's memorandum to the Foreign Affairs Select Committee of 24 October 2002²¹ or the Foreign and Commonwealth Office's legal advice of 8 March 2002,²² and absent from either the full advice of the Attorney-General or his short statement to the House of Lords on 17 March 2003 (both discussed below). It is no answer to suggest, as Greenwood does, in his memorandum noted above, that Resolution 687 did not repeal 678. No one need suggest it did. However, it leaves unaddressed why 687 did not, like 686, expressly provide for a suspension of the authorisation of the use of force. Further, the validity of the argument that 687 only suspended the use of force, as it did not repeal 678, runs headlong into the buffers of the objections set out below about allowing individual states acting unilaterally to decide that their unilateral interpretation of the wording of historical resolutions should prevail over the fundamental commitment of all Member States to the collective.
6. After the adoption of Resolution 687 Iraq had to decide whether to accept the provisions of the resolution, that is, the terms of the ceasefire. Paragraph 33 provides that a formal ceasefire will arise between Iraq on the one hand and Kuwait and the Coalition on the other on 'official notification by Iraq' of its acceptance of the provisions of the resolution and decides that the Council will remain seized of the matter and it will 'take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.' Thus, as the term 'ceasefire' implies, once Iraq had provided official notification, the authorisation of Resolution

²⁰ Cited in G Farebrother and N Kollerstrom (eds), *The Case against War: The essential Legal Inquiries, Opinions and Judgments concerning War in Iraq* (Nottingham, Spokesman, 2004) 23 ('*The Case against War*'). UNSC Res 686, UNSC Res 687, and UNSC Res 678 will be referred to both as 'Resolution 686', 'Resolution 687' and 'Resolution 678', and also in the further abbreviated form of '686', '687' and '678', due to the frequency of appearances in the text.

²¹ See C Greenwood, 'The Legality of Using Force against Iraq, Memorandum to The Select Committee on Foreign Affairs' (Memorandum to Foreign Affairs Select Committee 24 October 2002) <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfa/196/2102406.htm>> accessed 29 November 2007 ('Greenwood').

²² Downing Street Memo 'Iraq: Legal Background' (8 March 2002) <<http://www.downingstreet-memo.com/memos.html>> accessed 22 November 2007. See also Memorandum by the Foreign and Commonwealth Office, 'Iraq: Legal Basis for the Use of Force' (17 March 2003) <http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_c_-_memorandum_by_foreign_and_commonwealth_office_170303.pdf> accessed 22 November 2007>.

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678 came to an end. Putting together points 4 and 5, another way of putting this position is that there was no surviving authorisation to revive.²³

7. It is apparent that the Coalition to liberate Kuwait that had acted pursuant to the Resolution 678 authorisation long since ceased to exist, having being disbanded on the official notification by Iraq pursuant to paragraph 33 of 687. As Warbrick put it:

This authorisation [678] is to ‘the states co-operating with the government of Kuwait’ to take action effectively to restore the authority of the government of Kuwait (no longer an issue) and to restore international peace and security in the area (potentially a wider authority)—but the Coalition is no longer in existence and the power being sought is related to the implementation of resolutions pursuant to Resolution 678.²⁴

Thus not only did the Resolution 678 authorisation not survive, to be revived, but neither did the Coalition who acted on its authority.

8. Given the peremptory norm of Article 2(4), the divesting by individual states of the use of force in the collective security provisions of chapter VII (except Article 51 and self-defence), and the fundamental importance of the peaceful resolution of disputes underpinning what is referred to by Warbrick as ‘the compact’²⁵ of the UN, it is of fundamental constitutional significance that force be used only as a last resort when there is an explicit Security Council authorisation. This is well expressed by Lobel and Ratner:

To resolve these issues [whether the current resolutions implicitly authorise the use of force], two interrelated principles underlying the Charter should be considered. The first is that force be used in the interest of the international community, not individual states. That community interest is furthered by the centrality accorded to the Security Council’s control over the offensive use of force. This centrality is compromised by sundering the authorisation process from the enforcement mechanism, by which enforcement is delegated to individual states or coalition of states. Such separation results in a strong potential for powerful states to use UN authorisations to serve their own national interests rather than the interests of the international community as defined by the United Nations.²⁶

9. Subsequent to the end of hostilities in 1990 various senior members of the US and UK establishments at the time made explicit the constraints they had assumed there were in acting pursuant to Resolution 678. Former President George Bush (Senior), for example, said: ‘Going in and occupying Iraq, thus unilaterally exceeding the United Nations’ mandate, would have destroyed the precedent of international response to aggression that

²³ *The Case against War*, n 20, at 178.

²⁴ *The Case against War*, n 20, at 55–6. Further, OP 6 of Resolution 687 noted that the deployment of the UN force on the Kuwait–Iraq border would allow the Coalition to withdraw from Iraq.

²⁵ Cited in *The Case against War*, n 20, at 49.

²⁶ Lobel and Ratner, n 18, at 127.

we hoped to establish'.²⁷ Sir John Major has said: 'Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime'.²⁸

10. After Iraq notified its acceptance of the terms of Resolution 687 the Security Council passed Resolution 688. This was not a chapter VII Resolution. It dealt with the humanitarian issues arising from the situation in Iraq. However, amid a great deal of legal controversy the USA, the UK and France used Resolution 688 as authority to establish 'safe havens' for Kurds and Shiites, and later to establish no-fly zones over Iraq.²⁹ The UK and the USA argued that Resolution 688 implicitly authorised Member States to respond to Iraq's actions, including by establishing no-fly zones, and thereafter to defend these zones by force. They argued that these zones were essential for humanitarian purposes and to monitor Iraq's compliance with the Security Council's requirements. Gray rejects this position in clear terms:

In fact there did not seem to be any adequate legal basis for the establishment of the safe havens by the Coalition Forces. Resolution 688, although referred to at the time by the states involved, clearly does not authorise forcible humanitarian intervention. It was not passed under Chapter VII and did not expressly or implicitly authorise the use of force. The USA, UK and France did not expressly rely on a separate customary law right of humanitarian intervention in any Security Council debates or in their communications to the Security Council at the time of the establishment of the safe havens. Such a right is notoriously controversial; since the Second World War it has always been more popular with writers than with states.³⁰

This is an important background to explain why the revival doctrine is fundamentally flawed. And it explains in particular how the USA and the UK fought and lost the struggle to establish the legal validity of the essential framework of the doctrine at an earlier stage. This struggle was in the context of their efforts to establish that there was 'automaticity' within an earlier Resolution, 1154, which stated that the Security Council is 'determined to ensure immediate and full compliance by Iraq without conditions or restrictions with its obligations under Resolution 687 (1991) and the other relevant resolutions'.³¹

The Security Council also stressed that any violation by Iraq of its requirements under 687 and in particular to accord immediate, unconditional

²⁷ G Bush and B Snowcroft, *A World Transformed* (Knopf, New York, 1998), cited in R Alexander, 'Iraq: The Pax Americana and the Law', Justice Tom Sargent memorial lecture (2003), fn 82 <http://www.justice.org.uk/50_anniversary/index.html> accessed on 5 December 2007 ('Alexander').

²⁸ He continued on to say that: 'To go further than our mandate would have been, arguably, to break international law': Sir John Major, speaking at Texas A&M University 10th Anniversary Celebrations of the liberation of Kuwait, 23 February 2001, cited in Alexander, n 27.

²⁹ See Gray, n 9, at 34–5 and 254.

³⁰ C Gray, 'After the Cease Fire: Iraq, the Security Council and the Use of Force' (1994) 68 *BYIL* 135 ('Gray').

³¹ UNSC Res 1154 (2 March 1998) UN Doc S/Res/1154, Preamble.

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and unrestricted access to the Special Commission (that is, the UN Special Commission, the predecessor to the UN Monitoring, Verification and Inspection Commission (UNMOVIC)) and the International Atomic Energy Agency (IAEA) would have 'severest consequences.' Would the UN members have the right to use force without more if Iraq failed to comply with Resolution 1154? Blokker summarises the debate as follows:

No agreement was reached on this issue. The US and the UK did not receive support for the view that UN members would have such an automatic right. The other members of the Council, including the other permanent members, emphasised the powers and authority of the Security Council and in some cases explicitly rejected any automatic right for members to use force. Sweden emphasised that 'the Security Council's responsibility for international peace and security, as laid down in the Charter of the United Nations, must not be circumvented.' Brazil stated that it was 'satisfied that nothing in its [the resolution's] provisions delegates away the authority that belongs to the Security Council under the Charter and in accordance with its own resolutions.' And Russia concluded that, 'there has been full observance of the legal prerogatives of the Security Council, in accordance with the United Nations Charter. The resolution clearly states that it is precisely the Security Council which will directly ensure its implementation, including the adoption of appropriate decisions. Therefore, any hint of automaticity with regard to the application of force has been excluded; that would not be acceptable for the majority of the Council's members.'³²

Thus, we see that the combination of Resolution 678, the terms of 687, and all subsequent resolutions including 1154 and in particular the threat of 'severest consequences' was not sufficient in 1998 to provide 'automaticity'. As will be seen, this argument was to assume a key prominence after Resolution 1441 was passed on 8 November 2002.

11. Finally, from the moment of cessation of hostilities once Iraq had notified its acceptance of the terms of 687, there existed a situation of peace, in which the obligation under Article 2(4) not to use force applied again in full. Further, the Security Council provided by paragraph 34 of 687 that it 'decided to remain seized of the matter'. This decision by the Security Council to occupy the field, provides another powerful objection to the UK's arguments prior to Resolution 1441 that remained valid in the build-up to the war. Thomas Franck makes this perfectly clear:

By any normal construction drawn from the administrative law of any legal system, what the Security Council has done is occupy the field, in the absence of a direct attack on a member state by Iraq. The Security Council has authorised a combined military operation; has terminated a combined military operation; has established the terms under which various UN agency actions will occur to supervise the cease-fire, to establish the standards with which Iraq must comply; has established the means by which it may be determined whether those standards have been met (and this has been done

³² N Blokker, 'Is the Authorisation Authorised? Powers and Practice of the UN Security Council to Authorise the Use of Force by Coalitions of the Able and Willing' (2000) 11 *EJIL* 541, 559 ('Blokker').

by a flock of reports by the inspection system); and has engaged in negotiations to secure compliance. After all these actions, to now state that the United Nations has not in fact occupied the field, that there remains under Article 51 or under Resolution 678, which authorised the use of force, which authorisation was terminated in Resolution 687, a collateral total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 678, is to make a complete mockery of the entire system.³³

It is not the purpose of this section to attempt to answer comprehensively the case for the revival doctrine advanced by the UK government and its legal advisers. Many others have done so.³⁴ However, many of these counter-arguments rely on some or all of the above points, and it is worth collecting them together in demonstrating the role played by the Peacerights legal inquiry. It is worth noting also how legal arguments developed in the legal inquiry were deployed by CND in the case now described.

C. The CND Case

On 17 December 2002 the Divisional Court gave judgment on an application for judicial review on behalf of CND.³⁵ The case was lost.³⁶ However, in analysing its impact, two matters should be considered. First, how CND's arguments here as to why a reliance on Resolution 1441 without a Security Council authorisation would breach international law came to be widely regarded as legally correct. Second, how it paved the way for further key developments on the issue of *jus ad bellum* and the Iraq War that continue today.³⁷ It is not the purpose of this section to analyse in great detail the precise wording of Resolution 1441, and how that resolution on its own or in combination with Resolution 678 and 687 did not provide an authorisation.³⁸ However, in considering the state of international

³³ T Franck, 'Legal Authority for the Possible Use of Force Against Iraq' (1998) *ASIL Proceedings* 139 ('Franck').

³⁴ V Lowe, 'Iraq Crisis: What Now?' (2003) 52 *ICLQ* 859.

³⁵ *R (CND) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] LRC 335. Campaign for Nuclear Disarmament is a non-governmental organisation established in 1958 to campaign for the abolition of nuclear weapons. For more on its history, including an account of its case against the Iraq War, see K Hudson, *CND: Now More Than Ever: The Story of the Peace Movement* (London, Vision Paperbacks, 2005).

³⁶ It is a testament to how much the UK common law's approach to justiciability has changed in five years that this case would be decided differently now. In particular, the court's reliance in *CND on Marchiori* (*Marchiori v Environment Agency & Anor*, n 3), which reasserted the correctness of the traditional approach to justiciability that can be traced back to *Chandler v Director of Public Prosecutions* [1964] AC 763, no longer looks to be tenable.

³⁷ See section III below.

³⁸ For discussion on this, see, eg, D McGoldrick *From '9/11' to the Iraq War 2003: International Law in an Age of Complexity* (Oxford, Hart, 2003).

law now it is important to note how little justification for war was provided by the adoption of 1441.

Resolution 1441 has to be analysed in the context of relevant guiding principles as to interpretation of Security Council resolutions.³⁹ First there is the requirement that a resolution must be interpreted in accordance with its objects and purposes, including its preamble.⁴⁰ Second, there is an argument that, since the Security Council is exercising powers delegated to it by Member States under Article 24 of the UN Charter—powers which it must exercise in accordance with the Purposes and Principles of the United Nations—it must retain effective authority and a tight control over those functions which it authorises Member States to use by a chapter VII resolution. Accordingly these limits mean that the terms of a resolution that authorises chapter VII powers are to be interpreted narrowly.⁴¹ Third, the language of a resolution should be carefully analysed before a conclusion would be made as to its binding effect under Article 25 of the Charter (Namibia Advisory Opinion, (1971) ICJ Reports 15 at 53). Fourth, the question of whether the powers under Article 25 had been exercised was to be determined ‘having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and, in general, all the circumstances that might assist in determining the legal consequences of the resolution’.⁴²

In the light of these principles it is important to examine the *travaux préparatoires* and discussion before and after the adoption of the resolution, and in particular key ambassadorial statements made by Member States immediately after adoption on 8 November 2002. First, the *travaux préparatoires* included draft resolutions put forward for discussion by the USA and the UK that would have authorised military action in circumstances of non-compliance. As the grounds of challenge in CND note: ‘[s]uch a provision was conspicuously and deliberately absent from the final text of the resolution. That, moreover, was because Security Council permanent members (Russia, China and France) were opposed to such inclusion’.⁴³

³⁹ See generally MC Wood, ‘The interpretation of Security Council Resolutions’ (1998) 2 *Max Plank Year Book of United Nations Law* 73; and ‘The Security Council as Law Maker: The Adoption of (Quasi) Judicial Decisions’ in R Wolfrum and V Röber (eds) *Developments of International Law in Treaty Making* (New York, Springer, 2005).

⁴⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31.

⁴¹ D Sarooshi, *The United Nations and the Development of Collective Security* (Oxford, OUP, 1999) 44, 154–5 (‘Sarooshi’); see also Blokker, n 32. These arguments were referenced at para 70 of the statement of grounds for judicial review of 8 November 2002 in the CND case, contained in *The Case against War*, n 20, at 95.

⁴² *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 15, para 114.

⁴³ Para 14(7) of statement of grounds for judicial review of 8 November 2002 in the CND case, cited in *The Case against War*, n 20, at 82. A draft resolution circulated in October contained the following paragraph: ‘Decides that false statements or omissions in the declarations submitted by Iraq to the Council and the failure by Iraq at any time to comply and to co-operate fully in accordance with the provisions laid out in this resolution, shall constitute a further material breach of Iraq’s obligations, and that such breach authorises member states to use all necessary means to restore international peace and security in the area.’

Second, the explanation as to the resistance from Russia, China and France is the earlier attempts made by the USA and the UK to invoke Resolution 1154 together with Resolutions 678 and 1205 as authority for the use of force. On this occasion all three insisted on detailed changes to the final draft of 1441 to ensure that the same arguments could not be used again.⁴⁴ Third, both the US Ambassador, John Negroponte, and the UK Ambassador, Jeremy Greenstock, made clear statements at the time of adoption to the effect that the two governments accepted that there was no implied authorisation issue this time. Negroponte assured Council members that ‘this resolution contains no “hidden triggers” and no “automaticity”’ with respect to the use of force.⁴⁵ Greenstock stated:

We heard loud and clear during the negotiations the concerns about ‘automaticity’ and ‘hidden triggers’—the concern that on a decision so crucial we should not rush into military action; that on a decision so crucial any Iraqi violations should be discussed by the Council. Let me be equally clear in response, as a co-sponsor with the United States of the text we have adopted. There is no ‘automaticity’ in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for a discussion as required in operational paragraph 12. We would expect the Security Council then to meet its responsibilities.⁴⁶

To support the argument that it was never intended that there should be an implied authorisation within 1441 taken with earlier resolutions, the majority of the other members made ambassadorial statements as it was adopted confirming the commitment to a multilateral approach, confirming that there was no automaticity and that it would be for the Security Council to decide on further action if Iraq did not cooperate. In a joint statement issued on 8 November, France, Russia and China stated: ‘Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force.’⁴⁷

⁴⁴ These changes included, of course, the removal of any reference to ‘all necessary means’ and the addition of para 12 to ensure that whatever issue of Iraq’s non-compliance arose, it was for the Security Council to decide on what, if any, further action was required. Paragraph 12 reads: ‘Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant council resolutions in order to secure international peace and security’: UNSC Res 1441 (8 November 2002) UN Doc S/RES/1441. As noted below, the US Administration later insisted in private discussions with the UK’s Attorney-General that it never intended or accepted that the Security Council’s further role was to ‘decide’ what further action, if any, was required if Iraq failed to comply fully with 1441, but was limited to considering the situation.

⁴⁵ Statement by Ambassador John Negroponte of the USA, ‘Explanation of Vote on Resolution 1441’ (8 November 2002) <<http://www.globalpolicy.org/security/issues/iraq/document/2002/1108susstat.htm>> accessed 22 November 2007, also cited in *The Case against War*, n 20, at 63.

⁴⁶ *The Case Against War*, n 20, at 62.

⁴⁷ ‘Joint Statement by China, France and Russia Interpreting UN Security Council Resolution 1441 (2002)’ (adopted 8 November 2002) <www.staff.city.ac.uk/p.willets/IRAQ/INDEX.HTM> accessed 22 November 2007. Clare Short noted on Greenstock’s speech: ‘This speech is very important and was an on-the-record statement of the UK Government position. There had been tension in the drafting of the resolution over whether it would give Iraq a last chance to disarm and if it failed the issue would come back to the Security Council, or whether the resolution would give the US authority to declare

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There are other aspects of the legal debate post 1441 that were dealt with in the grounds of challenge in *CND* that are important in understanding how the case for war based on the ‘revival doctrine’ was comprehensively dismissed at an early stage in both the Peacerights inquiry and the subsequent *CND* case.⁴⁸ To understand these further arguments it is necessary to refer to the full text of the Attorney-General’s statement to the House of Lords of 17 March 2003 that became the UK government’s official case for war.

Reading Greenwood’s memorandum with the later statement of the Attorney-General, it is clear that the ‘revival doctrine’ rests on five key principles:

1. That ‘Resolution 687 suspended but did not terminate the authority to use force under Resolution 678’.⁴⁹
2. That ‘a material breach of Resolution 687 revives the authority to use force under Resolution 678’.
3. That in Resolution 1441 ‘The Security Council determined that Iraq has been and remains in material breach of Resolution 687’.
4. The Security Council in Resolution 1441 gave Iraq a ‘final opportunity to comply with its disarmament obligations’; and
5. Warned Iraq of the ‘serious consequences’ if it did not.

There are just three questions here:

1. As there is no doubt that Resolution 1441 did determine that Iraq was in material breach of 687, does this material breach alone, or with other factors, revive the 678 authorisation?⁵⁰
2. What, if anything, is added by the reference to ‘final opportunity’?
3. What, if anything, is added by the reference to ‘serious consequences’?

war if they judged Iraq had not complied. This is what automaticity meant. The US had wanted a resolution giving them authority to declare war as they saw fit. The rest of the Security Council did not want this. This is why it took nearly two months to reach agreement on the resolution. Jeremy Greenstock’s statement was therefore very important. He made a promise on behalf of the UK in that statement which was later broken when Blair decided that he had legal authority for war without another resolution. The point was later fudged by the claim that the issue went back to the Security Council for discussion, but that is not a fulfillment of the promise “there is no ‘automaticity’ in this resolution”: C Short, *An Honorable Deception?: New Labour, Iraq and the Misuse of Power* (London, Free Press, 2004) 157.

⁴⁸ Also the Peacerights inquiry approach to airing the issues which was to replicate the judicial review process was taken up by the BBC’s *Today* programme. The Adjudication of Professor Vaughan Lowe in that debate is of importance as it is a precursor to the powerful arguments subsequently made by Lowe that the authorisation from 678 had terminated and that there was, therefore, nothing to revive. See n 34.

⁴⁹ The arguments as to why this is wrong, relying on Resolution 686, and the summary of the position by Franck and Lowe are adequately dealt with above.

⁵⁰ The US Secretary of State, Colin Powell, had stated that ‘past material breaches, current material breaches, new material breaches’ provide more than enough without a fresh Security Council Resolution. T Harden and A Sparrow, ‘We Are Ready to Attack, US Warns Saddam’ *Daily Telegraph* (London 11 November 2002), as cited in AJ Bellamy, ‘International Law and the War with Iraq’ (2003) 4 (2) *Melbourne Journal of International Law* 497.

The first question is discussed below. The other two questions I will return to in section III of this chapter.

Briefly, then, in answering the first question one has to return to the context of arguments made above about:

1. The Purposes and Principles of the UN Charter.
2. The preemptory norm of Article 2(4).
3. The clear evidence that if the Security Council wishes to authorise force it uses clear terms to do so.
4. The reassurances given at the time of adoption as to no 'automaticity'.
5. That the Security Council had provided a clear mechanism within paragraphs 4, 11, 12 and 14 that further violations would lead to a convening immediately of the Council who would 'consider the situation' (para 12) and remained 'seized of the matter' (para 14).⁵¹

The earlier opinion of Singh and Kentridge had already dealt with the question as to whether a 'material breach' by Iraq of the ceasefire resolution could amount to a revival of the authorisation from 678. It had concluded:

If such use of force can ever be justified, this is clearly a decision to be taken by the Security Council ... Given the system of collective decision-making, the emphasis on peaceful resolution wherever possible, and the Security Council's active management of the Iraqi situation to date, neither breaches of the cease-fire agreement nor breaches of any other resolution authorise the unilateral use of force.⁵²

Nevertheless the reference to Iraq's 'material breach of its obligations under relevant resolutions, including 687 (1991)' from paragraph 1 of 1441 is there for a reason and had survived the redrafting of the earlier draft which had seen the removal of reference to 'all necessary means'.⁵³

The suggestion that the language of 'material breach' was used deliberately is strengthened by analysing Greenwood's arguments to the UK's Foreign Affairs Select Committee of October 2002 which expressly argued:

It is open to the Security Council to determine that Iraq continues to be in breach of the cease-fire conditions in Resolution 687 and that that breach involves a threat to international peace and security which peaceful means have failed to resolve. The effect of such a determination would be that the authorization of military action in Resolution 678 would again be rendered active. That would not necessarily require a Security Council Resolution. It could be done by means of a Presidential Statement (which would

⁵¹ Dorf wrote in January 2003 about these phrases: "The Resolution itself expressly considers material breach to be a trigger for further deliberation, not automatic war" (MC Dorf, 'Is Iraq in "Material Breach" of its obligations under the UN Resolution: A geo-political question, not simply a legal one' <<http://writ.news.findlaw.com/dorf/20030108.html>> accessed 22 March 2007.

⁵² *The Case Against War*, n 20, at 30.

⁵³ Text of draft resolution of 2 October 2002 at <www.casi.org.uk/info/usukdraftscr021002.html> accessed 23 March 2007. OP 1 read: 'Decides that Iraq is still and has been for a number of years, in material breach of its obligations under relevant resolutions, including resolution 687 (1991)'. This version remained until 25 October. A draft of 5 November contains an OP 1 in the same terms as 1441.

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require a consensus in the Council). Moreover a resolution stipulating that Iraq must take certain steps by a prescribed date could (depending on its wording) mean that the Council was determining that failure by Iraq to take such steps was a breach threatening international peace and security.⁵⁴

The USA and the UK had used the cover of ‘material breaches’ in 1993 and 1998 to use further force against Iraq and, presumably, as the bombing raids to enforce the no-fly zones intensified in the months before the invasion, continued to rely on this justification. The language of material breach reflects Article 60 of the Vienna Convention on the Law of Treaties (1969).⁵⁵ As McGoldrick notes:

Using Article 60 by analogy, it would be necessary to determine which states are ‘specially affected’ by the material breach or whether the material breach radically changed the position of the parties. The argument would be that at least the members of the 1991 coalition against Iraq would be so specially affected ... William Taft and Todd Buchwald submit that: ‘[A]ll agreed that a council determination that Iraq had committed a material breach would authorise individual states to use force to secure compliance with council resolutions’. With respect this seems to be exactly what the states in the SC were not agreed.⁵⁶

As ‘the grounds’ put it at 40: ‘It would be extraordinary if, having failed to obtain an express authorisation for the use of force, having incorporated in it minute changes to the final draft whose sole purpose was to exclude the possibility of ‘automaticity’ and ‘hidden triggers’ and to preserve the role of the Security Council, and having publicly agreed in their explanation of the vote for adoption of SCR 1441 that there was no such implied authorisation for force, the UK and US were to be able to use SCR 1441 as authority for the use of force without a further Security Council Resolution.’⁵⁷

And also in ‘the grounds’, bearing in mind the above points, and that a unilateral decision by the USA, the UK or both that 1441 contained the trigger to use force, that is, that there was an implied authorisation, it was argued this would thwart the notion of collective security that left such decisions to use force to the Security Council:

81. There is no authority anywhere in the Charter for a member state to decide to use force in order to enforce breaches of Security Council Resolutions. On the contrary that power is reserved to the Security Council at Article 42. It is only with an express delegation of that power that a member state may use force against another member state to ensure that it complies with a Security Council Resolution.⁵⁸

⁵⁴ Greenwood, n 21, at para 19.

⁵⁵ Vienna Convention, n 37. Article 60(1) reads: ‘1. A material breach of bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.’

⁵⁶ McGoldrick, n 38, at 63, quoting WH Taft and TF Buchwald, ‘Pre-emption, Iraq, and International Law’ (2003) 97 *AJIL* 557,560. See also J Yoo, ‘International Law and the War in Iraq’ (2003) 97 *AJIL* 563.

⁵⁷ *The Case Against War*, n 20, at 68.

⁵⁸ *The Case Against War*, n 20, at 97.

There are, thus, overwhelming reasons why the language of ‘material breach’ does not amount to an authorisation, taken with 678 and 687, and that international law does not recognise the right of states to use force to secure the implementation of international law. As Warbrick noted in his Adjudication:

Something more, then, is required to allow the use of force than the mere fact of Iraq’s non-compliance (even if it is described as a ‘material breach’). In my view the burden of showing this ‘something more’, viz Security Council authorisation, rests on the states claiming to use force, a claim that the UK has not made out.⁵⁹

The debate about whether a ‘material breach’ could in these circumstances amount to an authorisation of force should now be explored in the context of the revelations into the government’s case from the leaked full advice of the Attorney-General of 7 March 2003, and the later disclosure statement provoked, at least in part, by post-war legal action. Before doing so it is interesting to note that before the negotiations to obtain the later second SC resolution failed, the UK government’s own case in the event of any further material breach after 1441 was that there should be a second SC resolution authorising military action.⁶⁰

III. *Jus Ad Bellum* and The Legality of the Military Orders: The *Gentle et al* Case

On 3 May 2005 a letter before action was served on the Prime Minister. It was on behalf of the families of 10 soldiers killed during the Iraq War and occupation. It asked for an independent inquiry into the deaths and asserted that the scope of the inquiry should be broad so that the families could learn the full circumstances surrounding the decision to issue the relevant military orders. In the Court of Appeal in December 2006, where the case failed, the court referred to the relevant question to be answered in the inquiry called for as ‘the invasion question’. That question to be answered required an inquiry to adjudicate on the *jus ad bellum* and, specifically, to examine the circumstances that led to the Attorney-General’s lengthy advice of 7 March being replaced with his short statement of 17 March. At the time of writing the case proceeds to the House of Lords on the basis of a petition that describes the legality of the Iraq War question as ‘the most important legal question of this generation’.⁶¹

⁵⁹ *The Case Against War*, n 20, at 58.

⁶⁰ See *The Case against War*, n 20, at 114–15; ‘Resolution 1441 does not stipulate that there has to be a second Security Council resolution to authorise military action in the event of a further material breach by Iraq ... [T]he preference of the Government in the event of any material breach is that there should be a second Security Council resolution authorising military action’.

⁶¹ The case of *R (on the application of Gentle and another) v The Prime Minister and others* was heard by the House of Lords on 11–13 February 2008.

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It is not the purpose of this section to discuss the relevant domestic and European Court of Human Rights case law upon which the case is grounded. In particular, the Strasbourg jurisprudence on the adjectival duty that protects Articles 2 and 3 of the ECHR may be well known to readers and can be gleaned from the judgment of the Court of Appeal.⁶² Instead it is intended to explore the process whereby further litigation put yet more material and legal argument as to why the Iraq War was unlawful into the public domain.⁶³

In the grounds in *Gentle et al* it was pleaded that: 'in circumstances in which it is unlikely that [the soldiers] would have been sent to war without the clear and categorical advice of [the Attorney-General] a duty arises to investigate'.⁶⁴ The three defendants argued that '[T]he decision to take military action in Iraq was in no sense the immediate, direct or operative cause of the deaths of the claimants' relatives ... the legality of the decision to take military action in Iraq has no bearing on the circumstances which led to their deaths'.⁶⁵ Thus, the legal question as to whether there was a causative connection between the Attorney-General's advice (and thus his change of mind) took centre stage in the case. It is apposite, then, to explore the background to this legal advice. The starting point arises from the judgment of the Divisional Court in *CND*. Lord Justice Simon Brown said: 'There is no sound basis for believing the government to have been wrongly advised as to the true position in international law'.⁶⁶ This followed the representations made to the court by counsel for the three defendants that, of course, the government would not get international law wrong because it had access to specialist international law advice.

We now know that without the Attorney-General's decision to abandon his 7 March advice most probably the UK would not have been part of the coalition that invaded Iraq. On 10 March 2003 the Chief of Defence Staff (CDS), Admiral Sir Michael Boyce, demanded a formal assurance that the war would be legal. He recorded later:

I asked for unequivocal advice that what we were proposing to do was lawful. Keeping it as simple as that did not allow equivocations, and what I eventually got was what I required ... Something in writing that was very short indeed. Two or three lines saying our proposed actions were lawful under national and international law.⁶⁷

⁶² *R (Gentle and another) v The Prime Minister and others* [2006] EWCA Civ 1690. The judgment can be obtained at <www.publicinterestlawyers.co.uk> last visited on 5 December 2007.

⁶³ It is not suggested that material such as the Downing Street Memoranda which had been widely available at <www.downingstreetmemo.com> for some months were now for the first time available to the public because of this litigation. Further, the excellent analysis of Sands in his chapter 'Kicking Ass in Iraq' (Sands, n 6) was both acknowledged and specifically referenced in the legal argument.

⁶⁴ Argument of counsel for the appellants contained in the grounds, para 18. A copy of these is on file with the author.

⁶⁵ Summary grounds of defence, para 19. A copy of these is on file with the author.

⁶⁶ *The Case Against War*, n 20, at 145, para 47(iii).

⁶⁷ A Barnett and M Bright, 'War chief reveals legal crisis' *Observer* (London 7 March 2004) <<http://www.guardian.co.uk/Iraq/Story/0,,1164079,00.html>> accessed 22 November 2007, see also Sands, n 6, at 196–7.

Boyce's position was communicated to the Attorney-General and others at a meeting in Downing Street on 11 March.⁶⁸ However, it was not just the CDS who needed this unambiguous advice; it was also the Cabinet, the Ministers making the decision, and as Andrew Turnbull, the Cabinet Secretary and Head of the Civil Service, records in his evidence to the Public Administration Select Committee on 10 March 2005, he required this 'on behalf of civil servants committing the spending of money'.⁶⁹ Thus, it seems that the Attorney-General's lengthy equivocal advice of 7 March just would not suffice: if that advice remained his final advice neither the CDS, the Cabinet, relevant Ministers nor the Civil Service could have approved the invasion. And, although it is unwise to speculate, it is doubtful whether the government would have got its majority in the House of Commons vote on 18 March. It seems, with hindsight, that the Attorney-General had not foreseen that what had passed muster on previous occasions in Operation Desert Fox and Kosovo, namely that the legality of these actions 'was no more than reasonably arguable',⁷⁰ would not satisfy the CDS on this occasion. Thus, the Attorney-General, and subsequently the whole administration, was subjected to unprecedented political pressure.

On 22 May 2006 the Information Commissioner served an enforcement notice on the Attorney-General following a number of complaints he had received after requests had been made and refused for access to information relating to the advice given by him. The Attorney-General's disclosure statement contains key new information and was partially instrumental in persuading the Court of Appeal to allow this case to proceed to a full hearing. This statement attempts to explain how it came about that the UK's most senior lawyer took the unprecedented step of, first, reaching an opinion, admittedly equivocal, the subject of a 13-page advice; second, six days later changing that advice to a short, unequivocal assurance to the opposite (in the absence even of the later certification by the Prime Minister that there had been further material breaches by Iraq of relevant resolutions); and, third, a further four days later, giving a public statement that took a completely different line to the earlier advice.⁷¹ This disclosure statement says:

23. On 13 March the Attorney General discussed the matter with his Legal Secretary. It was clear to the Attorney that there was a sound basis for the revival argument in

⁶⁸ Legality of military action in Iraq, disclosure statement, Cabinet Office and Legal Secretariat to the Law Officers <http://news.bbc.co.uk/1/hi/uk_politics/5017872.stm> para 19 accessed 22 November 2007. This paragraph also records: 'As the CDS subsequently put it in a media interview, he needed an "unambiguous black-and-white statement" saying it would be legal for us to operate if we had to.' Of course, it is always possible that Boyce might have resigned and been replaced with a new CDS who would have issued military orders to invade Iraq. It is thought that scenario is unlikely.

⁶⁹ See fn 10 in the disclosure statement, n 68.

⁷⁰ See Attorney-General's advice of 7 March 2003, n 7.

⁷¹ It should also be noted that it is clear from the resignation letter of Elizabeth Wilmshurst, the Deputy Legal Adviser to the Foreign Office who resigned in protest that the war with Iraq would be illegal, that his equivocal advice of 7 March 2003 already represented a change of mind by the Attorney-General: "My views accord with the advice that has been given consistently in this office before and after the adoption of UN security council resolution 1441 and with what the Attorney General gave us to understand was his view prior to his letter of 7 March (the view expressed in that letter has of course changed again into what is now the official line)." <http://findarticles.com/p/articles/mi_qn4158/is_20050325/ai_n13462038> accessed on 22 November 2007.

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principle. The question was whether the conditions for the operation of the revival doctrine applied in this case.

24. As the Legal Secretary recorded at the time, the Attorney confirmed in that discussion that, after further reflection, having particular regard to the negotiating history of resolution 1441 and his discussions with Sir Jeremy Greenstock and the representatives of the US Administration, he had reached the clear conclusion that the better view was that there was a lawful basis for the use of force without a second resolution. The crucial point was that Operative Paragraph 12 of resolution 1441 did not stipulate that there should be a further decision of the Security Council before military action was taken, but simply provided for reports of further breaches by Iraq to be considered by the Council. The Attorney General made it clear that he had fully taken into account the contrary arguments as set out in his 7 March minute to the Prime Minister. In coming to the conclusion that the better view was that a further resolution was not legally necessary, he had been greatly assisted by the background material he had seen⁷² on the negotiation of resolution 1441.
25. It was agreed during that discussion that it would be proper for the Legal Secretary to confirm to the Ministry of Defence Legal Adviser that the proposed military action would be in accordance with national and international law. It was also decided to prepare a statement setting out the Attorney's view of the legal position and to send instructions to counsel to help in the preparation of that public statement.
26. Also on 13 March, following that discussion with his Legal Secretary, the Attorney informed Baroness Morgan and Lord Falconer at a meeting of his conclusion that action would be lawful without a further resolution.

Before commenting on the points arising from these, and subsequent, paragraphs in the disclosure statement it is important to set out the relevant summary paragraphs of the 7 March advice. Why this advice was not sufficient to authorise war will be immediately apparent:

26. To sum up, the language of resolution 1441 leaves the position unclear and the statements made on adoption of the resolution suggest that there were differences of view within the Council as to the legal effect of the resolution. Arguments can be made on both sides. A key question is whether there is in truth a need for an assessment of whether Iraq's conduct constitutes a failure to take the final opportunity or has constituted a failure fully to cooperate within the meaning of OP4 such that the basis of the ceasefire is destroyed. If an assessment is needed of that situation, it would be for the Council to make it. A narrow textual reading of the resolution suggests that sort of assessment is not needed, because the Council has predetermined the issue. Public statements, on the other hand, say otherwise.
27. In these circumstances, I remain of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force. [...] The key point is that it should establish that the Council has concluded that Iraq has failed to take the final opportunity offered by resolution 1441, as in the draft which has already been tabled.

⁷² It is clear from his 7 March advice that "seen" is to be taken as including "heard about" from US Administration officials who impressed him with their sincerity: Attorney-General's advice of 7 March 2003, n 7.

28. Nevertheless, having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.
29. However, the argument that resolution 1441 alone has revived the authorisation to use force in resolution 678 will only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation. Given the structure of the resolution as a whole, the views of UNMOVIC and the IAEA will be highly significant in this respect. In the light of the latest reporting by UNMOVIC, you will need to consider very carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity.⁷³

Returning to paragraphs 23 and 24 of the disclosure statement, the following questions arise to be answered if ever there is an independent inquiry into the invasion question:

1. His advice records his assessment of 'a reasonable case' for the revival doctrine. How was it now clear (and in his 17 March statement) it had a sound basis?
2. He previously records that he had seen 'the statements made on adoption of the Resolution'. Further he had previously referred to this material as giving him 'valuable background information' (paragraph 1 of his advice). Given the clarity of this background information on the issue of 'automaticity', what further and different insight did he now gain on 13 March from the negotiating history of Resolution 1441 and his discussions with Sir Jeremy Greenstock and the representatives of the US administration? Or is it that there were no new insights, or indeed further background information, but a mere change of view based on the 'same valuable background information' he had previously seen?
3. Given that the position was 'unclear' previously, how (without anything material changing on the ground) could he now be 'clear' that the 'better view' was that there was a lawful basis for the use of force *without* a second resolution? And how was it that the 'reasonable case' that could be made for a 'material breach' route into reviving 678 now became, without anything apparently changing, the 'better view' when on 7 March the 'safest legal course' was a second resolution?
4. Given that negotiations for a second resolution based on a draft resolution sponsored by the USA and the UK did not break down until late on 13 March (the day his advice was confirmed), and given that New York is five hours behind the UK at this time of year, does this mean that the Attorney-General's advice was given on 13 March without knowing for certain whether there would not be a second resolution? It will be recalled this had a key prominence in paragraph 27 of his 7 March advice.

⁷³ Attorney-General's advice of 7 March 2003, n 7.

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5. Recalling the assurance to the court in *CND*, why did he wait until he had already changed his advice to send instructions to outside (and presumably expert) counsel?

Returning to the disclosure statement, paragraphs 27–28 summarises what is explained more fully in the Butler Review.⁷⁴ This records as follows: “The legal secretary to the Attorney-General wrote to the private secretary to the Prime Minister on 14 March 2003 seeking confirmation that “it is unequivocally the Prime Minister’s view that Iraq has committed further material breaches as specified in paragraph 4 of Resolution 1441”’.⁷⁵

The Prime Minister’s private secretary replied to the legal secretary on 15 March, confirming that:

it is indeed the Prime Minister’s unequivocal view that Iraq is in further material breaches of its obligations, as in OP 4 of UNSCR 1441 because of ‘false statements or omissions in the declaration submitted by Iraq pursuant to this Resolution and failure by Iraq to comply with, and co-operate fully in the implementation of, this Resolution.’⁷⁶

The importance of what Sands has written about as a certification by the Prime Minister of ‘further material breaches’ is self-evident.⁷⁷ It did what the Attorney-General had previously advised could only be done by the Security Council. It was in effect a certification by the Prime Minister that there had been a material breach of the ceasefire and that Iraq had failed to take the ‘final opportunity’ afforded to it and that, accordingly, the authorisation of 678 was revived. This argument runs contrary to his previous advice and has since been widely derided by international lawyers and other senior members of the legal establishment.⁷⁸

⁷⁴ Committee of Privy Counsellors, ‘Review of Intelligence on Weapons of Mass Destruction’ (14 July 2004) HC898 <<http://www.butlerreview.org.uk/>> accessed 22 November 2007 (‘Butler Report’).

⁷⁵ Para 383, n 74.

⁷⁶ Para 384, n 74.

⁷⁷ See Sands, n 6, at 197.

⁷⁸ In the speech by Lord Alexander referenced at n 27 he described how the Government ‘desperately trawled way back to Resolution 678 to find a flag of convenience’, that the ‘flag simply cannot fly’ and ‘the suggestion that the authority to use force “revived” like spring flowers in the desert after rain, to be invoked by the US and the UK contrary to wishes of the Security Council, is risible. Nor does it find any support in international law’ <<http://www.justice.org.uk/trainingevents/annuallecture/index/html>> accessed 26 March 2007, at 19. Reference should also be made to the first public speech of Lord Steyn (an ex Law Lord) that he agreed with Lord Alexander ‘that the Iraq war was unlawful’ and ‘in its search for a justification in law for war the government was driven to scrape the bottom of the legal barrel’ <<http://www.guardian.co.uk/constitution/story/o.9061,1597486,00.html>> accessed 26 March 2007. Lord Steyn has also referred to the day of the Attorney-General’s advice as being ‘A black day for the rule of law’: ‘Our Government and the International Rule of Law Since 9/11’ [2007] EHRLR 1, 5. It is also interesting to note from the Butler Report that it is recorded as follows: ‘The Attorney General informed Lord Falconer and Baroness Morgan at a meeting on 13 March of his clear view that it was lawful under Resolution 1441 to use force without a further United Nations Security Council resolution’: Butler Report, n 74, at para 381. It appears from the historical record that this was the first time he advised in such unequivocal terms and questions would be asked of him, if an independent inquiry were to be held into the legality of the Iraq War, as to why he so advised these two particular figures, given that Baroness Morgan was at the time a mere adviser and Lord Falconer not directly concerned with the matters in issue.

This unilateral decision by the UK that the 678 authorisation had revived raises the following questions for the Attorney-General. First, as there is no reference in the advice of 7 March (or the statement of 17 March) as to the counter-arguments discussed above as to why 678 was not capable of being revived, and especially not by states acting unilaterally, were these alternative views considered and, if so, with what outcome? Second, it has always been the UK's view that the USA were acting unlawfully when, in the context of the enforcement of the no-fly zones, it said it could unilaterally decide that there had been a material breach of the ceasefire resolution and that, accordingly, it could rely on 678 as the justification for the use of further force. The Attorney-General notes this in paragraph 9 of his 7 March advice:

they [the USA] maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual member states. I am not aware of any other state which supports this view. This is an issue of critical importance when considering the effect of Resolution 1441.

And he re-emphasises this in paragraph 22 of the same advice:

By contrast [with the US position] the UK position taken on the advice of successive law officers, has been that it is for the Security Council to determine the existence of a material breach of the cease-fire.⁷⁹

Given this, on 7 March what led to the *volte-face* of 17 March? Paragraphs 6 and 7 of the 17 March statement, when read with the extract above from the Butler Review, make the position clear:

6 The Security Council also decided in Resolution 1441 that, if Iraq failed at any time to comply with and co-operate fully in the implementation of Resolution 1441, that would constitute a further material breach.

7 It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.

But plain to whom? The Prime Minister had certified the breach, but on what basis? Was it on the basis of an alleged non-compliance with the terms of Operative Paragraph (OP) 3 of Resolution 1441 that provided that Iraq should, within 30 days, make an 'accurate, full and complete declaration of all aspects of its programmes to develop chemical, biological and nuclear weapons etc'?⁸⁰ If so, it is worth noting from Blix's account of the position that on 13 March, the key date when the

⁷⁹ One of the leaked Downing Street memoranda is a legal options paper of 8 March 2002 entitled 'Iraq: Legal Background' <<http://www.downingstreetmemo.com/docs/legalbackground.pdf>> accessed 22 November 2007. It also notes that the author was not aware of any other state that supports this view. The similarity of the language of this assessment strongly suggests that the Attorney-General's advice of 7 March 2003 was based, at least in part, on this paper; see Attorney-General's advice of 7 March 2003, n 7.

⁸⁰ It should be noted that it is not clear whether UK intelligence services ever made a final assessment of the 12,000-page report that Iraq delivered on 7 December 2002 under the terms of OP 3 of Resolution 1441.

Attorney-General's advice was changed, he had been working very hard to produce a 'benchmarks' paper which would give Iraq five verifiable positions to achieve within a few days of 17 March so that the international community through the Security Council had the evidence as to whether it was disarming.⁸¹ Indeed, on the very day that the Attorney-General decided it was lawful to proceed without a second resolution on the basis of these 'further material breaches', the UK's Ambassador, Jeremy Greenstock, was attempting to win support for a British benchmark paper. It seems very odd that, in circumstances where the Attorney-General had advised that the 'safest course' was to obtain a second resolution, where Tony Blair and Hans Blix had agreed the basis for a 'benchmarks' resolution, where on 13 March the UK Ambassador was still trying to gain support for that approach, where negotiations for a second resolution did not break down until after all the key decisions and advice had been given by the Attorney-General, nevertheless it was the Attorney-General's advice that the 678 authorisation was now revived, and that the legal position was clear. Thus, for instance, what if the discussions at the Council on 13 March had considered the question of Iraq's non-compliance with 1441 and, in accordance with OPs 4, 11 and 12, concluded it should give Iraq a further warning as to 'serious consequences' of a further non-compliance so that it was made to understand it was required to comply with the terms of a new 'benchmarks' resolution to be subsequently drafted, negotiated upon and adopted? This would have undoubtedly been both a further Council consideration but also, importantly, leading to a further Council decision.

The key question here is: what caused the Attorney-General to abandon the conventional UK view that the question of a material breach of the ceasefire sufficient to justify an invasion was a matter for the Security Council alone? In answering that question it is necessary to address the interpretation of, first, 'material breach' and, second, the phrases 'final opportunity' and 'serious consequences'.

A. The Issue of 'Material Breach'

The starting point is: what did the UK understand constituted a 'material breach'? The answer is to be found at paragraph 17 of the Attorney-General's 7 March advice. In the context of the question 'who makes the assessment of what constitutes a sufficiently serious breach' to destroy the basis of the ceasefire the advice

⁸¹ H Blix *The Search for Weapons of Mass Destruction: Disarming Iraq* (London, Bloomsbury, 2004), pp245–8. It is worth noting Blix's account of his telephone discussion with Tony Blair on 10 March when Blair 'said they needed five or six items on which the Iraqis could demonstrate their compliance with UNMOVIC's work programme' and that Blair appears to have confirmed to Blix that the benchmarks process 'could extend a few days beyond March 17' (245). Later, he notes that the British Ambassador to the UN, Sir Jeremy Greenstock, was on 13 March trying 'desperately to win support for the British benchmark paper' and that Blix records it was only on 14 March that 'all efforts to reach an agreement in the Council had collapsed' (248).

notes public statements ‘to the effect that only *serious* cases of non-compliance will constitute a further material breach.’ The Attorney-General notes:

the Foreign Secretary stated in parliament on 25 November that ‘material breach’ means something significant; some behaviour or pattern of behaviour that is serious. Among such breaches could be action by the Government of Iraq seriously to obstruct or impede the inspectors, to intimidate witnesses, or a pattern of behaviour where any single action appears relatively minor but the action as a whole add [*sic*] up to something deliberate and more significant; something that shows Iraq’s intention not to comply. (para 17)

He then notes the long-held UK view of the revival argument that only the Security Council ‘can decide if a violation is sufficiently serious to revive the authorisation to use force’ (para 17). Thus, in relying on the Prime Minister’s certification of further material breaches, the Attorney-General specifically endorses an approach that involves the Prime Minister’s assessment (rather than the Council’s) that these breaches were sufficiently serious or significant that it could be reasonably argued that the effect was ‘to destroy the basis of the cease-fire’. And that in doing so the UK now, for the first time, decided to support the US position on material breaches. The legal *volte-face* becomes even more striking when considering further aspects of his advice.

It was the Attorney-General’s opinion that the finding by the Security Council that there has been a sufficiently serious breach of 687 to revive 678 means that the phrase ‘serious consequences’ from OP13 amounts to an indication of the use of force (para 10). He relies on ‘the previous practice and statements made by council members during the negotiation of Resolution 1441’. Further questions arise. First, he records fairly ‘it is very uncertain to what extent the court [if the matter ever came before one] would accept evidence of the negotiating history to support a particular interpretation of the resolution, given that most of the negotiations were conducted in private and that there are not agreed or official records’ (para 23). Second, what we have are the ambassadorial statements referred to above which indicate clearly that the majority of Member States had the clear impression that 1441 provided that more was needed and that this requirement was an assessment of the situation by the Council itself.⁸² Third, in relying on the previous practice of Council members, he is seeking to assert a rule of customary international law that a state or states may, acting unilaterally, decide this matter in circumstances where he has recorded twice in his advice that the USA stood alone on this, and that the UK had always had a different position. The advice of 17 March also leaves

⁸² For example, the Syrian Ambassador said, on the record: ‘Syria voted in favour of the Resolution, having received assurances from its sponsors, the United States of America and the United Kingdom, and from France and Russia through high-level contacts, that it would not be used for a pretext for striking against Iraq and does not constitute a basis for any automatic strikes against Iraq. The Resolution should not be interpreted, through certain paragraphs, as authorising any state to use force. It reaffirms the central role of the Security Council in addressing all phases of the Iraqi issue.’ See <<http://www.un.org.news/press/docs/2002/sc7564.doc.htm>> accessed 26 March 2007. For a summary of all 15 ambassadorial statements and for a full text of the Syrian statement, see <http://www.en.wikipedia.org/wiki/un_security_council_1441> accessed 26 March 2007.

completely unaddressed the serious concerns of commentators such as Gray that Resolution 688, not being a chapter VII resolution, did not allow the use of force to enforce the no-fly zones.⁸³ It is difficult to imagine what other practice he could have had in mind in creating this 'rule'. Fourth, did he consider the body of opinion that references to 'serious consequences' and 'final opportunity' were clear, unequivocal warnings to Iraq but not intended to be capable of amounting to an authorisation? It is far from accepted or demonstrated that 'serious consequences' indicates the use of force.

The legal basis for the Iraq War, adopted by the UK government (but by necessary implication the US government too) rested on three planks: one, that there had been a 'material breach' of 687 and OP 4 of 1441; two, that Iraq had been afforded a 'final opportunity' to comply 'with its disarmament obligations under relevant resolutions of the Council' (OP 2 of 1441); three, that the 'Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations' (OP 13 of 1441). This is made clear by the following paragraphs of the Attorney-General's written statement to the Houses of Parliament of 17 March 2003:

3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.
4. In Resolution 1441, the Security Council determined that Iraq has been and remains in material breach of Resolution 687, because it has not fully complied with its obligations to disarm under that resolution.
5. The Security Council in Resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.

These paragraphs need to be read alongside paragraphs 6 and 7 set out above. Accordingly, it is necessary to ask whether international law, reflecting state practice, recognises that a 'material breach' can have this impact in these circumstances, or recognises that the phrases 'final opportunity' and 'serious consequences' amounted in this context to an authorisation of the use of force under chapter VII of the UN Charter. There can be no doubt that this was the basis of the UK government's case, as made clear from the following passage from the Attorney-General's 7 March advice:

The previous practice of the Council and statements made by Council members during the negotiation of Resolution 1441 demonstrate that the phrase 'material breach' signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in Resolution 678 and that 'serious consequences' is accepted as indicating the use of force. (para 10)

There are a number of aspects of the 7 March advice and the 17 March statement that are striking: first, the issue of justiciability, second, the relevance of 'State practice', and third, the role of the Security Council. I will address these in turn.

⁸³ Gray, n 30, at 162.

i. Justiciability

In *CND* the court found that to interpret 1441 required the legal issue to be divorced from the conduct of international relations, which was not possible, and that, accordingly, the court was being asked to enter a 'forbidden area' of the government's conduct of international relations.⁸⁴ In relying on *CND* the Court of Appeal in *Gentle* held that it was not possible to consider legal questions of international law while respecting the principle of non-justiciability of non-legal issues of policy. It held that no sensible distinction could be made between a duty to take reasonable care to ensure that military operations are lawful, on the one hand, and militarily or politically desirable or sensible on the other. It also held, as related reasoning as to why the claim failed, that it was prohibited from considering the proper construction of Security Council resolutions since this would involve examining the discussions and negotiations between states leading to them—which involved political as well as legal questions.

Four points can be made on justiciability: first, the Attorney-General was asked to give his legal advice on the question of international law precisely because it is a discrete question of law capable of isolation and not purely a policy or political issue. He expressed no reservations about the difficulties of separating out that legal issue. It is interesting that the Attorney-General himself expressly introduces the so-called 'forbidden' areas of discussions and negotiations between states leading up to the adoption of 1441. In his 7 March advice he notes: 'I was impressed by the strength and sincerity of the views of the US Administration which I heard in Washington on this point [that is, that OP 12 of 1441 does not concede the need for a second resolution]'.⁸⁵ He further notes, however, that 'Having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington I accept that a reasonable case can be made that Resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution'.⁸⁶ Pausing only to note that 'a reasonable case' is difficult to square with an unequivocal assertion on the point 10 days later, it is quite extraordinary to view these statements in context. The Attorney-General himself notes the difficulty of relying on the assertions of

⁸⁴ See n 35: Richards LJ at 59(1).

⁸⁵ Attorney-General's advice of 7 March 2003, n 7, at para 23.

⁸⁶ Attorney-General's advice of 7 March 2003, n 7, at para 28. There is further insight on this point from the disclosure statement from the Legal Secretariat to the Law Officers of 25 May 2006 in response to an enforcement notice of 22 May 2006 under the Freedom of Information Act 2006 from the Information Commissioner <http://newsvote.bbc.co.uk/mpapps/pagetolls/print/news.bbc.co.uk/1/hi/uk_politics/50> accessed on 7 November 2007. This records that on 10 February 2003 the Attorney-General 'had meetings in Washington with members of the US Administration who have been closely involved in the drafting and negotiation of Resolution 1441' (para 4), that a 'principal purpose of these enquiries and discussions was for [him] to inform himself about ... whether the resolution was intended to require a further Council decision, or merely a Council discussion' (para 5). He records that the 'interpretation of the Foreign Secretary, Sir Jeremy Greenstock and the US Administration in the light of those negotiations, was that a further decision of the Security Council was not required' (para 13).

the US Administration that the French (and others) knew and accepted that they were voting for a further discussion and no more. As he notes:

We have very little hard evidence of this beyond a couple of telegrams recording admissions by French negotiators that they knew the US would not accept a resolution which required a further Council decision ... a further difficulty is that, if the matter ever came before a court, it is very uncertain to what extent the court would accept evidence of the negotiating history to support a particular interpretation of the resolution, given that most of the negotiations were conducted in private and that there are no agreed or official records. (para 23)

Thus, if it is difficult to rely on US assertions or on the negotiating history in these circumstances it seems odd that the Attorney-General should then go on to conclude as he did in paragraph 28 as set out above. Further, it is to be regretted that the Court of Appeal found that the examination of these issues and negotiations as political questions, and thus being in forbidden areas, rendered the claim unsuccessful when it was those very same discussions and negotiations which became the subject of assertions by the US Administration, that led to the Attorney-General's fateful conclusion that a 'reasonable case' could be made, which then converted to the unequivocal position of the 17 March statement. If, as is clear, the Attorney-General's legal judgment on the legal issue took into account and gave considerable weight to these negotiations and discussions, how then can it be rational for the court to render the outcome, at least, of those negotiations and discussions out of bounds and beyond judicial scrutiny? One can see the difficulties that a court on judicial review will itself, in effect, interrogate that political material but does it not add considerable weight to the argument that an Article 2 inquiry that complies with the relevant Strasbourg jurisprudence on the requirements of the adjectival duty should be held so that, at least, the Attorney-General should be required to explain himself?

The second point on justiciability is that compliance with international law is a hard-edged legal question, even if it takes place in a highly political context. In *A (no 1)*, which concerned the question of indefinite executive detention without due process of foreign nationals by the UK government, the House of Lords was required by Article 15 of the ECHR to consider whether the derogation from the Convention complied with the UK's other international obligations. Clearly, the case had a significant political context, being a response from the UK government to the so-called 'war on terror'. The House of Lords did not characterise the issue of the derogation's compliance with international law as 'purely political (in a broad or narrow sense)⁸⁷ and therefore non-justiciable. By the same token, the invasion of Iraq's compliance with international law was relevant to its 'political desirability': the government itself repeatedly stated in public in the month leading up to the war that it would only act if the invasion did also so comply.⁸⁸ That does not, it seems, render the question non-justiciable per se.

⁸⁷ *A and others v Secretary of State for the Home Department* [2005] 2 AC 68 (Lord Bingham).

⁸⁸ See n 14.

Third, the fact that the court may be required to consider political negotiations and discussions does not imply that the issue is non-justiciable. One need look no further than Keir Starmer's chapter in this volume on the case of *Al-Jedda*⁸⁹ for that proposition to be made good. In that case the courts, including the House of Lords, were required to interpret Security Council Resolution 1546 in the context of whether it was an obligation for the purposes of Article 103 of the UN Charter and were specifically obliged to consider discussions by various states that led to it being passed.⁹⁰ Additionally, the UK courts regularly consider *Hansard* and *White Papers*—which include political discussions.

Fourth, Strasbourg jurisprudence on the adjectival duty of Article 2, if properly analysed, demonstrate the general proposition that unless there is an identifiable question of law capable of determination, the courts will not and cannot decide it.⁹¹ The European Court of Human Rights has reviewed highly sensitive areas of government, such as the activities of Secret Service operations in the case of the killings of IRA members in Gibraltar.⁹² It does not recognise that there are areas within the exclusive competence of the executive which are beyond the reach of the Convention.

ii. *State Practice*

The second striking aspect is the reliance on state practice to justify the argument that there had been a finding by the Council of such a serious breach as to revive the authorisation in 678. It has already been noted that whether the authorisation from 678 had survived at all beyond 687 is not accepted by the vast majority of international lawyers. However, there is a separate point regarding whether a chapter VII authorisation of force can be triggered at all by a finding as to a material breach in these circumstances. It is important to recall that 678 was the first authorisation of force after the end of the Cold War. It used the phrase 'all necessary means' (OP 2) for the first time as a legal shorthand for force. At the time this was itself controversial and not generally accepted. However, as the phrase was repeated in subsequent contexts, for example, Bosnia, Somalia, Rwanda and Haiti,⁹³ commentators reflected that accepted state practice relying on the phrase as an authorisation to use force indicated that this had become the standard phrase used by the Security Council to mean 'force'. It is stating the obvious to point out that when the Security Council means to authorise force as a last resort, so that states are protected by Article 103 of the Charter

⁸⁹ K Starmer, 'Responsibility for Troops Abroad: UN Mandated Forces and issues of Human Rights Accountability' (ch 10 in this book).

⁹⁰ *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, paras 17, 22, 26 and 34.

⁹¹ See, eg, *Taylor v United Kingdom* (App no 23412/94) (1994); *McBride v United Kingdom* (2006) 43 EHRR SE10; *Jordan v United Kingdom* (2003) 37 EHRR 2.

⁹² *McCann v United Kingdom* (1995) 21 EHRR 97.

⁹³ See UNSC Resolutions at n 19.

from breaching the *jus cogens* obligations of Article 2(4) of the Charter, it does so in the clearest possible terms, using that phrase, in order that all states are certain as to the consequences. That this was the understanding of at least the USA in the context of Iraq is underpinned by newspaper reports that prior to publishing a draft resolution on 24 September 2002, which was not adopted but did contain the phrase 'all necessary means', it had considered going further, 'demanding the Security Council approved the use of "all necessary means" to enforce its will'.⁹⁴ Thus it was argued in an opinion of 3 March 2003 from Singh and Kilroy that the subsequent draft resolution would not authorise force, as 'if wording exists which clearly authorises force, and this wording has not been pursued in favour of alternative wording which does not, then this is the clearest indication that, if adopted, this Draft Resolution would do something less than authorise force'.⁹⁵ If that is correct about the Draft Resolution which was never adopted but bearing in mind that in the first of its two Operative Paragraphs it attempted to shore up 1441 by deciding 'that Iraq had failed to take the final opportunity afforded to it in Resolution 1441', then the Attorney-General's position is even more surprising. He specifically advised 'that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force ... and that it should establish that the Council has concluded that Iraq has failed to take the final opportunity offered by Resolution 1441, as in the Draft which has already been tabled' (para 27). So notwithstanding the advice referred to above in paragraph 10, he stood back and advised that a second resolution was required. However, when the negotiations for that resolution appeared to be about to break down, the Attorney undertook a complete *volte-face* and advised that it was permissible to proceed on the basis of the revival doctrine without that second resolution. Thus, one has no idea what his justification was to shift from the position of 'reasonable case' on 7 March to a completely unequivocal position 10 days later.

There is, therefore, the clearest indication from state practice that an authorisation in clear terms was required, that the language of 'material breach' in OPs 1 and 4 of 1441 did not amount to such an authorisation, and that the procedure decided upon by OPs 11 and 12 was that, in the event of a report from UNMOVIC and the IAEA that Iraq had failed to comply with its disarmament obligations, it was for the Council to consider the report and decide on what, if any, further action was required. This is consistent with the following: one, that authorisations of force are a matter for the collective decision-making of the Council and not to be the subject of unilateral decisions by a state or states based on their own interpretation of words or phrases in past resolutions; two, that the Council had deliberately occupied the field on the issue of Iraq's disarmament obligations by deciding 'to remain seized of the matter' in OP 34 of 687, which decision was subsequently reaffirmed in all 42 relevant resolutions that ended with 1441. The

⁹⁴ J Borger, 'Analysis: Julian Borger in Washington' *Guardian* (London 25 February 2003) <<http://politics.guardian.co.uk/foreignaffairs/comment/0,,902523,00.html>> accessed 22 November 2007.

⁹⁵ *The Case Against War*, n 20, at 195.

Council had re-asserted its authority in 687, and continued to do so; three, the dangers inherent in such unilateral interpretations are underlined by the UK government's own former legal adviser, Sir Michael Wood, who stresses that resolutions 'are often drafted by non-lawyers, in haste, under considerable political pressure, and with a view to securing unanimity within the Council'.⁹⁶

Finally, subsequent state practice has demonstrated unequivocally that specific authorisations using clear terms are required. Presumably reacting to the US and UK failure to keep assurances that there was no automaticity in 1441, the Security Council, faced with a similar crisis in Iran (and previously North Korea), now includes a specific Operative Paragraph to make it impossible for there to be a repeat of what took place in Iraq.⁹⁷

iii. The Role of the Security Council

Another aspect of the debate about the legality of the invasion concerns what OPs 4, 11 and 12 of 1441 amount to in terms of the Security Council's role. One needs to recall at the outset what Warbrick describes as 'the compact' whereby there is 'a vesting of authority in the Security Council to maintain international peace and security by a system of collective security'.⁹⁸ Against that the Attorney-General notes: 'The narrow but key question is: on the true interpretation of Resolution 1441 what has the Security Council decided will be the consequences of Iraq's failure to comply with the enhanced regime' (para 12). Another, or a more precise, way of putting it is: 'Whether a report comes to the Council under OP4 or OP11, the critical issue is what action the Council is required to take at that point' (para 21). However, earlier in discussing OPs 4, 11 and 12 he notes that what is clear is that 'if Iraq fails to comply there will be a further Security Council discussion. The text, is, however ambiguous and unclear on what happens next' (para 13). Given earlier warnings referred to above from Franck as to making 'a complete mockery of the entire system'⁹⁹ or that of Lobel and Ratner about powerful states using UN authorisations to serve their own interests,¹⁰⁰ it is unsurprising that the Attorney-General at first took the view that 'the safest legal course' would be to avoid these dangers by obtaining the second resolution he advises upon in paragraph 27. It is noteworthy that a mere six days later he resolved to authorise a course of action that amounted to a unilateral decision that what had previously been ambiguous and unclear was now 'plain'.¹⁰¹

⁹⁶ MC Wood, n 39, at 82. He also emphasises that 'such drafting practices as exist are not always well-known or appreciated, nor are they always applied consistently. The importance which lawyers attach to consistency of drafting has to be balanced against the need for flexibility if general agreement is to be reached and as often as not reached swiftly.'

⁹⁷ UNSC Res 1747 (24 March 2007) UN Doc S/Res/1747 OP 13; UNSC Res 1737 (23 December 2006) UN Doc S/RES/1737 OP 24; UNSC Res 1718 (14 October 2006) UN Doc S/Res/1718 OP 16; UNSC Res 1696 (31 July 2006) UN Doc S/RES/1696 OP 8.

⁹⁸ *The Case Against War*, n 20, at 46; see also Sarooshi, n 41.

⁹⁹ See Franck, n 33, at 139.

¹⁰⁰ See Lobel and Ratner, n 18, at 127.

¹⁰¹ Attorney-General's advice of 17 March 2003, entitled 'Legal basis for use of force against Iraq' <<http://www.pm.gov.uk/output/Page3287.asp>> accessed 22 November 2007.

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The Attorney-General addresses the problem that if OP 12 requires only the council to meet and consider, not assess and decide, this ‘reduces the role of the council discussion under OP12 to a procedural formality’. He then notes:

Others have jibbed at this categorisation, but I remain of the opinion that this would be the effect in legal terms of the view that no further resolution is required. The Council would be required to meet, and all members of the Council would be under an obligation to participate in the discussion in good faith, but even if an overwhelming majority of the Council were opposed to the use of force, military action could proceed regardless. (paragraph 24(iii))

Of course, the public was not to see this advice for over two years and plainly was never meant to see it. One notes it was not even disclosed to the Cabinet. However, it seems extraordinary that the Attorney-General could possibly have interpreted the ambassadorial statements that he discussed in paragraph 25 as less than clear that none of the other 13 Member States were prepared to allow the vesting of collective security provisions as meaning no more than a discursive role for the Council. And this in the context of Alexander’s view that: ‘surely there has been no more important or far-reaching issue of law for many years’.¹⁰² It is noted that Lord Steyn (as an ex-Law Lord) later described this legal justification as scraping ‘the bottom of the legal barrel’.¹⁰³

B. The Issues of ‘Final Opportunity’ and ‘Serious Consequences’

The first point to be made is that, as dealt with above, these phrases are not the equivalent of ‘all necessary means’ or ‘all necessary measures’ which is the established phrase used by the Security Council to authorise force. It is worth re-emphasising the importance of Member States, who decide to take up an authorisation to use force, being certain that this authorisation in clear terms triggers Article 103 of the Charter. Otherwise not only is that Member State open to challenge before the International Court of Justice by the state on the receiving end of such force for breach of the preemptory norm of Article 2(4),¹⁰⁴ but it is also open to challenge in domestic legal systems that recognise that the rule of customary international law prohibiting the crime of aggression is, in that criminal legal system, also a domestic crime.

The second point is that ‘serious consequences’ is evidently less of a warning to Iraq than the ‘severest consequences’ warned of in OP 3 of 1154.¹⁰⁵ That chapter VII resolution warning of 2 March 1998 was followed by another on 5 November 1998

¹⁰² See speech of Lord Alexander, above, n 27.

¹⁰³ See *Guardian*, above, n 78.

¹⁰⁴ As in, eg, *Nicaragua v United States of America*, above, n 17.

¹⁰⁵ OP 3 reads: ‘Stresses that compliance by the Government of Iraq with its obligations, repeated again in the memoranda of understanding, to accord immediate, unconditional and unrestricted access to the Special Commission and IAEA in conformity with the relevant resolutions is necessary for the implementation of resolution 687 (1991), but that any violation would have severest consequences for Iraq’: UNSC Res 1153, n 28.

when Resolution 1205 recalled 1154¹⁰⁶ and by OP 1 condemned ‘the decision by Iraq of 31 October 1998 to cease cooperation with the Special Commission as a flagrant violation of Resolution 687 (1991) and other relevant resolutions’. As is noted above in the passage from Blokker, a threat of ‘severest consequences’ was not sufficient to provide automaticity. Indeed, the United States attempted to persuade the Council to include an express authorisation of force in 1154, but failed. Again, the clearest of indications that ‘severest consequences’ does not amount to such an authorisation, and is no more than a warning to Iraq. The issue of implied authorisation remained a live issue, as noted above in the Attorney-General’s references to the USA being alone in asserting that it could unilaterally declare that Iraq had breached 687 such that 678 revived. Further, the issue was particularly key in debates at the Council, following Operation Desert Fox, a US and UK series of air strikes on Iraq in December 1998. The UK and the USA argued that 1205 implicitly revived the authorisation of the use of force contained in 678. The matter was debated at the 3,930th meeting of the Council on 23 September 1998. The records show that the majority of states speaking in the debate argued that the use of force by the UK and the USA under the purported authorisation of resolutions 678, 1154 and 1205 was unlawful.¹⁰⁷ Thus, given that much of the implied authorisation argument deployed by the UK and the USA hinged on the threat of ‘severest consequences’, it is apposite to note that most Member States, including the other three Permanent Members of the Security Council, did not consider the interpretation of 678, 1154 and 1205 to the effect of an authorisation to be compatible with the framework laid down for collective decision-making. The UK and the USA had in this context fought and lost the argument that the phrase ‘severest consequences’ was a precursor to the revival of 678.

The third point focuses on the precise wording of OP 13 of 1441. It states that the Council: ‘Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations’. It seems clear that the words ‘in that context’ indicate that any serious consequences which Iraq will face are to be decided upon in the context of the discussion by the Council envisaged by OP 12. Further, this paragraph does not itself warn of serious consequences but is a reference to the warning made in 1154 as to ‘severest consequences’ which this Operating Paragraph ‘recalls.’¹⁰⁸ Lowe says on this:

¹⁰⁶ By preambular para 1 of UNSC Res 1205 (5 November 1998) UN Doc S/RES/1205.

¹⁰⁷ Boris Yeltsin, President of the Russian Federation, stated that ‘[t]he UN Security Council resolutions on Iraq do not provide any grounds for such action. By use of force, the US and Great Britain have flagrantly violated the UN Charter and universally accepted principles of international law, as well as norms and rules of responsible conduct of states in the international arena ... In fact, the entire system of international security with the UN and the Security Council as its centre-piece has been undermined’. China also expressed the view that the actions violated international law, and France ended its role in policing the no-fly zones. The French Minister for Foreign Affairs stated that France had ended its participation since the operation changed from surveillance to the use of force, and he considered that there was no basis in international law for this type of action. See C Gray, ‘From Unity to Polarisation: International Law and the Use of Force Against Iraq’ (2002) 13 *EJIL* 1, 22; and C Antonopoulos, ‘The Unilateral Use of Force By States After the End of the Cold War’ (1999) *JACL* 117, 155.

¹⁰⁸ It should be noted that the first paragraph in the Preamble of 1441 recalls ‘all its previous relevant resolutions’: UNSC Res 1441 (8 November 2002) UN Doc S/RES/1441.

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The statement in paragraph 13 ... is a simple statement of what the Security Council has done in the past. It cannot in my opinion possibly be interpreted as an express or implied authorisation to states unilaterally to take military action against Iraq in the future. Certainly, paragraph 13 amounts to an implied threat of 'serious consequences' if Iraq breaches its obligations in the future. But nothing in paragraph 13 suggests that the consequences would be decided upon and taken by anyone other than the body that has, under the procedure established in the immediately preceding paragraphs 11 and 12, been given responsibility for deciding how to respond to material breaches, that is, by the Security Council itself.¹⁰⁹

The fourth point focuses on the reference to 'final opportunity' and whether that adds anything to the warning about 'serious consequences'. It is interesting to note that the draft resolution published on 24 February 2003 which was sponsored by the UK and the USA, and subsequently failed to get the necessary support, attempted to tie in 'final opportunity' with the crucial issue of whether the Security Council was intending merely to consider the issue of Iraq's non-compliance, or whether it was to consider and then decide what, if any, further action was required. OP 1 of the draft stated that the Council acting under chapter VII: 'Decides that Iraq has failed to take the final opportunity afforded to it by resolution 1441'. First, it is noteworthy that this draft faced up to the central problem, namely, that it was for the Council to decide on future action; second, having done so it does no more than attempt to have the Council decide a question of past fact, rather than decide as to an authorisation as to the future action of member states. That even this anodyne decision could not be agreed upon by other Member States, and Permanent Members, speaks volumes of their determination not to authorise force at this stage.

The fifth and final point also concerns 'final opportunity', and the question as to whether force automatically follows after the words have been used. Besides what is said above about Council practice on the use of the term 'all necessary means', it is obvious that just because Iraq had had its final opportunity tells Member States nothing about what was now decided or had been authorised. The need for certainty on this is emphasised by the point made above regarding Article 103. Accordingly, Iraq's failure to take its final opportunity might have led to the Security Council considering that, although it had indeed so failed, nevertheless the contemporaneous reports from IAEA and UMMOVIC led it to decide that an authorisation of force was not at this stage appropriate as Iraq was making progress towards full compliance and cooperation. Instead it may have decided that Article 41 measures¹¹⁰ were appropriate at this stage before considering whether to decide to take Article 42 measures. Even if it had at this first stage

¹⁰⁹ Adjudication of Professor Vaughan Lowe, the BBC Today Programme Hearing, 19 December 2002 at *The Case Against War*, n 20, at 172.

¹¹⁰ Art 41 of the UN Charter reads: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

moved immediately to Article 42 measures, or had first taken Article 41 and then later Article 42 measures, there are other possibilities of Article 42 measures not, at first, involving force. Thus, it may have decided to mount a blockade first. A determination that there has been a breach of the peace under Article 39 does not automatically entail military action. The importance of Article 39 is that it goes on to provide that the Council 'shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

Accordingly it was not open to the USA and the UK to pre-empt the outcome of the Council's discussions and assume not only that references to 'final opportunity' and 'serious consequences' automatically entailed Article 42 measures had been authorised and that these measures were not to first involve other alternatives such as a blockade, or even limited action by land in order to minimise civilian casualties. Instead, it was to be assumed that the Council had not just authorised the full force of Resolution 678, but had gone much further and authorised a full-scale invasion of Iraq. It will be recalled that 678 did no more than authorise the Coalition 'co-operating with the Government of Kuwait ... to use all necessary means to uphold and implement resolution 660',¹¹¹ and that 660 was limited to, in effect, restoring Kuwaiti sovereignty. It was precisely for these reasons that China, as a Permanent Member, through its ambassadorial statement as 1441 was adopted, noted that the USA and the UK had 'accommodated our concerns' and crucially that: 'The text no longer includes automaticity for authorising the use of force. According to the resolution, only upon receipt of a report by UNMOVIC and the IAEA on Iraq's non-compliance and failure to cooperate fully in the implementation of this resolution shall the Security Council consider the situation and take a position' (emphasis added).¹¹²

Whether or not the public will ever get to confront the true extent of the public defiance of international law on *jus ad bellum* depends, in the context of this litigation, on whether the judiciary in the UK follows a line of recent cases in which it has demonstrated that it is prepared to intervene in the area of executive decisions of high policy¹¹³ or follow a more conservative route of judicial deference¹¹⁴ and non-justiciability.¹¹⁵ There is a compelling argument to be made that in the context

¹¹¹ UNSC Res 678, OP 2.

¹¹² By Ambassador Zhang Yashan, (8 November 2002) <<http://globalpolicy.igc.org/security/issues/iraq/document/2002/1108chinastat.htm>> accessed 23 November 2007.

¹¹³ *A and others v Secretary of State for the Home Department* [2004] UKHL 56; *A and others v Secretary of State for the Home Department* [2005] UKHL 71; *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311.

¹¹⁴ F Klug, 'Judicial Deference under the Human Rights Act 1998' (2003) *EHRLR* 125, 128–9. For an assessment of, and response to, this critique, see A Kavanagh, 'Unlocking the Human Rights Act: the Radical Approach to Section 3(1) Revisited' (2005) *EHRLR* 259, at 267–70. See also generally: R Clayton, 'Judicial Deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] *PL* 33; and J Jowell, 'Judicial Deference: servility, civility or institutional capacity' [2003] *PL* 592.

¹¹⁵ Singh, n 2.

of actual or potential violations of human rights there is no area of government policy, not even the decision to wage war, that is automatically 'forbidden territory'. Strasbourg and UK jurisprudence in the context of a state's liability for interference with the right to life demands that lessons be learned from the outcome of an independent inquiry.¹¹⁶ In the context of the Iraq War, lessons learned do not necessarily include that it was, or was not, an aggressive war (as there seems little doubt it was), nor even how inappropriate political pressure was applied to persuade the Attorney-General to change his advice. It may be that the real lesson to be learned concerns the future of international law and its key role in regulating the behaviour of states, and particularly the most powerful, to ensure the peaceful resolution of disputes, in a context where the USA and the UK have paid little regard to this key principle.

IV. Conclusion

The two themes addressed in this chapter speak of the resistance to government action purportedly taken in accordance with international law. Through pre-emptive public and legal enquiry *and* post-conflict legal review of the decision to go to war, there has been a significant assessment of both the action taken and the legal basis relied upon. It might well be clear that these inter-related stories illuminate how a democratic state, supposedly fully supportive of the ideals and provisions of the UN Charter, can operate so as to undermine generally accepted key precepts of international law that have been constructed over the past 60 years. But they might also tell us considerably more about the parallel threat to and opportunity for justice that international law poses. Taking a purely practical perspective, and putting aside more complex theoretical arguments concerning the nature of global justice and the basis upon which international law could and should be constructed, the Iraq War has been extraordinary in its effects.

From the perspective of 'threat', international law has been shown to be capable of manipulation for the purposes of justifying military action that has had a devastating effect upon the population of a whole country. Of course, some would say that it was ever thus. Power and *realpolitik* have always relied upon any argument found favourable to support a desired course of action, and law has always been a tool employed in that respect. The distinction may be, however, that international law has occupied a position of great strategic significance for those liberal democracies concerned since the end of the Cold War. It has provided an ethical framework that supposedly distinguished between right and wrong and enabled

¹¹⁶ *McKerr v UK* (App no 28883/95) (2002) 34 EHRR 553; *Jordan v UK* (App no 24746/94) (2003) 37 EHRR 52; *R (on the application of Amin) v Secretary for State for the Home Department* [2003] UKHL 51.

the actions of states to be judged. The first Gulf War confirmed that position of relative moral and legal certainty. But Iraq 2003 and all those legal machinations surrounding the invasion have undermined both the framework of and the belief in law as a force for global good. Weaknesses in international law have been exploited through legal sophistry and political manipulation. The dangers inherent in the current system of international law have thus been exposed, providing a precedent for other states to engage in 'pre-emptive self-defence' regardless of the legal environment as generally understood.¹¹⁷

But with that threat has come opportunity for resistance. Whereas before the end of the Cold War international law was known to possess little force other than moral, since the removal of bipolar global politics it has been invested with considerable significance. It has been a legal source for national judgement on the external affairs of states. 'Live by the sword, die by the sword' could now be translated as 'Live by the law, die by the law'. The cases and inquiries considered in this chapter confirm this rather optimistic revised epithet. They suggest that whatever power may do to use international law for its own purposes, law has already reached a position of independence from such political control. International law now possesses an authority of its own that has permeated the legal systems of those who previously might have wished for a weighty international law but believed it should never prevent them from taking any particular desired action. Now it transcends the international/national divide providing people, the public and individuals of conscience with the means of critique and one form of resistance. That is the story that underpins the challenges that have been described in this chapter. At the very least it gives the hope that, paraphrasing Hans Kelsen,¹¹⁸ the idea of law will defeat the ideology of power. And in so doing, those seeking meaning behind the loss of life and suffering experienced on both sides of the conflict will find some evocative adjudicative avenue for their pains.

¹¹⁷ The invasion of Lebanon by Israel in 2006 was a prime example of where the legal arguments deployed by the USA and the UK in Iraq were mimicked.

¹¹⁸ H Kelsen, *Peace Through Law* (Chapel Hill, University of North Carolina Press, 1994).

3

The Challenges of Counter-proliferation: Law and Policy of the Iraq Intervention

DANIEL H JOYNER

Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion ... and you allow him to make war at pleasure ... If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him, 'I see no probability of the British invading us,' but he will say to you, 'Be silent; I see it, if you don't.'

Abraham Lincoln, 1848

This chapter will present the US-led Coalition's 2003 intervention in Iraq as a case study of the implementation of counter-proliferation as opposed to non-proliferation strategy. It will review those principles of international non-proliferation law that applied to the actions both of Iraq and of the Coalition forces respectively in the context of this intervention, and will reach conclusions regarding the compliance of the actions of the two sides with those legal obligations. It will then discuss the implications of the intervention for considerations of the likely effectiveness and general advisability of the shift in emphasis in national policies away from the classic non-proliferation 'treaties and regimes' system and toward more forceful and proactive strategies of counter-proliferation, of which the intervention is an example.

I. Non-proliferation and Counter-proliferation

The terms 'non-proliferation' and 'counter-proliferation', as used here and elsewhere in literature on weapons of mass destruction (WMD) proliferation, are attempts to give some categorisation to a variety of often interlinked concepts and policies.¹ In this sense, the distinction may be rightly challenged as somewhat

¹ For a more detailed explication of these concepts and their distinction, see DH. Joyner, 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation & International Law' (2005) 30 *Yale Journal of International Law* 507.

arbitrary and semantic. However, the purpose of this categorisation, essentially, is to recognise sometimes subtle, and sometimes not so subtle, differences in both methodology and purpose which are to be found in policies and philosophies relative to WMD proliferation. Thus, non-proliferation activities may be described broadly as efforts calculated, if not perfectly effectively implemented, to keep the proliferation of WMD-related technologies to at least a status quo, and preferably to affect a reversal of proliferation trends through requirements of disarmament of existing materials stockpiles.

Activities under this category include the web of international legal instruments and regimes of both hard and soft law character that have been constructed through multilateral diplomatic negotiation, primarily over the past 60 years since the founding of the United Nations system in 1945. These instruments and regimes include possession and proliferation treaties such as the 1968 Nuclear Nonproliferation Treaty (NPT), the 1972 Biological Weapons Convention (BWC), and the 1993 Chemical Weapons Convention (CWC)²; international safeguards and inspection regimes such as the International Atomic Energy Agency (IAEA) and the Organization for the Prohibition of Chemical Weapons (OPCW); and export control regimes such as the Nuclear Suppliers Group, Australia Group, Wassenaar Arrangement, and Missile Technology Control Regime.³ They further include the United Nations Charter, which specifies in Articles 11(1) and 26 the role of the United Nations in creating international non-proliferation law, and which provides in the articles of chapter VII a mechanism for enforcement of breaches of international law including international non-proliferation law that give rise to a threat to international peace and security. These various diplomatic and legal constructs have been referred to, collectively, as the non-proliferation 'treaties and regimes' system.

Notwithstanding all of the effort and resources expended by the international community in concluding and maintaining these treaty and other normative regimes, and their significant utility in accomplishing aims of non-proliferation of WMD and related materials and technologies, serious students of WMD proliferation have long understood that the regime which they comprise is not a perfect system and was never designed or expected to bring about a zero proliferation reality. Borders are too porous, corruption at both high and low levels is too rampant in places where WMD materials and technologies are already insufficiently physically secure, and both legitimate commercial and illicit trafficking in

² Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature 1 July 1968, 21 UST 483, TIAS No 6839, 729 UNTS 161; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature 10 Apr 1972, 26 UST 583, TIAS No 8062, 1015 UNTS 163; Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature, Paris, 13 January 1993, entered into force 29 April 1997, 32 ILM. 800.

³ See DH Joyner, 'Restructuring the Multilateral Export Control Regime System' (2004) 9 *Journal of Conflict & Security Law* 181.

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WMD-related and dual-use items and technologies is too big a business for states to hope to control completely and effectively through state-to-state treaties and supply-side export control regimes.

Adding to these difficulties is the increasing phenomenon of secondary proliferation, or proliferation from non-traditional supplier states, many of whom remain outside the existing regime structures. Concerns flowing from these realities of WMD proliferation have been aggravated in recent years. This may be due to the emergence of state actors and sophisticated and maturing groups of non-state actors with both the resources and either the ideological or strategic incentive to acquire and contemplate the use of WMD for the accomplishment of objectives perceived by many of the most powerful members of the international community as being inimical to international peace and security. The rise to prominence and capability of complex and well-funded cross-border organisations, whose practices include the use of terroristic and/or violent actions calculated to bring about desired ideological objectives, suspected of having access to or developing WMD, has in recent years formed a nexus of threat continually on the lips of international officials.⁴

Since the attacks of 11 September 2001 there have been a number of voices in the international community, and particularly from states which feel especially threatened by and vulnerable to WMD attacks staged by ideology driven non-state actors, who have called for a refocusing of attention and a lesser reliance on the traditional 'treaties and regimes' approach to stemming the proliferation of WMD. These commentators point to the previously described limitations of classical non-proliferation efforts and argue that, either as a supplement to or a replacement of this system of diplomatic relations and normative multilateral frameworks, states should increase their emphasis on and employment of proactive and forceful efforts of counter-proliferation, including the use of both pre-emptive and preventive strategies.⁵

Counter-proliferation activities may be generally defined as efforts either to preclude specific actors from obtaining WMD-related materials and technologies or to degrade and destroy an actor's existing WMD capability. The blurred distinction between the two concepts is made clearer through a list of activities usually classified as falling under the counter-proliferation category, in juxtaposition to the treaties and regime frameworks previously described. Under the heading of counter-proliferation activities can be grouped traditional efforts of deterrence and containment, efforts of defence and mitigation of attack, use of

⁴ See United Nations Security Council Resolutions 1373 and 1540.

⁵ JD Ellis, 'The Best Defense: Counterproliferation and U.S. National Security' (2003) 26 *The Washington Quarterly*; JD Ellis and GD Kiefer, *Combatting Proliferation: Strategic Intelligence and National Policy* (2003); H Muller and M Reiss, 'Counterproliferation: Putting New Wine in Old Bottles' (1996) 18 *The Washington Quarterly*; TG Mahnken, 'A Critical Appraisal of the Defense Counterproliferation Initiative' (1999) 5 *National Security Studies Quarterly*; G Andreani, 'The Disarray of U.S. Non-Proliferation Policy' (1999) 41 *Survival*; Roberts, 'Proliferation and Nonproliferation in the 1990s: Looking for the Right Lessons' (1999) 6.4 *Nonproliferation Review*.

early detection technologies, interdiction of suspected transfers of sensitive items, and pre-emptive and preventive acts of force against either actual or potential possessors of WMD.

Of course, neither of these counter- or non-proliferation activities are a stranger to policy makers. Both varieties have been pursued to greater or lesser extent for many years through national and international efforts. However, there is substantial evidence to support the assertion that the call of the pro-counter-proliferation commentators has been heard, and that, particularly in the policy positions of the United States and a small number of other powerful states, the momentum of policy has begun to swing toward an increased emphasis on proactive and often unilateral or small-coalition based counter-proliferation activities and away from more multi-lateral and diplomacy/international law based efforts of non-proliferation.⁶

While this shift can be seen in the statements of officials of a number of states, notably Russia, Japan, Australia and the United Kingdom, it has been most formally adopted by the United States in its stated foreign and security policy.⁷ In both the September 2002 National Security Strategy document and the December 2002 National Strategy to Combat Weapons of Mass Destruction document, US policy makers signalled a significant move toward counter-proliferation principles. The latter document states:

[w]e know from experience that we cannot always be successful in preventing and containing the proliferation of WMD to hostile states and terrorists ... Because deterrence may not succeed, and because of the potentially devastating consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures.⁸

The National Security Strategy document discussed the concept of pre-emption further:

[t]he United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile attacks by our adversaries, the United States will, if necessary, act preemptively ... [I]n an age where the enemies of civilization openly and

⁶ JD Ellis, 'The Best Defense: Counterproliferation and U.S. National Security' (2003) 26 *The Washington Quarterly*.

⁷ M Yamaguchi, AP, 'Japan Mulling Action over N.Korea Missiles' <http://news.yahoo.com/s/ap/20060710/ap_on_re_as/nkorea_missiles> accessed 1 November 2007; 'Russia Won't Rule Out Pre-emptive Use of Force' *Los Angeles Times* (Los Angeles, 13 October 2003) <<http://straitstimes.asia1.com.sg/storyprintfriendly/0,1887,214354,00.html?;>> speech by Tony Blair, 'Prime Minister Warns of Continuing Global Terror Threat' (5 March 2004) <<http://www.number-10.gov.uk/output/page5461.asp>> accessed 1 November 2007; D Murphy, 'Terror-Preemption talk Roils Asia' *Christian Science Monitor* (5 December 2002) <<http://www.globalpolicy.org/wtc/analysis/2002/1205preemption.htm>> accessed 1 November 2007.

⁸ Available at <www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> accessed 1 November 2007.

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actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.⁹

The place of the doctrine of pre-emption in U.S. counter-proliferation policy was recently confirmed in the 2006 National Security Strategy document, which sought specifically to justify the doctrine on the basis of a right to pre-emptive self-defence in international law.

Meeting WMD proliferation challenges also requires effective international action ... Taking action need not involve military force ... If necessary, however, under long-standing principles of self-defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack.¹⁰

As Jason Ellis has succinctly written

[T]he rise of counterproliferation to national stature really begins with the current administration ... The Bush version gives continued importance to 'strengthened' nonproliferation efforts but downgrades the prior treaties-and-regimes approach, elevating the status of proactive counterproliferation efforts to deter and defend against WMD and missile threats as well as effective consequence management should such weapons be used.¹¹

The argument in this chapter is that the Iraq intervention of 2003 should be seen properly as a manifestation of this resetting of emphasis in the United States and in a limited number of other countries to favour counter-proliferation efforts. While sharing the classic non-proliferation aim of preventing the development, possession and use of WMD, these differ from traditional non-proliferation approaches in that they prescribe action in situations in which that use is not an imminent reality, but rather perceived to be a serious developing threat.¹² As a case study of the application of counter-proliferation policy, moreover, it is argued that lessons should be learned from the 2003 Iraq intervention regarding both the legal and policy-oriented implications of this shift away from the non-proliferation treaties and regimes system.

II. Non-proliferation Law Relevant to the Actions of Iraq

In order to make this case, it will first be necessary to review the principles of non-proliferation law which are relevant to the actions of Iraq leading up to the 2003 intervention, and to establish Iraq's non-compliance with those obligations and the legal implications under the relevant legal sources.

⁹ Available at <www.whitehouse.gov/nsc/nss.html> accessed 1 November 2007.

¹⁰ Available at <www.whitehouse.gov/nsc/nss/2006/> accessed 1 November 2007.

¹¹ JD Ellis, 'The Best Defense: Counterproliferation and U.S. National Security' (2003) 26 *The Washington Quarterly*.

¹² The United States 2002 National Security Strategy document argues for a changed conception of the principle of imminence in light of the 'capabilities and objectives of today's adversaries' (15).

A. A Brief History of Iraq's WMD Programmes

Saddam Hussein rose to power in Iraq at the head of the secular Baathist party in 1979. After the Iranian revolution of the same year, Iraq was seen by the West as a useful counterforce against Islamic fundamentalism in the Middle East. Western states and private industries supported the Hussein government and provided it with military support through the decade of the 1980s.¹³

Once in office, Hussein pursued his goal of making Iraq a regional power. He came to see the development of a WMD arsenal as key to fulfilling that ambition. During the 1980's he embarked upon major nuclear, chemical and biological weapons as well as ballistic missile programmes, convinced that these technologies would allow Iraq to become pre-eminent over its regional rivals, Iran, Israel and Turkey. His determination was reinforced following the destruction of the Iraqi nuclear reactor at Osirak by Israel in 1981.¹⁴

The Iran–Iraq war of 1980–88 was the primary catalyst for the development by Iraq of these non-conventional weapons programmes. Iraqi forces invaded Iran on 22 September 1980, believing the campaign would be relatively quick. However, the resistance by Iranian forces was stronger than anticipated. The invasion became a protracted war of attrition lasting most of the next decade. In order to break this stalemate, Hussein turned to his fledgling WMD development programmes, accelerating research into nuclear and biological technologies, and using chemical weapons and ballistic missiles on the battlefield. Iraq's chemical weapons programme went from an initial production of mustard gas at one facility in the 1970s to full industrial-scale production by 1983. Its biological programme from 1985 to 1990 grew from pathogen research to full-scale production of weaponised agents and dissemination mechanisms. However, despite pressure from Hussein upon his nuclear scientists to expedite their development of the ultimate battlefield weapon, the Iraqi nuclear programme based in uranium enrichment through gas centrifuge cascade, progressed more slowly through the 1980s.¹⁵

For all of these programmes, Iraq relied heavily on imports of materials and technologies from Western companies, some of which were undertaken in intentional circumvention of national export control laws. However, many of these purchases were in compliance with relevant licensing procedures, often with the exporting companies having no idea of the intended end-use of their products. Through these legitimate imports, as well as through the dual-use materials black market, Iraq was able to develop an impressive array of WMD and ballistic missile research and development programmes by the late 1980s.¹⁶ The help received

¹³ J Cirincione *et al*, *Deadly Arsenals, Nuclear, Biological and Chemical Threats* (Carnegie Endowment, 2nd edn, 2005) 331. See generally H Blix *Disarming Iraq* (New York, Pantheon, 2004).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ J Holmes and G Bertsch, 'Tighten Export Controls' *Defense News* (5 May 2003).

during this period from Western companies is illustrated in the 2004 conviction in the Netherlands of Dutch businessman Franz van Anraat on charges of complicity to genocide and war crimes. Van Anraat had sold thousands of tons of chemical precursors for mustard gas and nerve gas to Iraq in the late 1980s. Both gases were used in the Iran–Iraq war, and in a 1988 attack on the Kurdish Iraqi town of Halabja in which more than 5000 people were killed.

As we know, Iraqi forces then invaded Kuwait on 2 August 1990, following allegations that Kuwaiti oil firms were slant-drilling oil from beneath Iraq's border. On 29 November 1990 the United Nations Security Council passed Resolution 678 which authorised UN members to use 'all necessary means' to 'uphold and implement Resolution 660' which had demanded that Iraq withdraw its forces from Kuwait, and 'restore international peace and security'. The resulting UN enforcement action lasted from 17 January to 27 February 1991 and resulted in the removal of Iraqi forces from Kuwait and their eventual defeat on Iraqi soil.

The Security Council passed Resolution 687 on 3 April 1991, in which it declared a formal cease-fire and demanded that Iraq 'unconditionally accept the destruction, removal or rendering harmless under international supervision of all chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities; all ballistic missiles with a range greater than 150 kilometers and related major parts and repair and production facilities'. The Council further decided that Iraq 'shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above'.

Along with these prohibitions on possession, Resolution 687 re-authorised a mandate, first authorised in Resolution 661, for a broad range of international sanctions, including prohibitions on importation of goods of Iraqi origin, prohibitions on export to Iraq of a broad range of goods and services related to the production of WMD, as well as a range of other financial and economic sanctions. The resolution further imposed upon Iraq the obligation to cooperate with IAEA inspectors with regard to its nuclear technologies obligations, and with an *ad hoc* United Nations weapons inspection regime, the United Nations Special Commission on Iraq (UNSCOM), with regard to its chemical and biological weapons obligations. UNSCOM and the IAEA were tasked with verifying Iraq's compliance with the disarmament provisions of the resolution.

After several years of grudging cooperation, the Iraqi policy appeared to change to one of frustration of and non-cooperation with the international inspectors, even though this meant the foregoing of over \$120 billion in oil revenues that the United Nations refused to release to Iraq as a consequence. The effects upon Iraqi civilians of the long-term economic sanctions regime imposed by UN resolutions, ironically was producing support for Hussein's government in Arab countries. Bolstered by this support, in the fall of 1998 Hussein refused to allow full access by weapons inspectors to sites within Iraq unless the sanctions were lifted. The resulting standoff led to the decision on 16 December 1998 to withdraw the

inspectors from the country. Two days of military strikes by the United States and the United Kingdom followed.¹⁷

On 17 December 1999, the Security Council passed Resolution 1284, which proposed a re-introduction of weapons inspectors into Iraq led by the IAEA and the renamed United Nations Monitoring, Verification and Inspection Commission (UNMOVIC). Hussein once again refused to allow the inspectors access while the sanctions regime remained in force. The absence of inspectors on the ground not only meant the end of on-site inspections of Iraqi weapons facilities, it also meant that the video monitoring of those facilities, and the other methods of safeguarding against their use in WMD development programmes were not being maintained. There was no way, therefore, to verify that the WMD programmes, which had been significantly dismantled through the inspections programme, and hampered as a result of the years of crippling economic sanctions, were not being restarted.¹⁸

From 1998 to 2002, the strategy of the West towards Iraq focused on containment and maintenance of the sanctions regime despite concerns regarding the effectiveness of this regime and fears that Hussein was rebuilding his WMD programmes in defiance of UN Security Council Resolutions. As time passed, the continued refusal to cooperate with the UN inspection regime led many analysts to believe that Hussein now had something to hide.¹⁹ Intelligence estimates compiled by Western intelligence agencies, particularly in the United States, began to be based less upon direct evidence (as they had no access to such information) and more on projections of likely behaviour of Hussein and his regime based upon past experience.²⁰ The CIA's summary of intelligence on Iraq reported to Congress in 1999 stated:

We do not have any direct evidence that Iraq has used the period since Desert Fox to reconstitute its WMD programmes, although given its past behaviour, this type of activity must be regarded as likely. The United Nations assesses that Baghdad has the capability to reinitiate both its CW and BW programmes within a few weeks to months, but without an inspection monitoring programme, it is difficult to determine if Iraq has done so.²¹

Beginning in late 2002, these intelligence estimates, and their interpretation by government officials and outside experts, began to contain a message of heightened concern. US Administration officials stated repeatedly that Iraq had restarted its nuclear weapons programme, that it had restarted industrial scale production of chemical and biological weapons and stockpiled hundreds of tons of chemical and biological weapons, and that it had produced dozens of Scud missiles and aerial drones to deliver these weapons.²² Secretary of State Colin Powell said in

¹⁷ Cirincione *et al*, n 13, at 331–2.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, at 332–3.

²⁰ *Ibid.*, at 333.

²¹ Central Intelligence Agency, Unclassified Report to Congress.

²² Cirincione *et al*, n 13, at 334–6.

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January 2003 that 'Iraq continues to conceal quantities, vast quantities, of highly lethal material and weapons to deliver it'.²³ Secretary of Defence Donald Rumsfeld went further in assuring that the United States knew the location of these chemical and biological weapons stockpiles: 'We know where they are'.²⁴ Secretary of State Condoleeza Rice said in June 2003 that the assessment of Iraq's possession and development of WMD was 'not about a data point here or a data point there, but about what Saddam Hussein was doing. That he had weapons of mass destruction. That was the judgment'.²⁵

Official statements regarding Iraq's WMD programmes reached their most definitive with the declaration of President George W Bush on 17 March 2003, which also included a reference to the assertion made for months by the US Administration that Iraq had 'ties' with the Al-Qaeda terrorist organisation:

Intelligence gathered by this and other governments leaves no doubt that the Iraq regimes continues to possess and conceal some of the most lethal weapons ever devised ... the danger is clear: using chemical, biological, or one day nuclear weapons, obtained with the help of Iraq, the terrorists could fulfil their stated ambition and kill thousands or hundreds of thousands of innocent people in our country or any other.²⁶

The United States led efforts at the United Nations to achieve the passage of a Security Council resolution clearly authorising the use of force to disarm Iraq. Significant opposition from other permanent members of the Security Council, particularly including France and Russia, however, countered these efforts. The result of this diplomatic discord was the passage, on 8 November 2002, of Resolution 1441, in which the Security Council determined that Iraq 'has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991)'. The Council further decided 'to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council' and accordingly to establish 'an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council'.

The Council demanded that Iraq cooperate with the UNMOVIC and IAEA inspectors, and make a full and accurate accounting of all of its WMD-related programmes and stockpiles. It stressed that any failure to comply with the demands made in the resolution would constitute a 'further material breach' of Iraq's obligations under Security Council resolutions. The Council decided to

²³ 'Iraq Weapons Inspectors' 60-Day Report: Iraqi Non-Cooperation and Defiance of the UN', briefing in Washington DC (27 January 2003) <www.state.gov/secretary/rm/2003/16921.htm> accessed 1 November 2007.

²⁴ Donald Rumsfeld, interview on 'This Week with George Stephanopoulos' *ABC Television* (30 March 2003).

²⁵ Condoleeza Rice, interview on 'This Week with George Stephanopoulos' *ABC Television*, (8 June 2003).

²⁶ Remarks in Cross Hall, Washington 'Address to the Nation on War with Iraq,' (17 March 2003) <www.whitehouse.gov/news/releases/2003/03/20030317-7.html> accessed 1 November 2007.

convene immediately upon the receipt of a report by the weapons inspectors 'in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'. Finally, it recalled its warning to Iraq of 'serious consequences' which would result from Iraq's failure to uphold its obligations.

The UNMOVIC and IAEA inspections began soon afterward and made significant progress, but the inspections ended in March without producing a report on their findings, when it became clear that hostilities were imminent. On 19 March 2003, the main invasion of Iraq by a US-led coalition of military forces began. By 1 May President Bush announced that major combat operations in Iraq had ended, though the occupation and battle against insurgent forces was to continue.

The search for evidence of Iraq's WMD programmes and weapons stockpiles had begun even before the invasion occurred, and continued afterwards for months. In June 2003 the Iraq Survey Group (ISG) assumed the lead in this effort. Over the next year, approximately 1300 members of the ISG inspection team scoured Iraq, looking for WMD development and weapons storage sites and combing through thousands of documents, trying to come up with evidence to support the pre-war allegations of active weapons programmes. Neither UN inspectors nor the members of the ISG found any of the active programmes or any of the weapons stockpiles that had been cited as the primary reason for the invasion. UNMOVIC found 18 chemical artillery shells that had apparently been produced before 1990. Sixteen of these shells were empty, and two were filled with water.²⁷

None of the allegations contained in US and UK intelligence estimates concerning the activity of WMD programmes in Iraq or the possession by Iraq of nuclear, chemical or biological weapons proved to have been correct. In July 2004, both the US Senate Intelligence Committee and the UK parliamentary inquiry (Butler Commission) tasked with presenting the findings of the post-war inspections presented their reports. Both reports confirmed the inaccuracy of pre-war intelligence, and were highly critical of the intelligence failures that had led to the war.²⁸ According to the US Senate report, most of the key pre-war intelligence judgments had been 'either overstated, or were not supported by, the underlying intelligence reporting. A series of failures ... led to the mischaracterization of the intelligence'.²⁹

On the question of why Saddam Hussein had not cooperated with UN and IAEA inspectors when in fact, as now became apparent, he did not have WMD programmes and stockpiles to hide, Kenneth Pollack has explained:

He may have feared that if his internal adversaries realised that he no longer had the capability to use these weapons, they would try to move against him ... Saddam's standing among the Sunni elites who constituted his power base was linked to a great extent

²⁷ Cirincione *et al*, n 13, at 336–7.

²⁸ *Ibid*.

²⁹ US Senate, 'Senate Report on the U.S. Intelligence Community's Pre-War Intelligence Assessments on Iraq' (7 July 2004) <<http://intelligence.senate.gov/iraqreport2.pdf>> accessed 1 November 2007.

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to his having made Iraq a regional power—which the elites saw as a product of Iraq's unconventional arsenal. Thus openly giving up his WMD could also have jeopardized his position with crucial supporters.³⁰

B. Non-proliferation Law Violations

Notwithstanding the fact that no evidence of active Iraqi WMD programmes or stockpiling after the 1991 Gulf War have been found, it is clear that prior to 1991 Iraq was in violation of its obligations under non-proliferation treaties. Similarly, after 1991 it was in violation of its obligations under UN Security Council resolutions, including Resolution 687. I will now review those breaches of non-proliferation law, and their implications, if any, for considerations of the legality of the 2003 Iraq intervention, as well as larger considerations of the likely effectiveness and advisability of counter-proliferation policies generally.

i. Nuclear Weapons

Iraq ratified the Nuclear Nonproliferation Treaty (NPT) on 29 October 1969 and subsequently concluded an independent safeguards agreement with the IAEA. As a Non-Nuclear Weapon State it was obligated under Article II not to acquire from any other states, or produce on its own, nuclear weapons or nuclear explosive devices and not to receive foreign assistance in weapons development programmes. Iraq first breached its NPT obligations through its efforts at its Osirak research reactor, which had been purchased from France in 1976, to generate plutonium for use in nuclear weapons. After the reactor at Osirak was destroyed by Israel in 1981, Iraq's efforts to produce fissile materials switched to uranium enrichment, using several different processes including chemical enrichment, gaseous diffusion, gas centrifuges, and electromagnetic isotope separation (EMIS). In its work on the nuclear fuel cycle and nuclear weapons production, it obtained the assistance of Western companies that transferred to Iraq classified design details of centrifuges, and high-tensile maraging steel for centrifuge manufacture.³¹

According to the IAEA, Hussein's original plan was to produce Iraq's first implosion-type weapons by 1991. However, the uranium enrichment process lagged behind projected targets and this goal became impossible. Despite a stepped-up programme which was initiated after Iraq's invasion of Kuwait in 1990, by the time of the 1991 war with Coalition forces, Iraqi scientists had been unable to master the complexities of the high-explosive charges which must follow ignition in order to bombard the fissile core of a nuclear warhead with homogenous shock waves.³²

³⁰ 'Spies, Lies and Weapons: What Went Wrong' *Atlantic Monthly* January/February 2004 22.

³¹ Cirincione *et al*, n 13, at 337–42. See also Graham S Pearson, *The Search for Iraq's Weapons of Mass Destruction* (London, Palgrave, 2005).

³² *Ibid.*

The 1991 war and subsequent inspections and disarmament activities of the IAEA succeeded in fully dismantling the Iraqi nuclear weapons programme. The IAEA secured all of the fissile materials and destroyed or removed all equipment and facilities relating to the programme.³³ Although Iraq had never successfully produced a nuclear weapon, all of the activities it had engaged in during its decade-long concealed nuclear weapons programme were both in breach of its safeguards agreement with the IAEA and in fundamental breach of its substantive obligations under Article II of the NPT.

ii. Biological Weapons

Iraq's international legal obligations in the biological weapons area present a slightly more complicated picture. Iraq did sign the Biological Weapons Convention (BWC) in 1972. However, it did not deposit its instrument of ratification with the Depositary Governments until 1991. Since the BWC specifies in Article XIV that the convention is subject to ratification, the substantive provisions of the BWC did not become binding on Iraq until that date. Thus, Iraq's activities related to development and possession of biological weapons from 1991 were in breach of its obligations under the BWC.

However, the 1969 Vienna Convention on the Law of Treaties, which is recognised to have codified pre-existing customary law, provides in Article 18 that after signature of a treaty and before its ratification, a state is bound 'to refrain from acts which would defeat the object and purpose of the treaty'. The object and purpose of the BWC being to forbid the development, possession and proliferation of biological weapons, Iraq's activities in these areas from 1975 (when the BWC entered into force) to 1991 would fall under this provision, and therefore be a violation not of the BWC but of the Vienna Convention and customary international law.

Iraq's biological weapons programme began in the 1970s but increased dramatically in both scale and pace during the Iran–Iraq war of 1980–88. During this time Iraq produced both lethal pathogens (anthrax, botulinum toxin and ricin) and incapacitating pathogens (aflatoxin, mycotoxins, haemorrhagic conjunctivitis virus and rotavirus). Iraq also developed dissemination devices, testing the first in 1988. It tested and developed aerial bombs, rockets, missiles and spray tanks as vehicles for dissemination of pathogens.³⁴

Iraq's efforts increased in 1990 in anticipation of coming conflict. Al Hussein missiles were filled with aflatoxin, anthrax and botulinum toxin and deployed in January 1991 to four sites in Iraq, where they remained throughout the Gulf War. After the war, Iraq's biological weapons and development programme remained secret, through constant denial of their existence and active efforts to keep the programme hidden from weapons inspectors. However, the location of the largest

³³ *Ibid.*

³⁴ *Ibid.*, at 346–9.

biological weapons research and development and production site at Al Hakam was revealed by Lieutenant-General Hussein Al-Kamal, Saddam's brother-in-law, after his defection in 1995. In 1996, UNSCOM destroyed the facility and materials at Al Hakam and transferred equipment from other R&D sites to Al Hakam to be dismantled.³⁵

Iraq's long-maintained biological weapons programme was in clear breach of its obligations under Articles I, II and IV of the 1972 Biological Weapons Convention, as well as its obligations under Article 18 of the 1969 Vienna Convention on the Law of Treaties. Its possession of biological weapons, and their concealment from UNSCOM inspectors subsequent to the passage of Resolution 687 in 1991, until their destruction in 1996, further constituted a breach of Iraq's obligations under Article 25 of the UN Charter.

iii. Chemical Weapons

In the area of development, possession and proliferation of chemical weapons, an international legal vacuum existed for most states until the signing of the 1993 Chemical Weapons Convention (CWC). Iraq has yet to sign the CWC but, as will be discussed below, this is a moot point because of the date of the destruction of the Iraqi chemical weapons programme and its chemical weapons stockpiles.

Before the CWC, the only multilateral international legal instrument addressing chemical weapons, including chemical gas weapons, was the 1925 Geneva Protocol, which banned the 'use in war' of 'asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices,' as well as the use of bacteriological methods of warfare. Iraq acceded to the 1925 Geneva Protocol on 8 September 1931.

Iraq's chemical weapons programme was by far the most extensive, and productive, of its non-conventional weapons programmes. Chemical weapons were also the only WMD Iraq actually used on the battlefield. Its programme began in the 1970s and expanded significantly during the Iran–Iraq war. It produced mustard gas as well as the more complex compounds of tabun, cyclosarin and sarin. These chemicals were weaponised by placement in artillery shells, grenades, mortars, aerial bombs and rockets. It further deployed 50 Al Hussein missiles with warheads filled with chemical weapons as part of its battlefield forces during the 1991 Gulf War.³⁶

Iraq used chemical weapons during its war with Iran on multiple occasions, resulting in the deaths of approximately 50,000 Iranian soldiers and civilians. Iraq further used chemical weapons to subdue the Iraqi Kurdish population in the north of the country in the late 1980s. The use of chemical weapons on the northern Iraqi town of Halabja on 16 March 1988, in which mustard gas, tabun,

³⁵ *Ibid.*

³⁶ *Ibid.*, at 342–5.

sarin and the nerve agent VX were delivered by aerial bombs to kill approximately 5,000 people and injure 10,000, has been described as 'the largest-scale chemical weapon attack against a civilian population in modern times'.³⁷

After the Gulf War, UNSCOM inspectors dismantled Iraq's chemical weapons programme and destroyed 760 tons of chemical weapons and more than 3,275 tons of chemical precursors. Because of the scale of the programme and the amount of chemicals produced through its industrial-scale processes, as well as gaps in the accounting records delivered by Iraq to inspectors, concerns lingered as to whether all chemical weapons stockpiles and facilities had been detected and destroyed. These suspected residual stockpiles of chemical weapons, which some believed existed in secret underground storage facilities, were at the heart of the concerns that eventually led to the 2003 intervention.³⁸ After the 2003 intervention, the head of the ISG, David Kay, stated that:

multiple sources with varied access and reliability have told ISG that Iraq did not have a large, ongoing, centrally controlled CW programme after 1991. Information found to date suggests that Iraq's large-scale capability to develop, produce, and fill new CW munitions was reduced—if not entirely destroyed—during operations Desert Storm and Desert Fox, 13 years of U.N. sanctions and U.N. inspections ... Our efforts to collect and exploit intelligence on Iraq's chemical weapons programme have thus far yielded little reliable information on post-2001 CW stocks and CW agents production.³⁹

Charles Duelfer, who succeeded Kay at the head of the ISG, stated more definitively in October 2004 that 'ISG judges that Iraq unilaterally destroyed its undeclared chemical weapons stockpile in 1991'.⁴⁰

Thus, Iraq's non-signature of the 1993 CWC is not material to consideration of its breaches of international legal obligations during the Presidency of Saddam Hussein, as Iraq's chemical weapons programme was not functioning, and its chemical weapons stocks had been destroyed, by 1991. However, the use of chemical weapons by Iraq against Iran during the Iran–Iraq war was in violation of Iraq's obligations under the 1925 Geneva Protocol. With regard to Iraq's use of chemical weapons against minority groups within Iraq, the prevailing legal opinion is that the limitation of the Geneva Protocol to the use of chemical weapons 'in war' does not allow the application of its provisions to intra-state conflicts. Thus, the horrific use of chemical weapons against the Iraqi Kurds in the late 1980s cannot be held to be a breach by Iraq of the Geneva Protocol obligations, although it almost certainly was a violation by Iraqi officials, including Saddam Hussein himself, of international criminal law.

³⁷ *Ibid*; CM Gosden, 'Chemical and Biological Weapons Threats to America: Are We Prepared?' Testimony before the Senate Select Committee on Intelligence (22 April 1998).

³⁸ Cirincione *et al*, n 13, at 342–6.

³⁹ Testimony of David Kay to Congress on 2 October 2003.

⁴⁰ 'Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD' (30 September 2004) <www.cia.gov/cia/reports/iraq_wmd_2004/index.html> accessed 1 November 2007.

iv. Ballistic Missiles

There are no multilateral international legal instruments or rules of customary international law addressing the development, possession and proliferation of missiles. Therefore, the only international law that applies to Iraq's ballistic missile programme and stockpiles is the provision in Security Council Resolution 687, passed in 1991, that Iraq's missile arsenal be limited to missiles with a range of no greater than 150 kilometres.

Before the 1991 Gulf War, Iraq had a large arsenal of short-range ballistic missiles, including single-stage, liquid-fuelled Scud-Bs (with a 300-kilometre range and a 1,000-kilogramme payload) which it had acquired from the Soviet Union. It also had developed three variants of the Scud-B itself, all of which had a range of around 600 kilometres. Iraq had weaponised both biological agents and chemical compounds by loading them into missiles, and was actively pursuing a programme to develop the ability to mount a nuclear warhead on its Al Hussein modified Scud platform.⁴¹

In 1991 UNSCOM destroyed the 48 ballistic missiles that were declared to it with a range of over 150 kilometres. In March 1992, however, Iraq informed UNSCOM that it had not declared the existence of a further 85 missiles with ranges longer than the prescribed limit. Officials said, though, that they had destroyed those additional 85 missiles in October 1991 in a secret operation. By early 1995, UNSCOM was confident that it had located and destroyed Iraq's non-compliant missile arsenal. However, due to repeated instances of concealment of missiles and related facilities, and incompleteness of missile accounting produced by Iraqi officials, UNSCOM still had concerns regarding the comprehensiveness of their purge of missile stocks.⁴²

Inspections carried out between November 2002 and March 2003 revealed the continued presence in Iraq's arsenal of Al Samoud 2 missiles that had a range exceeding 150 kilometres. Iraq began the destruction of these missiles on 1 March 2003 and had destroyed two-thirds of its Al Samoud 2 stocks by the time UNSCOM inspectors left, prior to the start of the war.⁴³

While the vast majority of the Iraqi missile arsenal prohibited by Resolution 687 had been decommissioned during the early 1990s, the possession of these missiles after 1991, as well as the 'substantial illegal procurement for all aspects of the missile programmes' revealed by the ISG, did constitute a violation by Iraq of the terms of Security Council Resolution 687, and thus was a breach by Iraq of its obligations under Article 25 of the United Nations Charter.⁴⁴

⁴¹ Cirincione *et al*, n 13, 350–5.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ Testimony of David Kay to Congress on 2 October 2003.

III. Non-proliferation Law Relevant to the Actions of the Coalition

Because of Iraq's breaches of its international non-proliferation law obligations, both real and imagined, and the threat that was deemed to exist both to the region and, through an alleged nexus to international terrorism, to the West as well, agreement was reached between the United States and the United Kingdom that action had to be taken to disarm Iraq once and for all and to remove the Saddam Hussein regime.⁴⁵ The question became: on what basis could such action be justified?

Looking first to the provisions of the substantive non-proliferation law instruments which Iraq had breached, there would seem to be little justification for forceful action. The NPT makes no mention of disputes arising regarding the provisions of the treaty. Safeguards agreements with the IAEA are mandated under Article III, and thus to that body is committed discretion in the first instance to investigate cases of suspected breach of NPT obligations. However, the IAEA is only empowered under its statute to determine breaches to its bilateral safeguards agreements and has no authority to determine breaches of underlying NPT obligations. The IAEA statute provides for referral of cases from the IAEA to the Security Council if a breach of safeguards commitments has been determined.

The BWC does contain provisions in Article VI regarding a situation in which any party to the treaty 'finds that any other state party is acting in breach of obligations deriving from the provisions of the Convention'. The prescribed procedure for registering such concerns is to lodge a complaint with the Security Council, which is to investigate the basis of the complaint.

Although the CWC, as discussed above, is not relevant to the case of Iraq, it too has provisions under which states are to pursue their complaints regarding another Member State's compliance with the obligations of the treaty. In the case of the CWC, these procedures are more complex and involve the use of the Organization for the Prohibition of Chemical Weapons (OPCW) as an intermediary between states parties to clarify information on chemical programmes and, if necessary, to administer challenge inspections demanded by one state party as regarding another. The treaty nonetheless provides that 'in cases of particular gravity' the issue is to be brought to the attention of the United Nations Security Council.

Thus, under all three substantive non-proliferation law instruments, there are no provisions for unilateral enforcement of treaty obligations as between Member States. Rather, all enforcement roads lead to the Security Council and to its

⁴⁵ P Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London, Penguin, 2005) 182–4.

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authority under chapter VII of the UN Charter. And of course, there were Security Council resolutions specifically on the subject of Iraq and its WMD programmes, stretching back to Resolution 678, demanding disarmament. These resolutions, all sources of international non-proliferation law emanating from the Security Council's enforcement authority under the Charter, had been demonstrably flouted by Iraq, as detailed above, particularly in the areas of biological weapons and ballistic missiles. But did violation of the substantive terms of these prior Security Council resolutions in itself give rise to a right of unilateral or coalition-based state enforcement action against Iraq, or was an explicit authorisation by the Security Council necessary to provide a justification for such enforcement action?

It was clear after the contentious passage of the ambiguously worded Resolution 1441 in November 2002 that no more specific authorisation to use force against Iraq would be forthcoming from the Security Council.⁴⁶ Thus, if Security Council authorisation to use force against Iraq were to serve as the legal basis for an enforcement action, that authorisation would need to be found in existing resolutions. This line of reasoning gave rise to the legal justificatory rubric adopted by the UK Attorney-General in response to legal challenges to the war, and echoed by the U.S. State Department Legal Adviser in an article in the *American Journal of International Law*.⁴⁷ As summarised by the UK Attorney-General, this justification proceeds thus:

1. In resolution 678 [of 1990] the Security Council authorized force against Iraq, to eject it from Kuwait and to restore peace and security in the area.
2. In resolution 687 [of 1991], which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under resolution 678.
3. A material breach of resolution 687 revives the authority to use force under resolution 678.
4. In resolution 1441 the Security Council determined that Iraq has been and remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution.
5. The Security Council in resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.
6. The Security Council also decided in resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of resolution 1441, that would constitute a further material breach.
7. It is plain that Iraq has failed to comply and therefore Iraq was at the time of resolution 1441 and continues to be in material breach.

⁴⁶ M Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 *Global Governance* 165–86.

⁴⁷ WH Taft and T Buchwald, 'Pre-emption, Iraq and International Law' (2003) 97 *AJIL* 557.

8. Thus, the authority to use force under resolution 678 has revived and so continues today.
9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorize force.⁴⁸

Were there other international legal bases for such an anti-proliferation oriented use of force against another state? When discussing the justifications for an intervention into Iraq prior to March 2003, US officials particularly focused on the threat that Iraq posed to the United States, through its possession of WMD and connections to international terrorist organizations like Al-Qaeda.⁴⁹ They argued that this threat would only increase in time, as Iraq continued its WMD development programmes. They stressed the need for the USA to act pre-emptively in order to defend itself by neutralising this present and future threat. As President Bush stated during his 17 March 2003 televised demand for Saddam Hussein to leave Iraq within 48 hours or risk war,

In this century, when evil men plot chemical, biological and nuclear terror, a policy of appeasement could bring destruction of a kind never before seen on this earth. Terrorists and terror states do not reveal these threats with fair notice, in formal declarations—and responding to such enemies only after they have struck first is not self-defense, it is suicide.⁵⁰

President Bush went on to reference the UN Security Council resolutions which had been passed on Iraq and the fruitless efforts of the United States to achieve passage of a further resolution clearly authorizing a renewed intervention campaign against Iraq. Distinguishing the coming action from action carried out under the UN paradigm, he went on to state that the 'United Nations Security Council has not lived up to its responsibilities, so we will rise to ours'.⁵¹

This policy of pre-emptive military strikes carried out either unilaterally or by an *ad hoc* coalition of willing states without authorisation from the UN Security Council, against states and non-state actors who possess WMD and threaten the security of the United States, has come to be known as the 'Bush Doctrine' of pre-emptive self-defence. It had its first official iteration in an address by President Bush to the graduating class at West Point Military Academy on

⁴⁸ 'Statement by the Attorney General, Lord Goldsmith, in Answer to a Parliamentary Question, Tuesday, 18 March 2003' *Times* (London 18 March 2003) 2.

⁴⁹ JB Judis and S Ackerman, 'The Selling of the Iraq War: The First Casualty' *The New Republic Online* (30 June 2003) <<http://www.tnr.com/doc.Mhtml?i=20030630&s=ackermanjudis063003>> accessed 1 November 2007; SR Weisman, 'Pre-emption: Idea with a Lineage Whose Time Has Come' *New York Times* (New York 23 March 2003); J Garamone, 'Rumsfeld Says Link Between Iraq, al Qaeda "Not Debatable"' *American Forces Press Service* (27 September 2002) <http://www.defenselink.mil/news/sep2002/n09272002_200209272.html> accessed 1 November 2007.

⁵⁰ Remarks by the President in Address to the Nation, The Cross Hall <<http://www.whitehouse.gov/news/releases/2003/03/print/20030317-7.html>> accessed 1 November 2007.

⁵¹ *Ibid.*

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1 June 2002.⁵² Its justification by reference to principles of self-defence in international law was included in the 2002 US National Security Strategy Document, which stated:

For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.⁵³

The Bush Doctrine thus represents an alternative legal justification for the 2003 Iraq intervention to that offered in the UK Attorney-General's opinion.⁵⁴

The presence of both of these legal justificatory arguments in official rhetoric and national policy of the states participating in the intervention raises poignantly the question of the proper interpretation of the 2003 Iraq intervention. Was it in fact a relatively straightforward non-proliferation action, ie simply an enforcement of non-proliferation law, undertaken legitimately by the established enforcement apparatus and procedures of the associated international organizational structure, as the UK Attorney-General's arguments would attempt to persuade? Or should the intervention rather be viewed as something different; a counter-proliferation action not essentially grounded in the legal structure of the non-proliferation treaties and regimes system, but on a theory of unilateral or small ad hoc coalition-based entitlement to engage in international uses of force, even including full scale military conflict, against specific state(s) or non-state actor(s) considered to pose a WMD threat to international peace and security, based upon international legal principles of the inherent right of states to self-defence? And do either of these theories of anti-proliferation oriented action have any merit under international law?

As regards the UK Attorney-General's arguments we first have to consider the role of UN Security Council Resolutions. There are a number of serious problems in this respect.

First, while much was made of the fact that Resolution 678 declared in Operative Paragraph 33 only that a 'formal cease fire' was in effect, and not that the conflict was definitively finished, what is not as often referenced is Operative Paragraph 6 of Resolution 678. Here the Council stated that it:

Notes that as soon as the Secretary-General notifies the Security Council of the completion of the deployment of the United Nations observer unit, the conditions

⁵² <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>> accessed 1 November 2007.

⁵³ <www.whitehouse.gov/nsc/nss.html> accessed 1 November 2007.

⁵⁴ See G Simpson, 'The War in Iraq and International Law' (2005) 6 *Melbourne Journal of International Law* 167, 171.

will be established for the Member States cooperating with Kuwait in accordance with resolution 678 (1990) to bring their military presence in Iraq to an end consistent with resolution 686 (1991).

By this provision, it appears clear that what was to follow the temporary cease-fire between Iraqi forces and military forces acting under Resolution 678's authorisation of 'all necessary means,' was the deployment of another UN force with a much more limited mandate; ie to safeguard the IAEA and UNSCOM inspectors while they proceeded with their mandate. Once that deployment was complete, the Member States who had acted pursuant to Resolution 678 were to 'bring their military presence in Iraq to an end' and this end was to be 'consistent with resolution 686'. Importantly, in Operative Paragraph 8 of Resolution 686 this is more clearly termed as a 'definitive end to the hostilities'. Thus, proponents of the Security Council resolution legal basis for the 2003 intervention make more out of the temporary nature of the 'cease fire' declared in Operative Paragraph 33 of Resolution 687 than is warranted, in light of the fact that this legal status of temporary cease-fire was subsequently replaced by the legal status of the terms of Operative Paragraph 6, which provided for a definitive end of military action in Iraq under the authorisation of Resolution 678.

Second, there is the textual construction of Resolution 678 itself. Operative Paragraph 2 of Resolution 678 authorises UN Member States to use force against Iraq 'to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security'. Resolution 660 and the other referenced resolutions were clearly focused on the invasion by Iraq of Kuwait. Resolution 660 is composed solely of a demand by the Security Council that Iraq pulls its forces out of Kuwait and returns its sovereign status. Once this pullout and restoration were accomplished, the first clause of this paragraph ceased to confer authority upon UN Member States to use force against Iraq. The second clause of Operative Paragraph 2, the authority to 'restore international peace and security', has become the basis for the claim by proponents of the resolutions argument that the authorisation to use force against Iraq in Resolution 678 was still in force and therefore could be 'revived' in 2003 to justify a subsequent military campaign against Iraq. While the broadness of the terms in the paragraph does permit this argument to be made, in a more circumspect view of the implications, and future potential applications of this argument, it can be seen to be a basis for dangerous precedent, and therefore not a persuasive legal interpretation.

The term 'restore international peace and security' is commonly used in chapter VII resolutions authorising military force, for a simple reason: this is the term used in Article 42 of the UN Charter which gives the Council its authority to mandate such actions. The legal parameters of this term have never been definitively clarified, however in practice it had never, prior to the debates over a legal basis for the 2003 Iraq intervention, been referenced as a basis for separate military actions spread out over a period of more than a decade, as in this case. This term as used in chapter VII resolutions, both before and after the revival of Security Council

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activity in the 1990s, had been understood to comport with the Security Council's role as an executive body, responding in an *ad hoc* manner to specific, temporary threats to international peace and security as they occurred. In all cases it was understood that once the situation that triggered the Council's determination of a threat to the peace under Article 39 had ceased to exist, through whatever means, the force of the resolution and the obligations it imposed were to end.

If this argument were conceded, and because of the common usage of this term in Security Council resolutions under chapter VII, all such resolutions would essentially become a blank check authorising force against the target state on an indefinite basis. This is particularly the case if one accepts the complementary argument in the UK Attorney-General's advice regarding the automaticity of revival of chapter VII authorisations of force by objective determination of Member States, and the lack of necessity for a revival of such authority of a subsequent Security Council resolution. Under this reading, there are an ever increasing number of states which, having once been the subject of a chapter VII resolution, are now and forever legally sitting ducks who have had their Article 2(4) rights under the Charter revoked indefinitely by a single Security Council resolution. The dangerous implications of such an interpretation argue strongly against its adoption.

Third, the argument that a breach of the terms of Resolution 687 per se worked a revival of the authorisation to use force against Iraq under Resolution 678 is without textual support in either Resolution 678 or Resolution 687. On the subject of implementation, what Resolution 687 does say in Operative Paragraph 34 is that the Council itself 'Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area'. Far from implying an automatic revival of the authorisation of Member States to use force in Resolution 678 upon a breach of Resolution 687, this paragraph specifies that it is for the Council, not Member States, to take any further enforcement steps which may be required to implement Resolution 687.

Thus, though the Council in Resolution 1441 did declare Iraq to be in material breach of its obligations, the Council did not stipulate that there would be specific consequences of this breach. On the contrary, the Council, using its declared discretion to determine what 'further steps' were required for the implementation of Resolution 687, specifically gave Iraq another opportunity to bring itself into compliance. Iraq's response was to be judged by UNMOVIC inspectors, who were to be re-introduced into the country, but whose work was cut short by the invasion on March 19, 2003. This argument of an automatic revival, without further action by the Security Council is therefore without foundation.

Fourth, the Attorney-General's opinion states that the fact of Iraq's non-compliance with the terms of Resolution 1441 was one which was objectively determinable by states themselves, and that no further Security Council resolution was required to confirm this before the authority to resume military action against Iraq was revived. The argument fails on a number of grounds. As

previously discussed, the mandate to use force under Resolution 678 was given by the Security Council. Subsequently, the cease-fire and thereafter the definitive end to hostilities declared in Resolution 687 was declared by the Security Council under its chapter VII authority. It is only logical that if a decision was to be made, the result of which would be to once again revive, or more properly re-authorise the mandate given under Resolution 678, the Security Council was the only entity empowered to make this decision.

Resolution 1441, indeed, provides the procedural method which was to be applied to enable the Council as a body to potentially make such a determination in the future. In Operative Paragraph 12, the Council 'Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'. Thus, procedurally, a report was to be produced by the re-authorized and empowered UNMOVIC inspectors detailing the current state of Iraq's compliance with Resolution 678. That report was to be considered by the Security Council as a body prior to the Council potentially taking a further decision to re-authorise force by Member States against Iraq. The dual notion that this process could be bypassed through the unilateral findings by Member States, and that an automatic right to use military force would result, is not supported by the text of Resolution 1441. More importantly, it is not supported by an understanding of the origin and right of exercise of chapter VII authority, which rests with the Security Council as a body and not with its members individually.

Finally, and perhaps the most disturbing argument advanced by the UK Attorney-General, is the notion that because Resolution 1441 did not expressly state the need for another Security Council resolution before the authority under Resolution 678 could be revived, the need for a further resolution did not exist, ie that, in its silence, the Council was acknowledging the validity of the objective discernment of non-compliance and automatic revival of authority arguments. As the Attorney-General explained to Parliament regarding the need for another resolution:

Had that been the intention, it would have provided that the Council would decide what needed to be done to restore international peace and security, not that it would consider the matter. The choice of words was deliberate; a proposal that there should be a requirement for a decision by the Council, a position maintained by several Council members, was not adopted.⁵⁵

This argument reveals a deep misapprehension of the fundamental tenets of UN Charter law, a correct understanding of which provides the most powerful argument against the Attorney-General's position. Security Council resolutions do not exist in an authority vacuum. They are exercises of the Security Council's

⁵⁵ 'Iraq: Legal Basis for the Use of Force', annex to 'Statement by the Attorney General, Lord Goldsmith' para 11.

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power under chapter VII of the Charter. However, the Charter has other provisions in addition to the Articles of chapter VII, and the Council's powers under those Articles must be read in conjunction with those other statements of rights and obligations in order to understand correctly the extent and limitations of the Security Council's powers.⁵⁶ The Articles of chapter VII, under which UN members can be authorised by the Council to use military force against another state, comprise a limited exception to the broad non-intervention obligation contained in Article 2(4) of the Charter. This states: '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'. The provision has consistently been interpreted by both the General Assembly and the International Court of Justice to comprise a broad and encompassing prohibition against the use of international force. As the General Assembly declared in 1970:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, or cultural elements, are in violation of international law.⁵⁷

This broad norm of non-intervention provides an obligatory backdrop for all UN members, and its breach is the inescapable result of any international use of force committed by a Member State which is neither based in the inherent right or self-defence recognised by Article 51, nor the subject of a specific exception to this rule contained in a chapter VII resolution. Simply put, the rule in Article 2(4) establishes a presumption of Member State sovereignty which specifically includes non-intervention into the territory, or assault against the independent internal autonomy of any state. This presumption must be specifically overcome either by reference to self-defence or through the clear and definitive mandate of the Security Council.

Thus, the silence of the Security Council in Resolution 1441 as to whether such a clear and definitive mandate was necessary has no legal implications. A clear mandate was necessary in order to overcome the presumption of sovereignty established as a fundamental tenet of the UN Charter by Article 2(4). As Jochen Frowein has explained, a Security Council resolution,

is the legal basis for the most severe encroachment upon the sovereignty of a member of the United Nations. It is submitted, therefore, that for the interpretation of such a

⁵⁶ D Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (The Hague, Kluwer, 2001) ch 4.

⁵⁷ Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV) (24 October 1970); Supporting the authoritative status of this Declaration, see Article 31(2) and (3) of the Vienna Convention on the Law of Treaties regarding subsequent agreements by the parties to a treaty and the effect thereof upon treaty interpretation.

resolution the old rule according to which limitations of sovereignty may not be lightly assumed is fully justified. Only where the use of force against a sovereign state is clearly authorised by a resolution this is [*sic*] in fact lawful under United Nations law.⁵⁸

The absence of this clear and definitive mandate by the Security Council in the case of the 2003 Iraq intervention places the actions of the US- and UK- led Coalition squarely at odds with this presumption in Article 2(4), and thus cannot be referenced as a justification for this action which, as a result, constitutes a breach of international law.

In summary, the UK Attorney-General's argument depends upon extreme and unpersuasive interpretations of UN Security Council resolutions, and upon fundamental misunderstandings of UN Charter law. In fact, the line of legal argumentation is so tenuous and unpersuasive that the dependence upon it by government lawyers in the UK and in other states gives credence to a number of conclusions regarding the circumstances surrounding its adoption. It was long suspected, and has now been persuasively shown by Philippe Sands, that this tortured legal analysis of UN Security Council resolutions was a line of non-proliferation law justification for the 2003 intervention which, far from being the starting point for considerations regarding that action, was invented by foreign ministry lawyers to provide a veneer of non-proliferation law cover, well after the substantive counter-proliferation policy to invade Iraq was decided upon at higher political levels.⁵⁹ Sands makes it clear that the enforcement of Security Council resolutions and other breaches of substantive non-proliferation law by Iraq were a mere afterthought to policy-makers considering the invasion of Iraq. Justifications based in the non-proliferation treaties and regimes system were considered only after the decision to go to war had already been made on other grounds. The precise reasons for the decision by policy-makers in the various coalition-state capitols to invade Iraq were undoubtedly complex and varied as among the states concerned, and will not be thoroughly analysed herein. However, it is clear that at the highest levels of power, both in the United States and the United Kingdom, the enforcement of non-proliferation law was not among the primary motivating forces behind the decision to invade Iraq in 2003. With this understanding, the tenuousness of the legal arguments constructed to support the decision in non-proliferation law terms becomes less surprising.

These considerations of political process and legal dubiousness make the interpretive application to the 2003 Iraq intervention of the non-proliferation law and policy framework flatly unpersuasive. The Bush Doctrine of counter-proliferation based on pre-emptive military strikes, and its legal justification in self-defence law,

⁵⁸ J Frowein, 'Unilateral Interpretation of Security Council Resolutions—a Threat to Collective Security?' in V Götz, P Selmer and R Wolfrum (eds), *Liber amicorum Günther Jaenicke—Zum 85. Geburtstag* (Berlin, Springer, 1998) 99 (as reprinted in M Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 *Global Governance* 165–86.

⁵⁹ P Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London, Penguin, 2005) 182–4.

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comport much more closely with the pre-war statements of both US President Bush and UK Prime Minister Blair regarding Iraq, which focused on the potential threat that Iraq posed to regional peace through possession of WMD, as well as to their own states through connections between the Iraqi administration and international terrorist groups, and the need to act pre-emptively in order to counter those threats before they were realised.

As Prime Minister Blair stated in the introductory section to the September 2002 dossier containing UK intelligence assessments of Iraq's WMD programme:

I am in no doubt that the threat is serious and current, that [Saddam] has made progress on WMD, and that he has to be stopped. Saddam has used chemical weapons, not only against an enemy state, but against his own people. Intelligence reports make clear that he sees the building up of his WMD capability, and the belief overseas that he would use these weapons, as vital to his strategic interests, and in particular his goal of regional domination. And the document discloses that his military planning allows for some of the WMD to be ready within 45 minutes of an order to use them ... In today's inter-dependent world, a major regional conflict does not stay confined to the region in question ... The threat posed to international peace and security, when WMD are in the hands of a brutal and aggressive regime like Saddam's, is real. Unless we face up to the threat, not only do we risk undermining the authority of the UN, whose resolutions he defies, but more importantly and in the longer term, we place at risk the lives and prosperity of our own people.⁶⁰

This rhetoric expresses a classic counter-proliferation strategy; to act proactively and forcefully, through unilateral or *ad hoc* coalition-based military action, in order to pre-empt a specific WMD threat posed against one's allies or against oneself. This, again, differs from non-proliferation strategy, which emphasises diplomatic efforts through established international legal institutions and other international negotiating *fora*, and measures taken under the authority of international legal institutions, including the United Nations, to enforce established obligations under non-proliferation law.

The Security Council resolutions argument advanced by the UK Attorney-General does succeed in muddying the conceptual water in making this categorisation. As intended, it cleverly uses the sources of law and institutions associated with the non-proliferation treaties and regimes system in an attempt to cast the intervention as simply an enforcement action, duly authorised by the institutions of the non-proliferation law system. In the final analysis, however, because of the focus in official rhetoric not primarily upon Iraq's breaches of non-proliferation law *per se* as the primary reason for the intervention, but rather on the threat posed by Iraq's suspected WMD programme to regional peace and stability, and to the intervening states themselves, and the need to act pre-emptively to counter that specific threat, the 2003 Iraq intervention fits much better under the counter-proliferation paradigm than it does under the non-proliferation paradigm.

⁶⁰ As reprinted in *The Guardian* (London 24 September 2002) <<http://www.guardian.co.uk/Iraq/Story/0,,797883,00.html>> accessed 1 November 2007.

While at first blush this distinction between non-proliferation strategy and counter-proliferation strategy may seem solely academic, the point of this analysis is to categorise more accurately the actions of the Coalition so that the proper lessons can be learned, particularly from its failures, and applied to consideration of the future place of counter-proliferation policies in national and international anti-proliferation strategy. Some of the legal and policy implications will now be considered.

IV. Legal Implications

The most significant legal issue arising from the counter-proliferation arguments relates to the interpretation of a state's right to self-defence. By almost universal consent, the arguments deployed in this respect have been particularly unconvincing.⁶¹ Nonetheless, the issues still need to be considered.

The basic legal point of reference, of course, is the UN Charter. As discussed above, in addition to the exception to the Article 2(4) non-intervention norm provided in the articles of chapter VII, the only other exception to this obligation is found in Article 51, which recognises the inherent right of states to self-defence. In its entirety, Article 51 provides:

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

Article 51 thus recognises a temporary right of UN Member States to take unilateral actions in self-defence 'if an armed attack occurs' against them. Voluminous commentary has been produced on the meaning of the terms of Article 51, including upon the correct interpretation of the term 'if an armed attack occurs'. If one employs the standard rules of treaty interpretation contained in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which mandates that the 'ordinary meaning' of the terms is given primacy in interpretation, a solid argument can be made that Article 51 can only be triggered subsequent to an

⁶¹ See, eg, G Simpson, 'The War in Iraq and International Law' (2005) 6 *Melbourne Journal of International Law* 167, 171; M Byers, 'Letting the Exception Prove the Rule' (2003) 17 *Ethics and International Affairs* 9; S Chesterman, 'Just War or Just Peace After September 11: Axes of Evil and Wars Against Terror in Iraq and Beyond,' (2005) 37 *New York University Journal of International Law & Policy* 281; M Shapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defense' 97 *AJIL* 599; T Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *AJIL* 607.

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armed attack having been made on the state wishing to invoke that right, or at the earliest, as the attack is occurring. Ian Brownlie has argued this position thus:

[W]here the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all? ... It is submitted that a restrictive interpretation of the provisions of the Charter relating to the use of force would be more justifiable and that even as a matter of “plain” interpretation the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defence.⁶²

Brownlie’s critique was made to counter arguments to the effect that, notwithstanding the arguably plain meaning of the term ‘if an armed attack occurs,’ the description of the right in Article 51 as an ‘inherent right’ implies that this treaty article was merely a codification of already existing customary law, and that it therefore must be read as being informed by the pre-existing scope and substance of that customary right. As Derek Bowett has argued:

It is ... fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except in so far as they have surrendered them under the Charter ... [T]he view of Committee I at San Francisco was that this prohibition [Article 2(4)] left the right of self-defence unimpaired.⁶³

Although addressing a different substantive question at the time (*obiter dicta*?) the ICJ in its 1986 *Nicaragua* decision lent support to this argument by holding that:

Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature ... Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the ‘armed attack’ which, if found to exist, authorizes the exercise of the ‘inherent right’ of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that in the field in question ... customary international law continues to exist alongside treaty law.⁶⁴

The principle in pre-Charter customary law that has caused the most controversy in the context of the interpretation of Article 51 is the right of anticipatory self-defence, recognised by both US and UK diplomats in their correspondence

⁶² I Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press, 1963) 156; see also B Simma (ed), *The Charter of the United Nations* (Oxford, Oxford University Press, 2nd edn, 2002); A Rifaat, *International Aggression: A Study of the Legal Concept* (Uppsala, Almqvist & Wiksell International, 1979).

⁶³ D Bowett, *Self-Defence in International Law* (1958) 185; See also MS McDougal and FP Feliciano, *Law and Minimum World Public Order* (New Haven, Yale University Press, 1961).

⁶⁴ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14 para 176.

during the 1841 Caroline incident. The following statement by Daniel Webster, US Secretary of State at the time, has been generally accepted as a correct statement of this principle of customary international law pertaining at the time, inclusive of its substantive limiting principles of necessity and proportionality:

Mr. Webster to Mr. Fox (April 24, 1841)

It will be for ... [Her Majesty's] Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.⁶⁵

Brownlie has suggested that state practice between 1841 and 1945 served to even further limit the flexibility of the principle of anticipatory self-defence, leaving it in a tenuous state of existence at the time of drafting of the United Nations Charter.⁶⁶ This position would seem to be supported through even more recent events, such as the 1981 pre-emptive attack by Israel against the Iraqi nuclear reactor at Osirak. Resolution 487 of the UN Security Council, which was adopted unanimously, denounced the incident as a 'clear violation of the Charter of the United Nations' notwithstanding Israel's reasonable (and later validated) claim regarding Iraq's nuclear weapons programme and its connection to the site.⁶⁷

However, even if one accepts the existence of the right of anticipatory self-defence and its legal validity as part of the contours of the Article 51, it clearly does not provide a sufficient legal basis for the 2003 Iraq intervention. The imminence of the threat posed by Iraq's suspected WMD stockpiles, and its alleged connections to international terrorist networks, even if either had in fact existed, did not present a threat to either the USA or the UK that could be characterised as presenting 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. This was recognised prior to the intervention by UK Ministers, which led them to seek for a legal grounding of the intervention in Security Council resolutions. Also in the 2002 US National Security Strategy document the inability to legally ground counter-proliferation-based pre-emptive military actions on existing self-defence law was conceded.

⁶⁵ See 'The papers of Daniel Webster, diplomatic papers' 1841–3, at 43 (KE Shewmaker *et al* eds, 1983). The *Caroline* was a US-registered steamer hired to ferry provisions across the Niagara River to supply Canadian rebels taking part in the insurrection against British colonial rule of Canada in 1837. On 29 December, several boatloads of British soldiers came across the river onto the US side and set fire to the *Caroline*, dragged her into the river current, and sent her blazing over Niagara Falls, killing one man in the process. The ensuing diplomatic correspondence between US and UK officials has come to be regarded as a reliable statement of contemporary customary international law on self defence. On the principles of necessity and proportionality in customary international law, see Brownlie, n 62, at 257–64.

⁶⁶ IBrownlie, *Principles of Public International Law* (Oxford, Oxford University Press, 6th edn, 2003) 702.

⁶⁷ See LR Beres and Y Tsiddon-Chatto, "Sorry" Seems to be the Hardest Word' *The Jerusalem Post* (9 June 2003) and C Gray *International Law and the Use of Force* (Oxford, Oxford University Press, 2nd edn, 2004).

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After correctly describing the requirement of imminence in the customary right of anticipatory self-defence, the document states '[w]e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries', thus recognizing that the sort of pre-emptive actions against possessors of WMD supported by the document would require a change to existing international law.⁶⁸ The scope of the current analysis will not allow a thorough treatment of the possible alternatives for revising this legal entitlement, nor of the likely effectiveness and juridical soundness of a right of pre-emptive self-defence so revised.⁶⁹ However, the argument that the 2003 Iraq intervention can be seen as an instance of state practice and related *opinio juris* in furtherance of a change to existing customary law will be briefly reviewed.

Customary international law can indeed be modified by state practice which is inconsistent with a settled customary rule, if that practice is accompanied by *opinio juris* to the effect that the modified rule is consistent with elements of the already established rule.⁷⁰ This process has been described by the International Court of Justice in its 1986 *Nicaragua* judgment as occurring 'if a state acts in a way prima facie inconsistent with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself'.⁷¹ In the same decision the Court further observed that 'reliance by a state on a novel right, or an unprecedented exception to the principle might, if shared in principle by other states, tend toward a modification of customary international law'.⁷² If a state acts with this *opinio juris*, and if that novel justification is accepted by a large enough number of other states so as to provide a basis for concluding that a new rule of customary international law should be adopted in modification of an existing rule, the acting state's conduct is legal and additionally contributes as one instance of state practice toward the development of the new modified rule.

In the specific case of the 2003 Iraq intervention, while the statements of US officials in the period leading up to the use of military force did seek to ground that force on a principle of self-defence, there was never expressed an *opinio juris* which could be construed as proposing that the intervention, while not in compliance with existing international law, was justifiable as a modification of settled customary law principles. Indeed, to expect such a nuanced statement from political officials conceding that the action was not in accordance with existing law, but was justifiable on the basis of this rather arcane rule of customary international law formation is unrealistic. However, US government lawyers, from whom such a statement might be more reasonably expected, were silent as to even the possibility of legally justifying the intervention on self-defence law, let alone upon

⁶⁸ <www.whitehouse.gov/nsc/nss.html> accessed 1 November 2007.

⁶⁹ See D H Joyner, *Non-proliferation Law: The Regulation of WMD* (Oxford, OUP, forthcoming 2008).

⁷⁰ H Thirlway, 'The Sources of International Law' in Malcolm Evans (ed), *International Law* (Oxford, Oxford University Press, 2nd edn, 2006) 27.

⁷¹ ICJ *Nicaragua Case*, n 64, at para 186.

⁷² *Ibid*, at para 207.

a customary modification. Interestingly, the legal justification adopted by US State Department lawyers, as contained in an article in the *American Journal of International Law* co-written by the department's Legal Advisor, William Taft, was centred upon the Security Council resolutions argument reviewed earlier.⁷³ Thus, as between US political and legal officials, there appears to have been a marked lack of coordination, if not disagreement, regarding the legal principles on which the intervention was to be justified. Because of this lack of clear *opinio juris*, the 2003 Iraq intervention cannot be justified as proposed modification of existing customary law on self-defence.⁷⁴

It is instructive for consideration of the future prospects for modification of international use of force law to include a counter-proliferation right of pre-emption along the lines of that contained in the Bush Doctrine, to note that the reason both political and legal officials did not make greater reference in their public statements to a pre-emptive self-defence right was likely a reluctance to establish such a right in international law. Though this would have served their immediate purposes, officials surely realised that the formal establishment of such a doctrine could lead to the opening of a Pandora's box. The right of counter-proliferation-based pre-emptive strikes could then have been relied upon by any state to justify military intervention, something that would no doubt have troubled the USA and the UK as a rule. The long term danger likely outweighed the usefulness of a clearer legal justification based in self-defence law for the Iraq intervention in the minds of US policy-makers as well as legal advisers.

The same considerations of short-term usefulness of a customary law modification versus the long-term benefits of a clear, though contradictory treaty rule had resulted in the decision by intervening states in the context of the 1999 Kosovo intervention not to rely on a customary right of humanitarian intervention in order to mediate the obligations of Article 2(4), though such an argument would have given increased legal credibility to the immediate action.⁷⁵ Again in that context, it was feared that the actual establishment of such a legal right could provide legal cover for too many actions of dubious object by less well-meaning states, simply clothed in the garb of humanitarian intervention. Thus, in both cases the decision was made to breach existing law when an argument for modification could at least to a degree have smoothed the legal road in the short term. Concern for the effects in international politics of the universal establishment of a modified right to use force was ultimately more influential than the legitimisation of a one-off intervention.

⁷³ Taft and Buchwald, n 47.

⁷⁴ On conflict of laws principles which would obtain if such a customary rule were to develop in conflict with UN Charter Art 51, see the analogous analysis of customary law in the humanitarian intervention context in D H Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm' (2002) 13 *EJIL* 597.

⁷⁵ *Ibid.*

In summary, then, the 2003 Iraq intervention cannot be legally justified by reference either to existing international use of force law or to a legitimate effort to modify customary international law in this area. As such, it must be seen as a breach of UN Charter Article 2(4). This legal failing of the intervention as a manifestation of counter-proliferation strategy is important because, while the intervention itself is unique, the principle of counter-proliferation-based pre-emptive military strikes, which the intervention embodies, is an ongoing element of the stated foreign policy of the United States as well as a number of other states including Russia, Japan, Australia and the United Kingdom. There is every reason to expect that the legal challenges that will attend future actions in manifestation of this counter-proliferation principle will be similar to those present in the 2003 Iraq case. Solutions to these problems that were not devised by officials and lawyers of the intervening states in this case will need to be devised if such future actions are to be deemed consistent with international use of force law.⁷⁶

V. Policy/practical Implications

The failings of the 2003 Iraq intervention are instructive in considering not only if counter-proliferation actions can be legally justified, but also whether counter-proliferation-based use of pre-emptive force is likely to be a practically feasible and effective doctrine for accomplishing the broader aims of international anti-proliferation efforts. These failures illustrate a number of formidable difficulties that will attend counter-proliferation strategies as they are integrated increasingly into national foreign and defence policies.

A. Intelligence Accuracy

The most significant of these difficulties relates to intelligence, its collection, analysis and sharing. Counter-proliferation-based pre-emptive/preventive military strikes are all about intelligence, and intelligence, as the Iraq intervention proved beyond any doubt, is an art and not a science. The case of the 2003 Iraq intervention casts into serious doubt the suitability of the use of this art to provide a reliable factual basis on which to ground counter-proliferation actions.

⁷⁶ A legal justification of the 2003 Iraq intervention by reference to humanitarian intervention legal principles is not considered in this chapter. This theory has been mentioned by some writers but in the present author's view this is both procedurally irrelevant and substantively meritless. Not only is there no *opinio juris* on the part of Coalition state officials to base a claim in such a principle of customary international law, such that the issue is not effectively raised in this case, but the author has also elsewhere argued against the existence of the principle itself. See DH Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm' (2002) 13 *EJIL* 597.

First, then, there is the question of the accuracy. It has now become clear that the intelligence assessments made *ex ante* by Coalition governments were significantly in error. Post-war inspections on the ground in Iraq have confirmed that assessments of Iraq's capabilities in all three WMD technology areas, in addition to missiles and other delivery devices, were either significantly exaggerated or completely groundless. Similarly, pre-war assessments of Iraq's links to international terrorist organisations, and to the Al-Qaeda organisation specifically, have now been found to have been entirely specious. These intelligence gathering and analysis failures are a severe blow to the credibility of claims that a high degree of certainty can be achieved regarding an adversarial state's WMD capabilities and intentions, and that such intelligence assessments can reliably serve as a basis for a pre-emptive counter-proliferation action. The most sophisticated and well-resourced intelligence agencies in the world were apparently essentially in agreement on seriously flawed intelligence assessments regarding the status of Iraq's WMD programmes as well as the nature of the threat that Iraq potentially posed with them.

The Iraq case presents a particularly useful example of the problems faced by intelligence agencies in producing an accurate assessment of a state or non-state actor's WMD capabilities, when the target state is not only engaging in serious efforts to keep information on such programmes secret, but is also intentionally presenting false information about those programmes; either through positive statements of exaggerated ability, or simply by denying outside verification of information, which gives rise (as intended) to a suspicion of illicit activity. However, such counter-intelligence efforts should be expected in future cases where a state or on-state actor perceives itself being vetted as a candidate for pre-emptive counter-proliferation action.

While a number of high-level government reports have been generated on the failings of intelligence assessment, none has yet been produced on the way they were used by political officials in order to make the case to their respective publics for the necessity and justifiability of the intervention. Thus, it is difficult to reach conclusions regarding failures in the intelligence assessment and presentation process at this level. However, the use or misuse of intelligence by political officials is undoubtedly another point at which the imperfect nature of the use of intelligence as a basis for pre-emptive war can be perceived.

Such a significant failure to produce accurate intelligence assessments on which to base an action of this magnitude and potential destabilising effect upon an area as sensitive as the Middle-East will cast a long shadow into the future upon arguments that counter-proliferation-based pre-emptive military strikes are a prudent part of a state's anti-proliferation policy. This new public mistrust of official statements regarding the WMD capability of states suspected of having clandestine WMD programmes can be seen in popular responses to more recent claims regarding the status and direction of Iran's nuclear programmes. These negative repercussions for the willingness of the public to trust such statements, as well as the chilling effect upon national officials to act on such assessments lest

the outcome be as politically disastrous as has been the Iraq intervention, will doubtless continue for many years to come.

Overall, the failures of the 2003 Iraq intervention with regard to the accuracy of the intelligence assessments upon which it was based serve to call into serious question the appropriateness and reliability of the use of intelligence gathering and assessment for making judgments regarding counter-proliferation-based pre-emptive military strikes. And since such judgments cannot be made without the use of intelligence assessments, the prudence and likely effectiveness of pre-emptive counter-proliferation as an increasingly emphasised part of national anti-proliferation policy are thereby cast into serious doubt.

B. Intelligence Sharing

Second, the intervening coalition of states in the 2003 Iraq case failed to overcome problems of intelligence sharing among states engaged in pre-emptive counter-proliferation actions, in their quest to gain multilateral approval for their intervention into Iraq. This illustrates the effects of these intelligence-sharing problems upon the potential for maintaining an effective and viable system for *ex ante* authorisations of pre-emptive counter-proliferation actions through the use of an international legal body such as the United Nations Security Council.

Some of the difficulties of reliance upon a unilateral right of self-defence to justify pre-emptive counter-proliferation actions, which would comprise a system for *ex post* judgments (through judicial review by a competent international legal tribunal) regarding the legality of such an action, have been reviewed above. In addition to these more legalistic problems, this scenario is also problematic because it allows such actions, the results of which are likely to be severe and irreversible for the target state, to go forward before a judgment on legality is made. In such a context, a judgment of illegality is likely to be seen as cold comfort to the target state regardless of any compensatory judgment it may be awarded. Thus, some have argued that a better system would include the use of the UN Security Council as an *ex ante* authoriser of such action through its chapter VII powers.

However, for the Security Council to fill such a role of authoriser of counter-proliferation oriented pre-emptive uses of force, it would have to be a forum in which member states were comfortable in sharing highly sensitive intelligence information, in order to convince fellow Council members to support their application for authorization. It would further have to be a body among whose members there is likely to be substantial agreement regarding the sources and characteristics of threats warranting pre-emptive uses of force, so as to make states confident that efforts to work through the Council would be likely to be successful and worth the transactions costs and inevitable risks of intelligence leaking to the target entity involved.

The Security Council, however, currently does not meet either of these criteria. The intelligence that states collect on WMD threats of a nature that causes them such serious concern is intelligence of the highest sensitivity and will have been

collected through means the secrecy of which the collecting state will protect at all costs. Information of this sensitivity will simply not be shared by states with a group as diverse as the current membership of the Security Council.

Sharing of intelligence of this degree of sensitivity sometimes occurs on an *ad hoc* basis between the closest of allies, for functional purposes, but would never be shared either openly or confidentially to the general membership of the Council or to UN staff. The risk of leakage to the target state, and general risks of divulgence of sources and methods, is simply too great with insufficient likely gain from the effort. Although there have been proposals for the establishment of safeguards and confidence-building processes for sharing of intelligence within the UN, none of these is likely to satisfy states when dealing with information of this level of sensitivity.⁷⁷ Thus while on 6 February 2003 US Secretary of State Colin Powell gave a briefing to the UN Security Council in which he presented some intelligence information obtained by US and other sources on Iraq's WMD programmes, in a final bid to obtain a clear authorisation of force from the Council, he was careful to say to the other members of the Council 'I cannot tell you everything that we know'.⁷⁸

The second institutional limitation the Security Council faces lies in the diversity of states comprising the Council's membership. Members of the Security Council differ fundamentally at times in their perception and appreciation of WMD threats. The 2003 Iraq intervention is a poignant example of such a divergence of views. In this case it became clear to those permanent members of the Council who wished to pursue forceful action under the authority of chapter VII of the Charter that that view was not shared by other permanent members of the Council. Thus, those states wishing to pursue such forceful action elected to operate outside of the Charter framework. Although the Security Council acts as a body empowered with special legal rights, such disagreements and resultant inability to act as a body and to use those rights are reminders that the Council is primarily an international political body, made up of states with divergent and often conflicting interests and world views. The expectation that such a group of states would in a consistent manner substantially agree in their perception of threats, so as to give states confidence that applications to the Council for pre-emptive force against WMD threats will likely find approval by nine members of the Council, including all five permanent members, has little foundation. This fact argues against the prudential soundness of reliance upon the Security Council as a body with the capacity to act as an authoriser of pre-emptive uses of force.

Thus, the problems of sensitive intelligence sharing among states largely foreclose the option of having an *ex ante* authorisation framework such as that offered by the UN Security Council, chapter VII route. With resort to an *ex post*

⁷⁷ See S Chesterman, 'Shared Secrets: Intelligence and Collective Security' Lowy Institute Paper, 10 (2006) <http://ilj.org/research/documents/chesterman_shared_secrets_2006.pdf> accessed 1 November 2007.

⁷⁸ Transcript available at <<http://edition.cnn.com/2003/US/02/05/sprj.irq.powell.transcript/>> accessed 1 November 2007.

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system of authorisation, such as that offered by the unilateral self-defence paradigm, also presenting significant problems both of law and practicality, options for having a system of multilateral mandate, under international legal principles, for pre-emptive counter-proliferation actions appear to be extremely limited. Without such multilateral mechanisms for mandate of counter-proliferation actions, the principled basis of counter-proliferation strategies as an element in national foreign policy becomes quite dubious. For without a mechanism for multilateral sanction or de-legitimation of such uses of force, the spectre of abuse of counter-proliferation principles, and their use as a pretext upon which to justify actions with other primary objects and motivating forces, looms large. Many, indeed, will argue that this is one of the real legacies of the 2003 Iraq intervention, ie that the genuine aims of economic and political power aggrandisement of Coalition states were pursued, dressed in the sheep's clothing of pre-emptive self-defence.⁷⁹ The potential for such abuse of a principle exercisable only through unilateral action or through secretive coalitions of willing states further undermines the case for greater reliance upon counter-proliferation strategies in national anti-proliferation policy.

C. Problems of Scope

In addition to failings relating to intelligence, many see in the Iraq intervention a failure by Coalition governments to grasp the implications that were to flow from the excessive scope and ambition of the action, particularly in its inclusion of a full-scale invasion accompanied by political regime change and long-term occupation by foreign ground forces. Counter-proliferation actions purposed in degrading a specific actor's WMD capabilities can take many forms of varying forcefulness; from targeted inspection systems, to the imposition of economic sanctions, to police interdictions of suspect transfers, to outright military force. However, before the 2003 Iraq War, counter-proliferation-based military action had been limited at the most extreme to targeted air strikes, such as the 1981 bombing of the Osirak reactor. Never before had counter-proliferation been the primary policy basis for a full invasion of a state and for forced political regime change. As Joseph Cirincione *et al* have aptly noted, '[t]he 2003 [Iraq] conflict was the world's first non-proliferation war'.

Incorporating full-scale invasion and regime change into a counter-proliferation military action naturally makes the endeavour much more complicated, both from a principled/theoretical perspective as well as from a practical, logistical perspective. It also dramatically increases the costs both to the state(s) taking the action as well as to the target state, in terms of financial resource commitment as well as potentially in terms of human casualties incurred through the action.

⁷⁹ See D Morgan and DB Ottaway, 'In Iraq War Scenario, Oil is Key Issue,' *Washington Post* (15 September 2002) at A01.

The question thus becomes: does the addition of full-scale invasion and regime change to a counter-proliferation action marginally increase the likelihood of success of the action in its aims of degrading the target state's WMD capabilities to a degree great enough to justify these additional complexities and costs? The purpose of joining an invasion and regime change to a counter-proliferation military action is surely to increase the amount of control enjoyed by the intervening states over the process of disarmament, as well as the installation of a government or government system, which will be amenable to the policies of the intervening states, and thus make more likely the permanency of the disarmament.

However, as the unfolding saga of the post-war occupation of Iraq and its political and social strivings are making clear, the control by intervening states over a target state's political as well as security future post-counter-proliferation-action is by no means an assured result of even the most successful initial military campaigns. Indeed, while the future of Iraq post-Saddam Hussein remains to be seen, the fact that Iraq has, at the time of writing, come to within a razor's edge of open civil war, despite the installation of democratic governmental process and the continuing presence of many thousands of both foreign and Iraqi security forces on the ground, shows the dangers of upsetting through insufficiently planned outside action what can be a very sensitive balance among peoples, cultures and religions inside a state of proliferation concern. The very real prospect of the collapse of the Iraqi state and its embroilment in factional political and religious civil war, which would produce a highly fluid security situation for whatever WMD-related items and technologies still exist in the country, demonstrates the very real possibility that counter-proliferation actions of the scope of the 2003 Iraq intervention can, by inadvertently contributing to the breakdown of law and public order, lead to a greater proliferation threat than that which existed *ex ante*. This observation is simply in keeping with the unpredictable reality of the consequences of major wars.

In the case of Iraq, however, even if the governmental system installed by the intervening states does take root and produce a stable democratic reality for the future of Iraq, it should be noted that the proliferation-oriented advantages which will have been achieved by the addition of a full-scale invasion and political regime change will have been minimal. This of course is in recognition of the discoveries made after the war to the effect that the years of economic sanctions and efforts of international inspectors in the years preceding the war had been largely effective in destroying Iraq's WMD programmes, leaving only a few non-compliant missiles in Iraq's military arsenal by the time of the 2003 intervention. Thus, whether the results of the invasion and regime change in Iraq are positive or negative for the future of the country generally, these additional aspects of the counter-proliferation action against Iraq in 2003 will not have proven to significantly contribute to the proliferation-related accomplishments of the intervention.

The fact that Iraq was such a unique example of a counter-proliferation action the scope of which included a full-scale ground invasion and forced political regime change, does in some respects narrow its applicability as a model from

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which to glean lessons regarding the future place of counter-proliferation strategies in national anti-proliferation policy. However, it is entirely possible, and perhaps likely, that actions of this scope will be seen repeatedly in the future, as powerful states attempt to deal with states and non-state actors they deem to pose a WMD threat to international peace and security, and which seem unresponsive not only to the non-proliferation treaties and regimes system, but also to classical counter-proliferation doctrines of deterrence and containment. Particularly when the existing political regimes within such WMD-threatening states display radical ideological tendencies, such that the rational basis underpinning such classical forms of dissuasion is determined to be absent from their foreign policymaking calculus, and are determined to be active proliferators to other states and non-state actors of concern, powerful states may see no other way to ensure their future security than to take this extreme preventative action. Thus, the lessons of the Iraq intervention even as a case of a full-scale counter-proliferation war, are likely to be valid and important notwithstanding the more limited likely reoccurrence of this particular type of action.

D. Unintended Consequences

Finally, the 2003 Iraq intervention, even if it had been successful in stopping a WMD proliferation threat from Iraq, could be argued to have failed in a larger sense in having effected an overall disadvantage to international anti-proliferation efforts generally. The Iraq intervention appears, in addition to exacerbating already tense relations between Western states and states and other groups in the Islamic world, to have produced a subtle yet powerful reactive phenomenon in the minds and policies of officials in states which feel that they might be next on the US list of states ripe for counter-proliferation-based pre-emptive action and regime change.

Far from the intended indirect consequence of convincing such states to abandon their WMD programmes or suffer a similar fate, the 2003 intervention of a state which had been forced to give up its WMD programmes, thus leaving itself too weak to oppose invasion, appears rather to have produced the deleterious blowback effect of giving a highly rational motivation to officials of such states to expedite their WMD programmes in order to deter such action. This line of reasoning is made the more rational by the difference in treatment accorded to North Korea, another member of President Bush's denominated 'axis of evil', which has confirmed that it does possess nuclear weapons, and which has been spared any meaningful counter-proliferation action.

Thus, for officials of a state like Iran which sees international attention beginning to focus upon it and its alleged WMD programmes, this difference in treatment, as well as the general deterrent effect which they know would be achieved by the possession particularly of nuclear weapons technologies, the lesson of the 2003 Iraq intervention is one of an imperative not to allow one's own state to be placed in the same position of indefensibility as was Iraq, but rather to strengthen one's arsenals of both conventional and non-conventional weapons in order to

gain the same powerful negotiating leverage which North Korea has apparently achieved through its open and notorious possession, and thus be enabled to approach negotiations from a position of strength.

Fundamentally, uses of international force produce unpredictable results, and the Iraq intervention of 2003 was a particularly impactful use of international force because of its scope, as discussed above. However, even relatively minor uses of international force can produce unintended, negative results if not for the immediate situation, then in the larger context of international political and security relationships. The nature of counter-proliferation actions typically as forceful actions thus associates this unpredictability into the nature of results likely to be achieved through such action. This unpredictability and the potential for overall significantly negative net effects of counter-proliferation actions, undermines arguments for the prudence and likely effectiveness of counter-proliferation as an increasingly emphasised element of national anti-proliferation policy.

VI. Conclusion

So what should be the lessons of the 2003 Iraq intervention regarding the challenges, both legal and policy-oriented, that accompany counter-proliferation actions? It is certainly true that the Iraq case is only one data point, and so cannot be used as the definitive basis for judging the marginal utility of counter-proliferation policy across the board. However, it is an important data point, in an area where data points are always scarce, and a concrete illustration of counter-proliferation strategies that have been an increasingly emphasised part of national anti-proliferation policy.

Legally, the Iraq intervention is an example of the inherent difficulty of conforming counter-proliferation strategies, which emphasise pre-emptive, forceful actions, to existing international law, which favours reservation of action until threats become demonstrably imminent. It further raises the troubling question of whether such actions could be legally squared with any principle of international law which could be devised to regulate international uses of force, and which possesses important rule of law characteristics such as predictability and objective verifiability.⁸⁰

In terms of its other policy-oriented implications for consideration of counter-proliferation as a useful and prudent strategy, the 2003 intervention certainly cannot be said to be a resounding affirmation of their practicality and likely marginal effectiveness over traditional non-proliferation strategies. This is the case not only because of the intelligence assessment and sharing problems it exemplifies, and the non-multilateral nature of the intervention itself. Its desirability as a precedent

⁸⁰ For further consideration of these legal issues relating to the use of force, see DH Joyner, *Non-proliferation Law: The Regulation of WMD* (Oxford, OUP, forthcoming).

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for pre-emption is also significantly compromised by the fact that in this case the strategy of pre-emptive military force was accompanied by a full-scale invasion, political regime change and extended occupation, which has in WMD proliferation terms accomplished nothing, and which has opened a Pandora's box of complexities in rebuilding the country *ex post*, and caused other significant unintended negative collateral effects.

Thus, while the 2003 Iraq intervention is a manifestation of counter-proliferation policy, it is one that proponents of counter-proliferation will not be keen to cite in the future when arguing for the wider use and effectiveness of such strategies in combating WMD threats. In fact, it is a case the failures of which they will continuously be forced to explain, and the weaknesses of which they will need to distinguish from future cases in which counter-proliferation actions are proposed.

4

The Iraq War: Issues of International Humanitarian Law and International Criminal Law

NICHOLAS GRIEF

I. Introduction

Before the Iraq War started, the media reported that Iraq would face a barrage of 800 cruise missiles in the first 48 hours of war under a Pentagon plan codenamed ‘Shock and Awe’. US military strategist Harlan Ullman¹ was quoted as saying:

We want them to quit not to fight. You have this simultaneous effect, rather like the Hiroshima nuclear weapons, not taking weeks but minutes. You’re sitting in Baghdad and, all of a sudden, you’re the general and 30 of your division headquarters have been wiped out. *You can also take the city down. By that I mean get rid of their power and water. In two, three, four, five days they are physically and psychologically exhausted.*²

In the event, things did not materialise as planned because the USA attempted an opportunistic air strike against Saddam Hussein on 19 March while he was reportedly at a farm on the outskirts of Baghdad.³ The attempt failed and, tactical surprise having been lost, land forces were ordered into Baghdad. It later emerged, however, that the UK had blocked the US plan for up to six days of ‘Shock and Awe’ bombing. Air Marshal Brian Burridge, the commander of British forces, had argued that ‘Shock and Awe’ would have disastrous political consequences, and that British lawyers and military advisers had adopted a ‘tighter’ interpretation than Washington as to what constituted a legitimate target.⁴

Even so, there is evidence that some targets of the Coalition’s military action were not legitimate and/or that excessive incidental damage was caused. Civilian

¹ Co-author, with JP Wade, of *Shock and Awe: Achieving Rapid Dominance* (Washington DC, National Defense University, 1996).

² See, eg, *CBS News*, 24 January 2003, ‘Iraq faces massive US missile barrage’: <http://www.cbsnews.com/stories/2003/01/24/eveningnews/main537928.shtml> (emphasis added).

³ *Financial Times* (London 21 March 2003): ‘After months of planning for a “shock and awe” bombardment that would send a shudder of fear through Saddam Hussein’s regime and prompt Iraqis to abandon it, President George W Bush rewrote the start of the war based on last-minute intelligence’.

⁴ *The Times* (London 2 May 2003): ‘Britain blocked US plan for six days of shock and awe bombing.’

objects, including elements of Iraq's civilian infrastructure, were damaged or even destroyed. In Baghdad, bombs were dropped on markets and media outlets, a hospital and a university. Electricity supplies were targeted in Baghdad and Basra, with severe implications for water supplies. In November 2004, a US air raid on Fallujah destroyed a hospital in the centre of the city.⁵ Water and sewage services were severely disrupted. According to Human Rights Watch, pre-planned targets included 'certain dual-use infrastructure elements (such as electrical power, media, and telecommunications facilities)'. It found that although '[a]ttacks on these facilities generally did not result in civilian casualties or extensive damage to civilian property ... air strikes on civilian power facilities in al-Nasiriyya caused serious civilian suffering and the legality of the attacks on media installations is questionable'.⁶

As the Chief Prosecutor of the International Criminal Court observed,⁷ international law permits belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur. A crime occurs only if there is an intentional attack directed against civilians or civilian objects or if an attack is launched on a military objective in the knowledge that the incidental civilian injuries or damage would be clearly excessive in relation to the anticipated military advantage.⁸

The purpose of this chapter is primarily to examine the legal framework of the military phase of the Iraq War. First, Part II considers aspects of international humanitarian law. The relevant provisions of international criminal law, through the lens of the ICC Statute, are charted in Part III. Part IV then outlines aspects of the conduct of the war by Coalition forces that are potentially causes for concern. In 2004 these were brought to the attention of the ICC Prosecutor, whose response in February 2006 took the form of a short communication. That response is assessed briefly in Part V, paying particular attention to the principle of complementarity, which was *not* relied upon by the Prosecutor.⁹ Finally, some conclusions about the implications for the International Criminal Court are outlined.

II. International Humanitarian Law

International humanitarian law is the body of principles and rules applicable in armed conflict. It is part of *jus in bello*, which regulates the conduct of armed

⁵ *BBC News*, 6 November 2004, 'US strikes raze Fallujah hospital': http://www.news.bbc.co.uk/1/hi/world/middle_east/3988433.stm.

⁶ Human Rights Watch, 'Off Target: The Conduct of the War and Civilian Casualties in Iraq' 41–2: <http://hrw.org/reports/2003/usa1203/> ('HRW report').

⁷ International Criminal Court, The Office of the Prosecutor, The Hague, 9 February 2006 5–10: http://www.icc-cpi.int/organs/otp/otp_com.html ('OTP').

⁸ Rome Statute of the International Criminal Court Art 8(2)(b)(iv).

⁹ The chapters by W Schabas and AT Williams in this volume (chs 6 and 5 respectively) assess the Prosecutor's communication in much greater detail.

conflict and is distinguished from *jus ad bellum*, which governs recourse to armed conflict.¹⁰ Regardless of the legality or otherwise of a decision to go to war, all the parties to a conflict must comply with international humanitarian law. One of its cardinal principles is the principle of distinction. States must never make civilians the object of attack or use weapons or methods of warfare that are incapable of distinguishing between civilian objects and military targets. Conversely, a state which is attacked must not try to protect military objectives by locating them in civilian areas or using civilians as human shields.

Having at its heart ‘the overriding consideration of humanity’, the principle of distinction was described as an ‘intransgressible principle of international customary law’ by the International Court of Justice (ICJ) in the *Nuclear Weapons Case*.¹¹ Although the Court did not need to consider whether the basic rules of international humanitarian law are *jus cogens*, ie peremptory norms of general international law from which no derogation is permitted, its reference to the ‘overriding’ consideration of humanity and use of the word ‘intransgressible’ make it appropriate to regard them as such.¹² Indeed, in the *Wall Case*, where Judge Higgins underlined the intransgressible nature of the principle of distinction, the ICJ emphasised the superior authority of the fundamental rules of international humanitarian law when it declared that they ‘incorporate obligations which are essentially of an *erga omnes* character’.¹³

The significance of this for present purposes is that peremptory norms of general international law, such as the principle of distinction, generate strong interpretative principles.¹⁴ There is thus a very strong presumption against the lawfulness of attacks on dual-use facilities, such as media installations, which can only be rebutted by the clearest evidence that they are making an effective contribution to military action.

¹⁰ In *Prosecutor v Dusko Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, 2 October 1995 para 87, the ICTY Appeals Chamber observed: ‘The expression “violations of the laws or customs of war” is a traditional term of art used in the past, when the concepts of “war” and “laws of warfare” still prevailed, before they were largely replaced by two broader notions: (i) that of “armed conflict”, essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of “international law of armed conflict”, or the more recent and comprehensive notion of “international humanitarian law”, which has emerged as a result of the influence of human rights doctrines on the law of armed conflict’.

¹¹ ICJ Reports 1996 226, paras 78–9 and 95. In para 78 the Court referred to the obligation to distinguish between ‘civilian and military targets’ but the notion of ‘civilian targets’ is inappropriate. See Art 48 of Protocol I (below).

¹² J Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge, Cambridge University Press, 2002) 246; A Cassese, *International Law* (Oxford, Oxford University Press, 2nd edn, 2005) 206.

¹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, paras 155–9. Recalling the *Barcelona Traction Case*, the Court held that all states have a legal interest in the protection of obligations *erga omnes* and that situations resulting from acts in violation of such obligations must not be recognised.

¹⁴ Crawford, n 12, at 187.

A. The Principles of Distinction and Proportionality

As ‘intransgressible principles of international customary law’, the fundamental rules of international humanitarian law are binding on all states, whether or not they have ratified or acceded to the conventions that contain them.¹⁵ Nevertheless, to elaborate the principles of distinction and proportionality it is helpful to set out some of the treaty provisions which enshrine them.

Article 48 of Additional Protocol I of 1977 relating to the Protection of Victims of International Armed Conflicts (‘Protocol I’)¹⁶ lays down the basic rule:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall *at all times* distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations *only* against military objectives. (emphasis added)

Indiscriminate attacks are therefore prohibited. Article 51(4) of Protocol I defines such attacks as:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

The principles of distinction and proportionality both feature in Article 51(5) of Protocol I, which provides that, among others, the following type of attack is to be considered as indiscriminate:

- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁷

Article 52 of Protocol I, entitled ‘General protection of civilian objects’, then declares:

- (1) Civilian objects shall not be the object of attack or of reprisals.¹⁸ Civilian objects are all objects which are not military objectives as defined in paragraph 2.
- (2) Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature,

¹⁵ *Nuclear Weapons Case*, ICJ Reports 1996 226 para 79.

¹⁶ The USA and Iraq have not ratified Protocol I but the UK is a party to it.

¹⁷ On ratifying Protocol I, the UK government declared: ‘In the view of the United Kingdom, the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack’. See the International Criminal Court Act 2001 (Reservations and Declarations) Order 2001 SI 2001/2559 sch 1.

¹⁸ The prohibition of reprisals against civilian objects and the civilian population (Art 51(6)) is reinforced by Art 60(5) of the Vienna Convention on the Law of Treaties 1969, which states that the doctrine of material breach does not apply to ‘provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such provisions’.

location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

- (3) In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Also critical is Article 57 concerning precautions in attack:

- (1) In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
- (2) With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;
 - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

B. Inappropriate 'Permissiveness'

In terms of applying the above provisions, two of the most difficult issues are what constitutes a military objective and, in particular, how to judge proportionality. It is generally accepted that dual-use facilities can be attacked if necessary, provided that the harm to civilians is not disproportionate to the expected military advantage. As Anthony Dworkin¹⁹ has observed, however:

judgments about proportionality are notoriously slippery. And in modern industrial societies just about any aspect of the economic or social infrastructure could conceivably

¹⁹ Editor of the Crimes of War Project website (www.crimesofwar.org) which reports on international humanitarian law and its application to armed conflict around the world.

contribute to the war effort. Pentagon officials—in common with British and some other European armed forces—take a fairly permissive attitude in this area.²⁰

But such permissiveness is surely at odds with the cardinal principle of distinction and the fundamental values which it is intended to protect:

once you blur the boundary between military and civilian targets, it is hard to see another clear-cut standard that could be used to minimise the barbarity of warfare. Sooner or later the result seems to be more civilian deaths.²¹

III. International Criminal Law

For prosecutors to establish breaches of international criminal law is even more challenging—because a violation of international humanitarian law is not necessarily a war crime.²² As Cassese explains, ‘War crimes are *serious violations* of customary or, whenever applicable, treaty rules belonging to the corpus of the international humanitarian law of armed conflict ... a vast body of substantive rules comprising what are traditionally called “the law of the Hague” and “the law of Geneva”’.²³ War crimes entail the personal criminal liability of the perpetrators and not just the responsibility of the state.²⁴

With reference to Article 3 of the ICTY Statute which declared the ICTY competent to adjudicate ‘violations of the laws or customs of war’, the ICTY Appeals Chamber held that this means serious violations of international humanitarian law.²⁵ It went on to explain the meaning of ‘serious’:

the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a ‘serious violation of international humanitarian law’ although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby ‘private property must be respected’ by any army occupying an enemy territory.²⁶

The fact that it is only serious violations of international humanitarian law which constitute war crimes is reflected in Article 85 of Protocol I, which provides:

(3) In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation

²⁰ ‘Which way to the war?’ *Guardian* (London 18 February 2003): <http://www.guardian.co.uk/print/0,,4607924-103550,00.html>.

²¹ *Ibid.*

²² A Cassese, *International Criminal Law* (Oxford, Oxford University Press, 2003) 50–51.

²³ *Ibid.*, at 47.

²⁴ *Ibid.*, at 23.

²⁵ *Prosecutor v Dusko Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, 2 October 1995 para 90.

²⁶ *Ibid* para 94(iii).

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of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- (a) making the civilian population or individual civilians the object of attack;
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);
- (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);

...

- (5) Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Similarly, Article 8(2) of the Rome Statute of the ICC provides that for the purpose of the Statute 'war crimes' means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

...

- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

...

- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

...

- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated;

- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

...

- (xxiii) Utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

As those provisions show, war crimes have mental as well as material elements. Article 30 of the Rome Statute states that, unless otherwise provided, a person shall be criminally responsible for a crime within the jurisdiction of the ICC only if the material elements are committed with intent and knowledge. There is 'intent' in relation to conduct where the person means to engage in that conduct, and in relation to a consequence where the person means to cause that

consequence or is aware that it will occur in the ordinary course of events.²⁷ ‘Knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.²⁸

IV. Legally Questionable Incidents and Tactics during the Iraq War

Against that background, it is strongly arguable that certain attacks or tactics during the Iraq War, and the use of certain weapons, violated international humanitarian law—or, at the very least, give rise to a case to answer. Human Rights Watch produced a detailed assessment of this case in its 2003 report ‘*Off Target*’.²⁹ Key aspects of its conclusions are rehearsed below.

A. Attempted ‘Decapitation’ Strikes

Several Coalition air attacks were directed against civilian objects, including a restaurant, on the basis of intelligence that Saddam Hussein or other leading members of his regime were present. Those strikes caused many civilian casualties without achieving the intended objectives. Human Rights Watch found that the attacks on the Iraqi leadership ‘likely resulted in the largest number of civilian deaths from the air war’.³⁰ Its report includes a case study from al-Dura Farm, Baghdad, to illustrate the civilian impact of the Coalition’s ‘flawed targeting methodology and intelligence’.³¹

The war opened on March 20 with an attempted attack on Saddam Hussein. This strike was the beginning of a pattern that would be repeated many times. The US military targeted a facility in the mistaken belief that the Iraqi leadership was there; instead of ‘decapitating’ the regime, this strike resulted in fifteen civilian casualties because of faulty intelligence.³²

That raises issues under Article 57 of Protocol I concerning precautions in attack.³³ The production and use of flawed intelligence sits uncomfortably with the obligation to ‘do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects ... but are military objects’.

B. The Market Bombings

A House of Commons Library research paper recalls that on 26 March 2003, ‘15 civilians were killed and 30 injured when two missiles hit a busy street market in

²⁷ Art 30(2) of the Rome Statute.

²⁸ *Ibid* Art 30(3).

²⁹ Above, n 6.

³⁰ HRW report 27.

³¹ *Ibid*.

³² *Ibid* 28.

³³ See above.

the northern Shaab district of Baghdad.³⁴ Two days later a missile devastated the city's Shu'ale market, reportedly killing 62 civilians and injuring many others. The US and UK governments claimed that the market bombings were caused by old Iraqi anti-aircraft missiles, but a missile casing's serial number suggested that the Coalition action was responsible:

A piece of fuselage shown by a Shu'ale resident to The Independent's Robert Fisk reads the number 30003-704ASB7492, followed by a second code, MFR 96214 09. An investigation by The Independent determined that 'the reference MFR 96214 was the identification or 'cage' number of a Raytheon plant in the city of McKinney, Texas. The 30003 reference refers to the Naval Air Systems Command, the procurement agency responsible for furnishing the US Navy's air force with its weaponry.' Many defence analysts have agreed that what happened at the Shu'ale market was almost certainly due to a HARM—which carries a warhead designed to explode into thousands of aluminum fragments.³⁵

In both cases no apparent military objective was identified.³⁶ Furthermore, if the missiles were fired by the Coalition and did indeed carry warheads designed to explode into thousands of fragments, violation of the principle of distinction was surely aggravated.³⁷

C. The Use of Cluster Munitions

Cluster munitions are air-launched or ground-launched weapons that disperse numerous submunitions over a large area. Although there is not yet a specific international prohibition on the use of cluster munitions,³⁸ their use in or near civilian areas arguably violates the prohibition against indiscriminate attacks because they cannot be directed in a way that distinguishes between military targets and civilians. In addition, the submunitions have a high failure rate which increases the danger to civilians.³⁹

According to Human Rights Watch, Coalition cluster munitions caused harm to civilians both during and after military strikes in Iraq. Whereas 'the US Air Force took steps to reduce humanitarian harm by using newer, guided cluster bombs and generally avoiding populated areas',⁴⁰ '[t]he use by US and UK ground forces of cluster munitions, especially in or near populated areas ... was one of the major causes of civilian casualties.'⁴¹ US and British ground forces

³⁴ House of Commons Library, International Affairs and Defence Section, Research Paper 03/50, 23 May 2003, C Taylor and T Youngs, 'The Conflict in Iraq' 32: <http://www.parliament.uk/commons/lib/research/rp2003/rp03-050.pdf> ('HC Library').

³⁵ P Escobar, 'Cluster bombs liberate Iraqi children' *Online Asia Times* (4 April 2003): http://www.atimes.com/atimes/Middle_East/ED04Ak07.html. 'HARM' means 'high-speed anti-radiation missile'.

³⁶ As regards the 26 March attack, 'Coalition officials did not directly admit responsibility but said that missiles and launchers had been targeted at a residential area in the vicinity of the market around the time of the explosions': HC Library 32.

³⁷ See Art 51(4) of Protocol I, above.

³⁸ The text of a Convention on Cluster munitions was adopted in Dublin on 28 May 2008.

³⁹ HRW report 55–6.

⁴⁰ *Ibid* 62.

⁴¹ *Ibid* 80.

used cluster munitions extensively in populated areas. Although Human Rights Watch found that most, if not all, of the strikes appeared to have been directed at military targets and that Coalition forces took precautions to limit civilian casualties by establishing a vetting process,⁴² it concluded that the USA and the UK ‘made poor weapons choices when they used cluster munitions in populated areas ... because the weapons blanketed areas occupied by soldier and civilian alike with deadly submunitions that could not distinguish between the two’.⁴³

D. Attacks on Power Distribution Facilities

Electricity supplies were intentionally targeted in Baghdad and Basra, with severe implications for water supplies and the humanitarian situation generally. According to Human Rights Watch, ‘[e]lectrical power was out for thirty days after US strikes on two transformer facilities in al-Nasiriyya’.⁴⁴ Although the attacks ‘targeted electrical power distribution facilities, but not generation facilities’,⁴⁵ it is ‘unclear ... what effective contribution to Iraqi military action these facilities were making and why attacking them offered a definite military advantage to the United States.’⁴⁶ There was ‘significant and long-term damage, and the civilian cost was high’.⁴⁷ The Director of al-Nasiriyya General Hospital stated that ‘the loss of power was a huge impediment to the treatment of war wounded [and] created a water crisis in the city’.⁴⁸

Human Rights Watch researchers saw many areas in al-Nasiriyya where people had dug up water and sewage pipes outside their homes in a vain attempt to get drinking water. Even when successful, the water was often contaminated because the power outage prevented water purification. This led to what, [the Director] termed ‘water-born diarrheal infections’.⁴⁹

E. Attacks on Media Installations and Personnel

Apart from the use of ground-launched cluster munitions, the Coalition’s attacks on media installations probably raised the most issues in terms of international law. Human Rights Watch researchers visited three media facilities in Baghdad which had been hit by US air strikes: the Ministry of Information, the Baghdad Television Studio and Broadcast Facility, and the Abu Ghraib Television Antennae

⁴² *Ibid* 92.

⁴³ *Ibid*.

⁴⁴ *Ibid* 43.

⁴⁵ *Ibid* 42.

⁴⁶ *Ibid* 44.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* 44–5.

⁴⁹ *Ibid* 45.

Broadcast Facility.⁵⁰ They found that ‘[w]hile special care [seemed] to have been taken to avoid civilian casualties when attacking the Ministry of Information, the latter two facilities [had been] completely destroyed.’⁵¹ Although, ‘there were no recorded civilian casualties as a result of any of these attacks’,⁵² Human Rights Watch found ‘no evidence that Iraqi media was being used to provide direct assistance to the Iraqi armed forces.’⁵³

If the media is used to incite violence, as in Rwanda, or to direct troops, it may become a legitimate target. The media facilities in Iraq, however, did not appear to be making an effective contribution to military action. As a consequence ... while attacking them may have served to demoralize the Iraqi population and undermine the government’s political support, neither purpose offered the definite military advantage required by law to make the media facilities legitimate targets.⁵⁴

Journalists too came under attack. In March 2003, ITN reporter Terry Lloyd was killed near Basra when US troops opened fire on a civilian minibus taking those wounded in an earlier exchange between US and Iraqi troops to hospital. Mr Lloyd and his team were travelling in two vehicles clearly marked ‘TV’ when an Iraqi vehicle armed with a machine gun drove alongside the vehicle carrying Mr Lloyd and his cameraman. Iraqi and American troops opened fire and Mr Lloyd was wounded by Iraqi fire. A civilian minibus came from Basra to take the wounded to hospital, and as Mr Lloyd lay in the back of the minibus he was shot and killed by a US marine.⁵⁵ In October 2006, the Oxfordshire coroner decided that he had been unlawfully killed, as there had been no justification for the US troops to open fire on the minibus.⁵⁶ The marines in question did not give evidence and the US authorities refused to reveal their identities.⁵⁷

F. The Location of Military Objectives in Protected Places

It was not just the Coalition’s conduct that raised legal issues. Although international humanitarian law protects hospitals, places of worship and cultural

⁵⁰ *Ibid* 46.

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ *Ibid* 49.

⁵⁴ *Ibid*. Three media leaders were convicted of genocide in Rwanda: *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No ICTR-99-52-T, judgment of 3 December 2003’ (*Media Case*).

⁵⁵ See S Purvis, ‘What Terry’s death means for us’, *Guardian* (London 16 October 2006): <http://guardian.co.uk/media/2006/oct/16/mondaymediasection>. Mr Lloyd’s interpreter was also killed and a cameraman is missing, presumed dead.

⁵⁶ *Guardian* (London 13 October 2006): <http://media.guardian.co.uk/site/story/0,,1921611,00.html>. See also Hansard HC vol 461 col 854W (11 June 2007).

⁵⁷ The MOD subsequently informed coroners that the US would not provide witnesses for inquests: <http://news.bbc.co.uk/1/hi/uk/6967982.stm>. In March 2007, ITN launched a campaign to amend the Rome Statute to make wilfully killing a journalist a specific war crime.

property, Human Rights Watch found that Iraqi forces had used such places ‘to advance their military goals.’⁵⁸

The fedayeen used al-Nasiriyya Surgical Hospital as the base of their local operations [while] the *Mukhabarat* occupied the Baghdad Red Crescent Maternity Hospital and threatened to kill [its] director, if he challenged them⁵⁹ Parties to an armed conflict are required to respect and protect civilian hospitals, which may in no circumstances be attacked. This protection ceases, however, if hospitals are used to commit ‘acts harmful to the enemy.’⁶⁰ By using hospitals as military headquarters, Iraqi forces turned them into military objectives.⁶¹

Human Rights Watch also found that Iraqi forces ‘sought to protect themselves by establishing positions in mosque.’⁶² Noting that ‘international humanitarian law prohibits the use of “places of worship which constitute the cultural or spiritual heritage of peoples . . . in support of the military effort”⁶³, it concluded that the ‘use of these mosques for military action [was] clearly illegal.’⁶⁴ Human Rights Watch further concluded that the Iraqi practice of intentionally locating ‘military objectives in civilian areas well ahead of any combat operation . . . coupled with the failure to remove the civilian population from areas exposed to the dangers of fighting, [constituted] a failure to take the precautions required by IHL against the effects of attacks.’⁶⁵

V. The ICC Prosecutor’s Response: An Assessment

The Office of the Prosecutor (OTP) of the ICC received over 240 communications from the public concerning the situation in Iraq, including many allegations relating to civilian deaths, injuries and damage during the Coalition’s military operations between March and May 2003. The communications were subjected to an initial review to determine whether they provided a possible basis for further action. The Chief Prosecutor concluded that the available material was characterised by (1) a lack of information indicating clear excessiveness in relation to military advantage; and (2) a lack of information indicating the involvement of nationals of States Parties to the Rome Statute. He indicated that most of the military activities had been carried out by non-states parties and did not provide a reasonable basis for believing that a crime within the jurisdiction of the ICC had been committed.⁶⁶

⁵⁸ HRW report 72.

⁵⁹ *Ibid* 72–3.

⁶⁰ HRW’s text contains references to Arts 18 and 19 of Geneva Convention IV of 1949 Relative to the Protection of Civilian Persons in Time of War.

⁶¹ HRW report 73 (original footnotes omitted).

⁶² *Ibid* 73.

⁶³ *Ibid* with in reference to Art 53(b) of Protocol I.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* 78.

⁶⁶ OTP 7/10. However, the Chief Prosecutor observed that as stipulated in Art 15(6) of the Statute, the conclusion may be reviewed in the light of new facts or evidence.

The Prosecutor has rightly stated that his ‘first duty ... is to observe scrupulously the law that governs this Court, namely the Rome Statute.’⁶⁷ Under the Statute, the ICC’s jurisdiction is expressly limited to ‘the most serious crimes of international concern’ and is ‘complementary to national criminal jurisdictions.’⁶⁸

A. Gravity and Complementarity

As regards the first of those limitations, the Prosecutor’s policy is—understandably in view of the Court’s limited mandate and resources—to focus investigative and prosecutorial efforts and resources on those who bear the greatest responsibility for the most serious crimes.⁶⁹ The gravity thresholds are high.⁷⁰ Besides the gravity inherent in each of the core crimes listed in Article 5,⁷¹ Article 17(1)(d) of the Statute (on admissibility) provides that the case must be ‘of sufficient gravity to justify further action by the Court’. This means that there is ‘an *additional* gravity threshold’⁷² over and above the inherent gravity of the core crimes. As the Prosecutor has observed, ‘gravity in our Statute is not only a characteristic of the crime, but also an admissibility factor, which seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world.’⁷³ Ambos states that gravity in the sense of Article 17(1)(d) ‘must be determined on a case by case basis, invoking as criteria the nature and social impact of the crimes (systematic or large-scale?), the manner of commission (e.g. particular brutality or cruelty?) and the status and role of the suspected perpetrators (are they the most responsible ...?).’⁷⁴

The complementarity principle is fleshed out in Article 17, which has been described as ‘the most fundamental provision of the ICC Statute with regard to the States Parties.’⁷⁵ It provides that the ICC shall determine that a case is inadmissible where, *inter alia*, the case is being investigated or prosecuted by a state which has jurisdiction over it ‘unless the State is unwilling or unable genuinely to carry

⁶⁷ Update on Communications received by the Office of the Prosecutor of the ICC, 10 February 2006: http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf (‘OTP update’).

⁶⁸ Art 1.

⁶⁹ Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 24 October 2005: http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf (‘Moreno-Ocampo statement’).

⁷⁰ OTP update.

⁷¹ Genocide, Crimes against humanity, War crimes and the Crime of aggression.

⁷² K Ambos, ‘The Legal Framework of Transitional Justice’, a paper prepared for the international conference on ‘Building a Future on Peace and Justice’,—Nuremberg, 25–27 June 2007, para 38: http://www.peace-justice-conference.info/download/Ambos_Nurembergstudy_070512.pdf.

⁷³ Moreno-Ocampo statement 8–9.

⁷⁴ Ambos, n 72, para 38.

⁷⁵ *Ibid* para 37.

out the investigation or prosecution.’⁷⁶ By deferring to the states parties if they are able and willing genuinely to investigate and prosecute, Article 17 ‘tries to strike an appropriate balance between the states’ sovereign exercise of jurisdiction and the international community’s interest in preventing impunity for international core crimes.’⁷⁷ The Prosecutor must consider this requirement when deciding whether or not to start an investigation,⁷⁸ and a state with jurisdiction over a case may challenge admissibility on the ground that it is investigating or prosecuting the case or has done so.⁷⁹ As Robinson has put it, the ‘ICC only acts when States do not undertake proceedings or do not do it properly’.⁸⁰ Thus, the ICC is a court of last resort.⁸¹ Complementarity also gives the accused a degree of certainty—of ‘that being that’.⁸²

B. Applying the Gravity and Complementarity Considerations to the Iraq War

When considering whether to investigate a situation, various factors are considered by the OTP, including the number of victims of particularly grave crimes. Each of the three situations under investigation in February 2006 (Democratic Republic of Congo, Northern Uganda and Darfur) involved thousands of deliberate killings as well as large-scale sexual violence and abductions. Collectively, those situations have resulted in the displacement of more than 5 million people.⁸³ By comparison, the Iraq War, though intense and bloody, does not appear to have been as grave in terms of the number of victims or, arguably, the mental element accompanying the acts which caused the civilian casualties and infrastructure damage, even if one includes the casualties and damage occurring since major combat activities ended on 1 May 2003.⁸⁴

⁷⁶ Art 17(1)(a). See also Art 17(1)(b) which provides for inadmissibility where a state with jurisdiction has investigated the case and decided not to prosecute ‘unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute’.

⁷⁷ Ambos, n 72, at para 37.

⁷⁸ Rule 51 of the Rules of Procedure and Evidence provides that in considering the matters referred to in Art 17(2) (concerning the determination of ‘unwillingness’), and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the state may choose to bring to its attention showing that its courts meet internationally recognised norms and standards for the independent and impartial prosecution of similar conduct, or that the state has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.

⁷⁹ Art 19(2)(b) of the Rome Statute.

⁸⁰ D Robinson, ‘Comments on chapter 4 of Claudia Cárdenas Aravena’, in JK Kleffner and G Kor (eds), *Complementary views on complementarity* (The Hague, Asser Press, 2006) 142; cited by Ambos, n 72, at para 37.

⁸¹ <http://www.icc-cpi.int/about.html>. *The Court of last resort* is also the working title of a film about the ICC being made by Paco de Onís and Pamela Yates.

⁸² A comment by Marieke Wierda (International Center for Transitional Justice) at the Nuremberg conference, June 2007, n 72 above. See further Art 20 of the Rome Statute (*ne bis in idem*).

⁸³ OTP Update.

⁸⁴ Views differ as to the reliability of estimates of civilian casualties. The Iraq Body Count Project maintains and updates the only independent and comprehensive public database of media-reported

The OTP's decision not to open a formal investigation in respect of the Iraq War was based on the perceived lack of gravity rather than on the complementarity principle, so there was no question of complementarity being used as a shield to try to thwart international justice.⁸⁵ Nonetheless, complaints about the war were lodged by individuals with the UK police in an attempt to ensure accountability through the domestic courts, and investigations were undertaken. In some cases the complaints were followed up by requests under the Freedom of Information (FOI) Act 2000 for information concerning the actions taken by the police. In September 2003, for example, Dorset Police were asked to investigate the Prime Minister and other members of the British government with a view to their prosecution for war crimes and crimes against humanity. The petitioner subsequently wanted to know what action the police had taken and, following an FOI request in January 2005, was informed that a similar allegation made to Scotland Yard by 'Legal Action Against the War' had been investigated by the Metropolitan Police. The file had been submitted to the Crown Prosecution Service (CPS), which had concluded that there were no grounds for bringing proceedings in the English courts on the material disclosed. The response continued: 'The effect of that decision was that the investigation, and future generic ones, were not to be proceeded with or prosecutions undertaken.'

While some British soldiers have been court-martialled as a result of the Iraq War and the ensuing occupation,⁸⁶ there are considerable obstacles to prosecuting UK government Ministers or military leaders for war crimes in British courts since under both the Geneva Conventions Act 1957 (as amended) and the International Criminal Court Act 2001 no prosecution can be initiated without the consent of the Attorney-General.⁸⁷ In principle, a refusal to consent could be challenged by way of judicial review, but the chances of success are virtually non-existent. In *R v Starkey and Another*, for example, the Divisional Court dismissed an application for judicial review of the Attorney-General's refusal to consent to the prosecution of the Prime Minister and the Secretary of State for Defence for conspiring to commit genocide and grave breaches of the Geneva Conventions.⁸⁸ Lloyd LJ said: 'Even if this court had power to review the Attorney General's decision to

civilian deaths in Iraq that have resulted from the 2003 military intervention. The count includes civilian deaths caused by Coalition military action and by military or paramilitary responses to the coalition presence (eg insurgent and terrorist attacks). It also includes excess civilian deaths caused by criminal action resulting from the breakdown in law and order which followed the Coalition invasion. Where media sources report differing figures, the range is given. On 13 July 2007, the IBC figures were 67,237 (minimum) and 73,568 (maximum). See <http://www.iraqbodycount.org/background.php>.

⁸⁵ Cf A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 144, 159.

⁸⁶ In April 2007, the first British soldier to be convicted of a war crime under the International Criminal Court Act 2001 was sentenced to one year's imprisonment and dismissed from the army for inhumanely treating Iraqi detainees.

⁸⁷ See s 1A(3) of the 1957 Act, as amended, and s 70 of the 2001 Act.

⁸⁸ CO/1593/87, 14 December 1987, Lexis. The application concerned the deployment of nuclear weapons.

refuse his fiat this is not a case in which we would exercise that power'.⁸⁹ Clearly, the requirement of consent does not in itself constitute 'unwillingness' or 'inability' genuinely to prosecute for the purposes of Article 17 of the Rome Statute. In certain circumstances, however, refusal to consent might constitute 'unwillingness'. The OTP would have to look behind the refusal and decide whether it was really designed to shield someone from criminal responsibility.⁹⁰

With regard to the complaints that war crimes and crimes against humanity were committed in the context of the Iraq War, the CPS's decision not to prosecute was made long before the OTP's decision not to open a formal investigation. The CPS was not influenced by the OTP. That could happen in certain circumstances, however. If national prosecuting authorities or courts were to take their lead from the OTP and the OTP indicated that, on the basis of the available information, a crime within the ICC's jurisdiction had not been committed, the former might simply follow suit even though the OTP's decision was based on a lack of 'gravity' in the Rome Statute sense (bearing in mind the additional gravity threshold mentioned above) or influenced by resource considerations or other extraneous factors. Although s 50(5) of the International Criminal Court Act 2001 provides, *inter alia*, that in trying offences, domestic courts must take into account any relevant jurisprudence or decision of the ICC, that should not include decisions of the OTP: while the OTP is an organ of the ICC,⁹¹ it is separate from the Court and required to act independently⁹² and on the basis of the Statute's provisions. National authorities and courts should make up their own minds independently of the OTP, but there is a risk that they will regard it as unduly authoritative. If so, the combination of OTP authority and undue domestic deference could mean impunity or at least a lack of accountability.

The complementary nature of the ICC's jurisdiction invites comparison with the machinery established by the European Convention on Human Rights (ECHR), which is subsidiary to the national systems for safeguarding human rights. Just as the Rome Statute's complementarity principle accords primacy to states if they are able and willing genuinely to investigate and prosecute, so the ECHR's subsidiarity principle recognises the primary competence and duty of the state to protect Convention rights and freedoms effectively within the domestic legal order.⁹³ A corollary of subsidiarity is that the European Court cannot entertain an application

⁸⁹ When the International Criminal Court Bill was being debated in the House of Lords, Lord Archer of Sandwell (a former Attorney-General) asked what would happen if a UK court concluded that the authorities had bad reasons for not prosecuting and should have prosecuted: 'Would the court then have some power to order the appropriate authorities to prosecute? That would be the first time in 600 years that such a power has been invested in a court in this country, to my knowledge'. See Hansard HL vol 621 col 1305 (8 February 2001).

⁹⁰ Art 17(2)(a) of the Rome Statute.

⁹¹ *Ibid* Art 34(c).

⁹² *Ibid* Art 42(1).

⁹³ H Petzold, 'The Convention and the Principle of Subsidiarity' in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, The Hague, 1993) 59–60.

unless all domestic remedies have been exhausted,⁹⁴ even if the domestic authorities are not dealing with the matter ‘properly’. Conversely, once domestic remedies have been exhausted, the Court can consider an application even if those authorities have handled it ‘properly’. Under the Rome Statute, in contrast, the ICC can intervene before the end of the domestic process if it considers that the domestic authorities are not investigating or prosecuting ‘properly’, while ‘proper’ domestic treatment prevents it from getting involved at all—in accordance with the *ne bis in idem* principle in Article 20 of the Statute.⁹⁵

When (or perhaps if) Protocol 14 to the ECHR comes into force,⁹⁶ however, Article 35(3) ECHR will be amended to read:

The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

- (a) ...
- (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

Protocol 14 is designed to give the European Court the necessary procedural means and flexibility to process all applications within a reasonable time, while enabling it to concentrate on the most important cases.⁹⁷ The exponential increase in the number of individual applications seriously threatens both the Court’s ability to cope with its workload and the survival of the ECHR’s machinery for the judicial protection of human rights.⁹⁸ The Rome Statute’s gravity thresholds and the complementarity principle should help to ensure that the ICC does not suffer the same fate. Indeed, that amendment to Article 35(3) ECHR will bring the European Court more into line with the ICC, though not completely. The former will have to declare a complaint inadmissible if it considers that it has been ‘duly considered’ by a domestic tribunal and that the applicant has not suffered a significant disadvantage, unless respect for human rights requires the complaint to be examined. The combination of ‘duly considered’ and ‘no significant disadvantage’ seem to be substantially equivalent to the Rome Statute’s standard. However, the European Court will still be

⁹⁴ Art 35(3) ECHR.

⁹⁵ Art 20(3) states that no person who has been tried by another court for conduct also proscribed under Arts 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the previous proceedings were for the purpose of shielding the person from criminal responsibility or otherwise were not conducted in accordance with due process and were conducted in a manner inconsistent with an intent to bring the person to justice.

⁹⁶ Protocol 14 will not enter into force until it has been ratified by all 47 of the ECHR’s Contracting States. To date, all except Russia have ratified it.

⁹⁷ Council of Europe, Report of the Group of Wise Persons to the Committee of Ministers, 10 November 2006 para 29 (‘Council of Europe report’).

⁹⁸ *Ibid* para 26. On 31 May 2008, 88,850 applications were pending before a judicial formation and 22,800 were at a pre-judicial stage: <http://www.echr.coe.int/NR/rdonlyres/A63F2A14-2C6841F3-BFEF-4903BF9D8C63/o/statistics2008.pdf>.

able to entertain a complaint on the grounds of 'respect for human rights', even if it has been 'duly considered' domestically and the applicant has 'not suffered a significant disadvantage'; whereas the complementarity principle prevents the ICC from exercising jurisdiction if the national authorities have acted properly. The ICC has no residual 'international criminal law' competence to compare with the European Court's residual 'human rights protection' competence. That is because the ICC is a criminal court where individuals accused of the most serious international crimes are tried, whereas the function of the European Court is, at one level, '[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'⁹⁹; and, on a constitutional level, to lay down common principles and standards relating to human rights and to determine the minimum level of protection which states must observe.¹⁰⁰

The problem for both Courts is partly one of resources. The European Court's budget for 2008 (part of the general budget of the Council of Europe) is €53.46 million.¹⁰¹ The ICC's budget for 2007 was €88.87 million, an increase of €8.45 million on 2006.¹⁰² The ICC Prosecutor must devote his resources to the most serious situations.¹⁰³ It is not feasible to bring charges against all apparent perpetrators.¹⁰⁴ Complementarity and subsidiarity make sense in the context of limited resources, but only if most states can be relied on to act properly most of the time. They also make sense because hopefully they spur the development of domestic capacity.

Under Article 17(1)(a) of the Rome Statute, a case that is being properly dealt with by a state with jurisdiction is inadmissible before the ICC. Of course, it may be that a case is being investigated by a state with jurisdiction other than the suspect's own state. Article 2(2) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹⁰⁵ provides that certain offences, including 'crimes within the jurisdiction of the International Criminal Court', if they are punishable in the issuing Member State by a custodial sentence for a maximum period of at least three years, shall, without verification of the act's double criminality,¹⁰⁶ give rise to surrender pursuant to a European arrest warrant.¹⁰⁷ In theory, therefore, provided that its domestic law

⁹⁹ Art 19 ECHR.

¹⁰⁰ Council of Europe report para 24.

¹⁰¹ This covers judges' remuneration, staff salaries and operational expenditure. It does not include expenditure on the building and infrastructure. See <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Budget/Budget/>.

¹⁰² http://www.icc-cpi.int/library/about/newsletter/11/en_03.html.

¹⁰³ OTP update.

¹⁰⁴ Moreno-Ocampo statement 5.

¹⁰⁵ [2002] OJ L190/1.

¹⁰⁶ Ie without verifying that 'the alleged conduct of the person whose extradition was sought was not only a criminal offence in the requesting member state but would also have been a criminal offence if done in the requested member state': see *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31, [59] (Lord Scott of Foscote).

¹⁰⁷ In Case C-303/05 *Advocaten voor de Wereld* [2007] 3 CMLR 1, the Court of Justice of the European Communities held that the removal of verification of double criminality for certain offences was consistent with the principles of legality and non-discrimination.

allowed the exercise of jurisdiction,¹⁰⁸ any of the EU's 27 Member States could issue a European arrest warrant in respect of an alien (including a national of another Member State) suspected of having committed a crime within the jurisdiction of the ICC (eg a war crime in Iraq); and, subject to the specified grounds for mandatory or optional non-execution,¹⁰⁹ the warrant would have to be executed on the basis of the principle of mutual recognition.¹¹⁰ Presumably, issuing such a warrant would mean inadmissibility under Article 17(1)(a) of the Rome Statute, as long as the issuing state really did have jurisdiction and was investigating properly. Depending on the circumstances, however, there could be questions for the OTP about the issuing state's jurisdiction as well as about the genuineness of the investigation.

There would currently be no complementarity or admissibility issue if the crime concerned were the crime of aggression, since the ICC cannot yet exercise jurisdiction over that crime.¹¹¹ Interestingly, however, it appears that the crime of aggression could nevertheless give rise to surrender pursuant to a European arrest warrant, without verification of double criminality, because since the entry into force of the Rome Statute in July 2002 it has been one of the 'crimes within the jurisdiction of the International Criminal Court'.¹¹² It is only in respect of offences other than those covered by Article 2(2) of the Framework Decision that surrender may be subject to the condition that the acts for which a European arrest warrant has been issued constitute an offence under the law of the executing Member State. This position, if correct, is anomalous. For example, the crime of aggression is a crime in Bulgarian law¹¹³ but not in English law.¹¹⁴ In principle, it would seem that the Bulgarian authorities could issue a European arrest warrant with a view to the arrest and surrender by the United Kingdom of a British national suspected of having committed the (leadership) crime of aggression by attacking Iraq. However, the

¹⁰⁸ See R Higgins, *Problems & Process* (Oxford, Oxford University Press, 1994), 59: 'While, from the perspective of international law, there is clear universal jurisdiction to try and punish war crimes, there is some uncertainty as to whether anything further is required in domestic law for this possibility to be acted upon ... It may be the case that, even if the domestic law of a country acknowledges the international law universality principle that allows it jurisdiction over an offence, as a practical matter it will be necessary for the offence to be defined in domestic legislation.'

¹⁰⁹ See Arts 3 and 4 of the Framework Decision. Under Art 4(7), for example, execution may be refused if the warrant relates to offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

¹¹⁰ Art 17(1) of the Framework Decision provides that a European arrest warrant shall be dealt with and executed as a matter of urgency.

¹¹¹ Art 5(2) of the Rome Statute.

¹¹² *Ibid* Art 5(1). There is a distinction between the existence and the exercise of jurisdiction.

¹¹³ Art 6(1) of the Bulgarian Penal Code states: 'The Penal Code shall also apply to foreign citizens who have committed abroad crimes against peace and humanity, whereby the interests of another state or foreign citizens have been affected'. Art 409 provides: 'Whoever plans, prepares or wages aggressive war shall be punished by imprisonment of fifteen to twenty years or by life imprisonment without an option'. See <http://www.legislationline.org/legislations.php?jid=10<id=15>.

¹¹⁴ In *R v Jones and others; Ayliffe and others v DPP; Swain v DPP* [2006] UKHL 16, the House of Lords held that the crime of aggression is a crime in international law but, in the absence of statutory authority, not in English law.

crime of aggression is not an extradition offence for the purposes of the Extradition Act 2003,¹¹⁵ Part I of which is intended to transpose the Framework Decision into UK law.¹¹⁶ In that regard the Act seems to be inconsistent with the Framework Decision.¹¹⁷

Although the Framework Decision recognises the *ne bis in idem* principle as a ground for non-execution of a European arrest warrant, it does so only in relation to national courts,¹¹⁸ not in relation to the ICC. That omission (which is surprising given the reference in Article 2(2) to ‘crimes within the jurisdiction of the International Criminal Court’) has been noted by the Commission of the European Communities, which has not objected that certain Member States have filled the gap by making *ne bis in idem* in relation to the ICC an additional ground of refusal to execute such a warrant.¹¹⁹

VI. Conclusion

It is disappointing—but hardly surprising—that the Coalition’s conduct during the Iraq War has not been examined by any court, domestic or international. The ICC does not have the resources to investigate all situations that appear to fall within its jurisdiction. Within the limits of his resources, the Prosecutor must necessarily select the most grave and urgent ones. A resource-driven approach whereby the Court focuses on the very worst crimes should increase the international consensus towards their prosecution. The Prosecutor himself has warned that a case-driven approach, implying that the Court should act in every situation involving crimes apparently falling within its jurisdiction, would mean taking on multiple situations, including those of comparatively lesser gravity, thus expanding the Court’s reach and reducing the role of states, possibly leading to ‘ICC fatigue’ and a diminishing of support. It would also require a much larger budget.¹²⁰

Furthermore, the USA (the major partner in the coalition) is not a party to the Rome Statute¹²¹ and the ICC would no doubt prefer not to antagonise permanent

¹¹⁵ See s 64(7)(a) of the Act, which refers only to genocide, crimes against humanity and war crimes.

¹¹⁶ By Art 34(2)(b) EU, framework decisions are binding on Member States as to the result to be achieved but leave to national authorities the choice of form and methods.

¹¹⁷ However, under the current EU Treaty the Commission cannot bring Treaty infringement proceedings. The Court of Justice can give preliminary rulings on the validity and interpretation of framework decisions, but only if the Member State concerned has accepted its jurisdiction. See Art 35 EU. The Lisbon Treaty would broaden the scope of the court’s jurisdiction.

¹¹⁸ See Arts 3(2) and 4(3) of the Framework Decision.

¹¹⁹ COM(2006)8 final, 2.2.1.

¹²⁰ Moreno-Ocampo statement 8–9.

¹²¹ As Schabas argues in ch 6, however, this was not necessarily an obstacle to opening an investigation.

members of the Security Council.¹²² But while the Court's long-term credibility may well depend on how it deals with situations involving any of the P5, it would be unfair to accuse the OTP of deference over Iraq. It is true that Article 16 of the Statute appears to give the P5 (and their allies) an unfair advantage: it provides that no investigation or prosecution may be commenced or proceeded with for a period of 12 months after the Security Council has requested the Court to that effect, and that a request may be renewed by the Council under the same conditions. However, nine votes and no veto would be required for such a deferral.¹²³ In any case, the ICC's credibility would scarcely be enhanced if the OTP investigated or prosecuted merely because a permanent member was involved. What matters is that the Statute's provisions are rigorously observed without fear or favour, objectively and impartially. In respect of the Iraq War, ICC and domestic prosecuting authorities considered whether to investigate or prosecute on the basis of the information available to them, so there was legal scrutiny to that extent. The OTP was considerably more transparent than the CPS in detailing the reasons for not taking things further.¹²⁴ A resource-driven approach by the ICC, focusing on a few particularly grave situations, presupposes that national authorities fulfil their responsibility to investigate and, where appropriate, prosecute—and give adequate reasons for not doing so.

At national level there has also been a degree of accountability via the jury system. Since September 2006, for example, five people have been tried at Bristol Crown Court in connection with their activities at RAF Fairford on the eve of the Iraq War.¹²⁵ Charged with, inter alia, conspiracy to cause criminal damage, and prevented by the House of Lords' ruling in *Jones*¹²⁶ from arguing that they had been trying to prevent the crime of aggression, the defendants argued that they had been seeking to prevent war crimes,¹²⁷ that they had a lawful excuse for damaging property because they had sought to prevent damage to the property of Iraqis¹²⁸ and that they had acted under duress of circumstance or

¹²² The President of the ICC, Judge Philippe Kirsch, has said that while the absence of particular states does not affect the Court's functioning, in the long run their participation will be necessary for it to achieve broader acceptance: <http://www.hindu.com/2005/12/10/stories/2005121017501400.htm>.

¹²³ See Art 27(3) of the UN Charter.

¹²⁴ In most cases where a decision is taken not to initiate an investigation on the basis of the communications received, the OTP submits reasons only to senders of communications. In the interests of transparency, however, it may make its reasons publicly available where three conditions are met: (1) a situation has warranted intensive analysis, (2) the situation has generated public interest and the fact of the analysis is in the public domain and (3) reasons can be provided without risk to the safety, well-being and privacy of senders. It was on this basis that the OTP published its reasons in relation to Iraq on the ICC website. See OTP update.

¹²⁵ *R v Jones and Milling, R v Olditch and Prichard, R v Richards*.

¹²⁶ [2006] UKHL 16.

¹²⁷ s 3(1) of the Criminal Law Act 1967 provides: 'A person may use such force as is reasonable in the circumstances in the prevention of crime.'

¹²⁸ s 5 of the Criminal Damage Act 1971 provides: '(2) A person charged with an offence to which this section applies shall ... be treated ... as having a lawful excuse ... (b) if he destroyed or damaged ... the property in question ... in order to protect property belonging to himself or another ... and at the

necessity.¹²⁹ At least two of them testified that they had been driven to act by their anticipation of 'Shock and Awe' and the expected use of cluster bombs. Defence witnesses included an expert on cluster munitions and individuals who had been in Baghdad and seen civilians fleeing the city or witnessed the destruction caused by the bombing. All five defendants were re-tried after 'hung juries' at their original trials. Three of them were eventually acquitted and two were convicted. After the first two hung juries, George Monbiot observed:

It is true that such verdicts (or non-verdicts) impose no obligations on the government. They do not in themselves demonstrate that its ministers are guilty of war crimes. But every time the prosecution fails to secure a conviction, the state's authority to take decisions which contravene international law is weakened.¹³⁰

Even though two of the Fairford Five were ultimately convicted, the acquittals in the other two cases (and the original hung juries) surely detract from the Coalition's dubious claim to have had international law on its side.

time of the act or acts alleged to constitute the offence he believed—(i) that the property ... was in immediate need of protection; and (ii) that the means of protection adopted ... were ... reasonable having regard to all the circumstances. (3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held'

¹²⁹ In essence, that the damage agreed upon was done to prevent an act of greater evil directed towards persons for whom the accused had responsibility and, viewed objectively, was a reasonable and proportionate response to the threat of death or serious injury to be avoided.

¹³⁰ *Guardian* (London 17 October 2007) 31.

International Criminal Law and Iraq

ANDREW WILLIAMS

I. Introduction

Before the commencement of hostilities by US and UK forces against Iraq in 2003, the issues of international criminal law associated with that country and the regime of Saddam Hussein seemed to be reasonably clear. The focus for outrage lay with long-standing accusations of genocide,¹ crimes against humanity,² and unpunished war crimes and crimes of aggression.³ There had been many political calls for those responsible for these atrocities to be held accountable but the sense of futility in such demands was ever-present. Given that the first Gulf War had failed to bring Saddam Hussein to book for well-documented breaches of standards that were gradually coalescing into an emerging and spasmodically effective response to 'international crimes', those who were cynical about an international system of accountability of true worth could perhaps boast about their discernment. International criminal law, through the prism of dictatorship in Iraq, appeared to be a rhetorical conceit that held little purchase in international law terms.

By the time of the 2003 Iraq invasion, this perception was being challenged in significant ways. The 'success' of international tribunals in Yugoslavia, Rwanda and Sierra Leone, the emergence of a coherent and ever-deepening jurisprudence and system of procedure, the development of a cohort of legal professionals engaged in this area of law, the growth of an impressive academic literature and, above all, the creation of an International Criminal Court, all spoke of a new era of international criminal law. So much so that at the time Saddam Hussein's regime was announced as overthrown in April 2003 there was a real prospect of not only bringing to justice those Iraqis accused of atrocities over the previous decades but also scrutinising the actions of the invading forces under the same international legal standards. Indeed, the response at the time of invasion by

¹ Human Rights Watch, 'Genocide in Iraq; the Anfal Campaign against the Kurds' (Report) (July 1993) <<http://www.hrw.org/reports/1993/iraqanfal/>>.

² See, for instance, Human Rights Watch, 'Ali Hassan al-Majid and the Basra Massacre of 1999' (Report) (February 2005) <<http://hrw.org/reports/2005/iraq0205/>>.

³ The invasions of Iran and Kuwait, for instance.

human rights and humanitarian law organisations to the prospect of widespread accountability was recognised at governmental level.⁴

Notwithstanding this optimism, the impact on international criminal law of the events in Iraq post-2003, and the responses to them, suggests the cynics have been proven correct after all. For not only has the prosecution and execution of Saddam Hussein and certain members of his ruling elite undermined fundamental precepts of international criminal procedure and forms of punishment, but the sense of failure in assessing seriously the behaviour of UK and US forces before a competent tribunal has also given credence to the claim that international criminal law is a chimera incapable of addressing power and its nefarious whims. The purpose of this chapter is not to address the former, being complaints levelled against the treatment of Saddam Hussein *et al* that have been well made by human rights organisations.⁵ Rather, the aim is to consider the response of the International Criminal Court's Chief Prosecutor to a cacophony of calls for review of actions of the victorious forces in the war and subsequent occupation. It is here, perhaps, that the greatest impact on international criminal law can be observed, whether to confirm the existing state of the discipline or to push it towards an increasingly precarious position in terms of international law.

II. The Communication

In February 2006, Luis Moreno-Ocampo, the Chief Prosecutor of the International Criminal Court, issued a communication responding to 240 complaints relating to the war in Iraq raised by various individuals, human rights groups, peace activists and academics.⁶ His conclusion was brief and simple. There were no grounds to even commence an investigation into the allegations of a crime of aggression, genocide, crimes against humanity or war crimes arising from the USA and the UK's joint operations.

⁴ See UK Attorney-General's Opinion 7 (March 2003) <[http://216.239.59.104/search?q=cache:CvtEo3Ed-vs\]:www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_a_attorney_general%27s_advice_070303.pdf+Attorney+general+opinion+iraq+1441&hl=en&gl=uk&ct=clnk&cd=1](http://216.239.59.104/search?q=cache:CvtEo3Ed-vs]:www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_a_attorney_general%27s_advice_070303.pdf+Attorney+general+opinion+iraq+1441&hl=en&gl=uk&ct=clnk&cd=1)>.

⁵ The condemnation of the Iraqi Tribunal has been widespread. See, for instance, Human Rights Watch report 'Judging Dujail; The First Trial before the Iraqi High Tribunal' (Report) (November 2006) <<http://hrw.org/reports/2006/iraq1106/>> and Amnesty International Press releases 'Iraq: Amnesty International deplores death sentences in Saddam Hussein trial' (11 May 2006) and 'Iraq: Saddam Hussein trial must be fair and seen to be fair' (20 October 2005).

⁶ See *Communication by Chief Prosecutor Luis Moreno-Ocampo ('Prosecutor') concerning the situation in Iraq* (9 February 2006) <http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>. Throughout this chapter I refer to this document as the 'Communication' and to the Prosecutor as either the 'Prosecutor' or Mr Moreno-Ocampo. The Prosecutor remains solely responsible for the Communication even though his Office presumably provided significant assistance in its construction.

Of course, the charges the Prosecutor had to consider were loaded with immense international political significance. No other series of events in the 21st century, perhaps since the end of the Cold War, had captured such global attention and caused such international, regional and national political rancour and reaction than the invasion and occupation of Iraq in 2003. Framed by this environment, it would have been understandable for any legal officer of a nascent international court to think twice about becoming embroiled in these volatile waters. But is the Prosecutor's communication something more than just a cautious response to a set of politically sensitive legal problems? Does it also epitomise the state of international criminal law and justice today, being a microcosm, indeed, of some of the key issues that plague the 'discipline'?⁷ Equally, might it provide us with a flavour of the International Criminal Court's (ICC's) expressed long-term strategy to 'be regarded as the reference institution in international criminal law'?⁸

Four distinct aspects of the Prosecutor's communication demand attention in these respects, raising specific and relevant questions for our present enquiry.

First, the Prosecutor addressed the allegation that a crime of aggression had been perpetrated by the USA and the UK in the invasion of Iraq. He rejected such a claim with apparent ease, maintaining that the crime of aggression lies outside the present jurisdiction of the Court. This was indeed a position he had already adopted on consideration of some initial complaints communicated to him soon after the war had ended.⁹ But does the dismissive approach of the Prosecutor reflect a tendency in the discipline to treat the legal distinction between law governing the use of force (*jus ad bellum*) and law concerned with the conduct of hostilities (*jus in bello*) as sacrosanct? And if so, does this cause difficulty for the integrity of international criminal law (ICL) when faced by contemporary issues of military interventions perhaps exemplified by the experience of the Iraq War?

Second, the Prosecutor considered allegations of genocide and crimes against humanity. Again he was dismissive of such claims. But does his conclusion fail to recognise the hidden complexities beneath a superficial interpretation of the specific events in Iraq? Was his conclusion reached too hastily and without serious legal analysis? Does it reflect a general lack of appreciation of context and embrace too enthusiastically the inevitability of, and lack of accountability for, that odious euphemism 'collateral damage'?

⁷ There is, of course, every reason to suppose that no such 'discipline' actually exists. However, there is sufficient evidence in academic writing to suggest that we can assume the discipline of international criminal law has substance and form. See, for instance, A Cassese *International Criminal Law* (Oxford, Oxford University Press, 2003) for a leading text on the subject.

⁸ Strategic Plan of the International Criminal Court, Report of the International Criminal Court Assembly of State Parties, ICC-ASP5/6 (4 August 2006) <http://www.icc-cpi.int/library/asp/ICC-ASP-5-6_English.pdf> 9.

⁹ See *Communication of the Office of the Prosecutor* (24 July 2003) <http://www.icc-cpi.int/library/press/mediaalert/160703press_conf_presentation.pdf> which noted 38 complaints received regarding the crime of aggression in Iraq and which concluded that no action would be possible until the crime was defined and the conditions under which the Court could exercise jurisdiction had been determined.

Third, the Communication examines allegations of war crimes, particularly concerning the use of certain weapon systems and targeting processes by UK forces in particular. It thus also draws to the fore the way in which ICL has responded (or not) to the development of military technology. Echoing the (in)famous experts' report commissioned by the International Tribunal for the Former Yugoslavia in relation to the NATO bombing campaign undertaken in 1999,¹⁰ the Communication struggles with the concepts of proportionality and military necessity in determining the prima facie legality of particular military action. In so doing, did the Prosecutor entrench an uncritical approach to such issues, emphasising the willingness of ICL to favour military opinion rather than any other objective perspective? Does this in turn undermine the 'justice' component of an ICL-inspired international criminal justice system?

Fourth, the Prosecutor considered issues of admissibility and the meaning of 'gravity' in determining the threshold for initiating an investigation by the ICC. Does this highlight a key element of the practice of ICL by revealing a sense of containment that questions when it is practicable and appropriate for international criminal law institutions to take action?

These four significant aspects of the Prosecutor's Communication provide the basis for analysis in the remainder of this chapter. In doing so, it aims to complement other contributions in this book, notably those of William Schabas and Nicholas Grief.

III. The Crime of Aggression

The Prosecutor's first consideration of interest focused on the claim that the military attack in March 2003 was illegal. He did not examine why this allegation might have been made. Nor did he rehearse the arguments that might aid an observer in deciding whether the action was against international law. Rather, he merely dismissed the claim by noting the ICC's lack of mandate to even consider the lawfulness of decisions to engage in armed conflict. This could have been of no surprise to anyone who was aware of the failure to agree a definition of the crime of aggression when the ICC Statute was instituted in Rome in 1998.¹¹ One of the most significant principles determined at Nuremberg¹²—that aggressive

¹⁰ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia <<http://www.un.org/icty/pressreal/nato061300.htm>> (visited Dec. 8, 2006) ('NATO Report').

¹¹ For an account of this failure, see, for instance, W Schabas, *An Introduction to the International Criminal Court* (Cambridge, Cambridge University Press, 2nd edn, 2003) and his contribution to this volume.

¹² See principle VI in Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Report of the International Law Commission Covering its Second Session, 5 June–29 July 1950, Document A/1316 11–14.

war was against the norms of international law—remained on the law’s margins despite the seeming best intentions of the ICC Statute’s architects. It continues to be the subject of political negotiation, occupying a strange position in the meantime. Not until 2009 at the earliest—the first date a review conference to decide the issue can be held under the Statute’s own terms¹³—will the ICC be allowed to assume this legal heritage and be granted full authority to hear allegations of aggression. Until then, the crime stands outside the Court’s remit but still within its constitutional framework.

Even with the prospective review, there can be no guarantee that negotiations will be successful. Indeed, the political reasons for its original exclusion have hardly diminished. If anything they have intensified given the activities of many states party to the Statute who are engaged in armed conflicts of one form or another. Thus, despite the best intentions of the ICC itself (the process of review has already begun in earnest¹⁴), an agreed definition remains as unlikely today, perhaps particularly after the Iraq War, as it did a decade ago.

The Prosecutor’s bland refusal to countenance the charge vis-à-vis Iraq, therefore, confirms the tepid approach of ICL to one of its supposed fundamental principles. Is the crime against peace a true subject of the field or has it become a dubious concept in the light of current global military interventions? There are undoubtedly voices that maintain the crime’s pre-eminent position (termed ‘the supreme international crime’ in the Nuremberg judgment)¹⁵ but the practical fact is that no tribunal since those in Germany and Japan immediately after the Second World War have encompassed aggression within its competence. The International Criminal Tribunal for the Former Yugoslavia (ICTY) presented the most blatant omission. Undoubtedly the product of an unwillingness by the international community to become embroiled in both defining and applying the notion of aggression, the ICTY nonetheless confirmed that this particular crime presented so many legal problems that it had the capacity of destabilising any criminal process rather than ensuring that justice was done. That the Statute of the ICC then managed to include the crime of aggression into the Court’s jurisdiction was testament to the resilience of those determined not to allow the crime to disappear in all but name.

The Prosecutor’s refusal to consider the allegations of a crime of aggression, however, did more than merely restate the textual restriction of the ICC’s mandate. It also attested to a continuing ambivalence inherent in ICL as a whole. On the one hand declaring the crime of aggression as a worthy and necessary issue for prosecution and judgment and on the other avoiding its application in practice, speaks volumes about the political grip over the development of an independent

¹³ See Art 5(2) Statute of the International Criminal Court (‘ICC Statute’).

¹⁴ For details of these proceedings, see ICC Special Working Group on the Crime of Aggression <<http://www.icc-cpi.int/asp/aspaggression.html>>.

¹⁵ See B Broomhall, *International Justice and the International Criminal Court* (Oxford, Oxford University Press, 2003) 46.

international criminal law. But this is a familiar critique. And, unsurprisingly, Mr Moreno-Ocampo was not likely to re-engage the matter while it remained the subject of negotiation and debate through the ICC's Special Working Group on the Crime of Aggression.¹⁶ Officially, there must still be hope that a suitable and comprehensive definition can be agreed by the initial deadline of 2009 so that it can be fully incorporated within the Court's and therefore the Prosecutor's jurisdiction. That this leaves one of the most serious crimes of concern to the international community outside the Court's practical concern may well be ironic but it could also be construed as politically expedient for the longer-term international criminalisation and prosecution of those who engage in aggressive war.

But could the Prosecutor have done otherwise? Could he have somehow addressed the issue of the crime of aggression perhaps tangentially in the context of Iraq and thus given credence to the textual fiction of Article 5(1) of the ICC Statute that the crime of aggression remains in the Court's jurisdiction? Two possibilities present themselves.

First, one of the citizens' reports submitted to the Office of the Prosecutor that provoked the Communication indicated a simple, if contested, legal interpretation that could have been deployed. Peacerights, an NGO that held an enquiry into the allegations of war crimes committed by the UK during the Iraq conflict, presented the possibility of aligning the crime of aggression with the notion of joint criminal enterprise.¹⁷ This theme has been taken up by William Schabas in his chapter in this book. So we can see when considering the liability of individuals with regard to allegations of complicity in the execution of crimes against humanity under Article 7 of the ICC Statute or war crimes under Article 8, both wholly within the ICC's jurisdiction, it could be argued that the Prosecutor was at liberty to assess whether the parties to the invasion operated with a common criminal objective. Under Article 25(3)(d) of the ICC Statute the Court may judge whether individual responsibility flows from a crime that has been committed by a 'group of persons acting with a common purpose'. Commonality can relate to a criminal purpose of a group where such 'purpose involves the commission of a crime within the jurisdiction of the Court'.¹⁸ As there is little dispute that aggressive war is a crime recognised as within its jurisdiction by the ICC Statute in Article 5(1) then, in theory, the Prosecutor was entitled to review the legality of the invasion as a necessary contextual issue when considering the liability of UK individuals in relation to crimes committed by parties to the enterprise, notably the United States. Unfortunately, although the Prosecutor noted the relevance of Article 25, his Communication did not tackle the issue of complicity or joint enterprise in any form. Nor did he dismiss it as a possible line of enquiry.

¹⁶ See n 14.

¹⁷ Peacerights, Report on the Inquiry into the Alleged Commission of War Crimes by Coalition Forces in the Iraq War during 2003 (31 March 2004) paras 3.23 et seq <<http://www.peacerights.org/reports.php>>. The author is co-founder and member of Peacerights and was co-author of the report.

¹⁸ See Art 25(3)(d)(i) of the ICC Statute.

Given that he did have at his disposal a good degree of judicial precedent emanating from the ICTY, for instance, it is surprising that the question of joint criminal enterprise escaped even rudimentary consideration. The burgeoning case law would have told him that three judicially devised categories of joint criminal enterprise could have been entertained.¹⁹ The first two of these, the 'basic' and the 'systemic', relate to cooperation between parties for the purposes of undertaking some criminal endeavour. The third, the 'extended' category, relates to 'responsibility for crimes committed beyond the common purpose but which are nevertheless a natural and foreseeable consequence of the common purpose'.²⁰ In the case of *Vasiljević*, for instance, reference was made to the forcible removal of people from a region as being the criminal purpose during the execution of which murders took place. Such killings might not have been part of the common plan but were nevertheless 'foreseeable' as a likely consequence of its undertaking.²¹

By analogy, if the invasion of Iraq could have been interpreted as a common criminal act, based on aggression as a crime, then the various killings of civilians and other crimes committed by US forces (for instance through the over-deployment of cluster munitions in civilian areas, or the targeting of civilian installations as a means of government leader assassination, or mass detention and ill-treatment) could have been seen as at least foreseeable by the UK authorities. As was determined in *Tadić*, the extended notion of joint enterprise required the risk of death to be 'a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk'.²² By avoiding any analysis of the issue Mr Moreno-Ocampo both failed to offer any clarity or guidance in this respect and succeeded in rendering all evidence of alleged international crimes committed by US forces outside his and the Court's vision.

Given that at least the Peacerights report highlighted an otherwise unresolved issue of international criminal law, namely the application of the doctrine of joint criminal enterprise vis-à-vis the crime of aggression, specifically in relation to the culpability of UK personnel for acts committed by US forces, it is hard to understand why this matter was all but ignored by the Prosecutor. His only reference was in a footnote whereby he claimed that 'the available information provided a reasonable basis with respect to a limited number of incidents of war crimes by nationals of State Parties, but not with respect to any particular incidents of indirect participation in war crimes' (emphasis added).²³ No discussion or indication was provided that 'indirect participation' had been assessed in accordance with any particular criteria. One can understand why the Communication needed to be accessible to the public but this should not have precluded a proper review

¹⁹ See *Prosecutor v Tadić*, Appeals Chamber, No IT-94-1-A (15 July 1999) para 195 for a fuller description of the three types of joint criminal enterprise contemplated by the ICTY.

²⁰ See *Prosecutor v Kvočka et al*, Appeals Chamber, No IT-98-30/1 (28 February 2005) para 83.

²¹ See *Prosecutor v Vasiljević*, Appeals Chamber, No IT-98-32-A, (25 February 2004) para 99.

²² See *Tadić*, n 19, at para 204.

²³ Prosecutor, n 6, 3 at fn 10.

of the relevant legal arguments. The Prosecutor's determination not to engage in analysis does little to assist the development of an international criminal law generally and his own office in particular. But it does perhaps reflect the way in which ICL has fought shy of judging aggression even indirectly in any scenario since the Second World War.

The second possibility to draw in discussion of the crime of aggression in the Communication, despite the restriction of the Court's mandate, could have arisen if the Prosecutor had been willing to revisit the relationship between the *jus ad bellum* and *jus in bello* concepts. Undoubtedly, this would have been taking him into contentious territory. As it was, by merely stating that the ICC's mandate was 'to examine the *conduct during the conflict*, but not whether the *decision to engage* in armed conflict was legal' Mr Moreno-Ocampo confirmed the legal doctrine that separated in law the conduct of warfare and the decision to undertake military action.²⁴ In this he was doing no more than follow the persistent approach in practice that the legality of the one should neither confirm nor deny the legality of the other. The principle has been protected by international lawyers with immense vigour over the past half century. It represents the attempt to dissolve the arguments that a 'just war' can condone any behaviour.²⁵ In other words, carpet bombing cities, targeting civilian installations to degrade public morale rather than achieve any direct military purpose, should no longer be acceptable merely because the aim is to defend a nation against a wicked regime.

With good reason, lawyers have been proud of the doctrine. It has been an important advance in judging victors as well as the losers of any conflict. Christopher Greenwood, for one, suggested that 'to allow the necessities of self-defence to override the principles of humanitarian law would put at risk all the progress in that law which has been made in the last hundred years or so'.²⁶ But is the doctrine necessarily complete? Why, in theory, should the waging of an illegal war not induce a greater degree of responsibility particularly with regard to the impact on civilians? Such a proviso was in effect presented by the Chief British Prosecutor at the Nuremberg Tribunal. He declared that the 'killing of combatants is justifiable ... only where the war itself is legal. But where the war is illegal ... there is nothing to justify the killing'.²⁷ Those sentiments could apply with greater force when those killed were civilians. Thomas Hurka, for instance, talks of an intuitive response to the matter, which suggests that an illegal (or unjust) war means that all killings arising from the pursuit of that conflict have to be morally suspect.²⁸

²⁴ Prosecutor, n 6, at 4 (original emphasis).

²⁵ For a modern interpretation of this doctrine, see M Walzer, *Just and Unjust Wars* (New York, Basic Books, 3rd edn, 2000).

²⁶ C Greenwood, 'Jus ad bellum and Jus in bello in the Nuclear Weapons Advisory Opinion' in L Boisson de Chazournes and P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge, Cambridge University Press, 1999) 247–66 at 264.

²⁷ Quoted in Walzer, n 25, at 38.

²⁸ See T Hurka, 'Proportionality in the Morality of War' (2005) 33 *Philosophy and Public Affairs* 34–66 at 44–5.

This does not have to mean that forces in defence of an act of aggression should be released from their international humanitarian law obligations. Far from it. It rather infers that those civilian and military leaders intent on pursuing an illegal war are made responsible for all casualties that flow from it. There is every reason in such circumstances for that responsibility to be criminal as well as civil in nature.

However, there is a clear preference in various international criminal tribunals not to become embroiled in this issue. It represents a minefield for lawyers, where unnecessary time and energy could well be lost by concentrating on the now traditionally ambiguous interpretation of the legality of the use of force. The practical difficulties also have their ethical foundations. François Bugnion, for instance, has suggested that

no demands of justice or equity could ever justify all the nationals of one State—or even all the members of its armed forces—being lumped together as criminals simply because they are citizens of a State regarded as an aggressor. In other words, the criminal responsibility of all the nationals of a State or of all the members of its armed forces cannot be deduced from that State's international responsibility.²⁹

There is only limited power in this argument, structured to preserve the integrity and independence of *jus in bello* regardless of the context of a conflict. Yoram Dinstein proclaims that 'the proposition of equality between the belligerents is, first and foremost, a precept of common sense'.³⁰ Any attempt to disrupt this balance is seen as prejudicial to the whole edifice of international humanitarian law. But such a view does not necessarily find favour in all circumstances or from all quarters. For instance, Christopher Greenwood, writing on the Advisory Opinion of the International Court of Justice on Nuclear Weapons, interpreted the Court's ruling as suggesting that to be lawful the use of nuclear weapons 'would, of course, also have to comply with the requirements of the *jus ad bellum*, i.e. of the right of self-defence'.³¹ He concluded that the 'two requirements are, however, cumulative, not alternative'.³² There is no clarity, however, as to the question whether in the event of a finding that a conflict was commenced against international law, it would follow axiomatically that the particular killing of any civilians or indeed combatants by the aggressor state would be unlawful and thus a breach of customary international humanitarian law. The cumulative nature of the test suggested by Greenwood could operate both ways. On the one hand it could suggest that illegality for the former necessarily means illegality under the latter. Equally, one could claim that the cumulative process implies that regardless of the circumstances of the conflict, whether legal or not, the laws of war have to be applied to

²⁹ F Bugnion, 'Just wars, wars of aggression and international humanitarian law' (2002) 84 *International Review of the Red Cross* 523, 536.

³⁰ Y Dinstein, *War, Aggression and Self Defence* (Cambridge, Cambridge University Press, 2nd edn, 1995) 156.

³¹ Greenwood, n 26, at 264.

³² *Ibid.*

each and every specific incident that causes complaint. Thus, each civilian death, for instance, would have to be assessed in relation to the standard rules applied under international humanitarian law and in particular the Geneva Conventions and their additional protocols. Indeed, the preamble to the Additional Protocol I to the Geneva Conventions reaffirmed this proposition stating that

the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

The position could of course merely testify to a tendency in ICL to establish a separation between the crime of aggression on the one hand and all other international crimes on the other. In other words, the determination that a person in authority, whether military or civilian, was responsible for instituting a crime of aggression would not, in the absence of specific evidence to the contrary, entail responsibility for any particular atrocity committed during a conflict.

The possibility that a symbiosis might exist between *jus ad bellum* and *jus in bello* was recognised, however, in the Final Report to the Prosecutor of the ICTY, which considered the possibility of an investigation into the NATO bombing campaign in Kosovo in 1999. The considered 'expert' view was that 'a person convicted of a crime against peace may, potentially, be held criminally responsible for all of the activities causing death, injury or destruction during a conflict.'³³ This at least speaks to that concern expressed by Bugnion by focusing attention on those who might be identified as responsible for a crime of aggression, rather than tarring all participants with the same legal brush. In other words, culpability would adhere to those most senior figures in the military and civilian administration responsible for initiating an illegal war not the rank and file troops. Nevertheless, the Report still suggested that the relationship between *jus ad bellum* and *jus in bello* was 'not completely resolved' and therefore, given that the ICTY's mandate did not include the crime of aggression, it would be better to leave the issue to one side.³⁴

It would appear that Mr Moreno-Ocampo has adopted, in essence, the same argument, although in the absence of any reasoning it is difficult to surmise one way or the other. The issue is inherently problematic, which in itself might suggest an international criminal tribunal should avoid considering any circumstances other than the most obvious and unambiguous. Despite clear arguments to the contrary, the Iraq War does not fall easily into that latter category, at least if one listens to the legal arguments deployed by the US and UK governments.³⁵ However, there is one significant difference between the ICC Statute and the ICTY

³³ NATO Report, n 10, at para 30.

³⁴ *Ibid*, at para 32.

³⁵ UK Attorney-General's Opinion (7 March 2003) <http://216.239.59.104/search?q=cache:CvtEo3Ed-vsJ:www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_a_attorney_general%27s_advice_070303.pdf+Attorney+general+opinion+iraq+1441&hl=en&gl=uk&ct=clnk&cd=1> and, from the US perspective, see Ruth Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-Defence', (2003) 97 *AJIL* 576.

Charter. In the latter, no mention whatsoever was made of the crime of aggression. There was no doubt, therefore, that it lay outside the Tribunal's concern. The ICC, in contrast, is only excluded from the *exercise* of jurisdiction over the crime of aggression.³⁶ This causes us to ask whether it would have been an exercise of jurisdiction if the legality of the use of force were considered as contextually relevant when determining issues pertinent to the decision whether to initiate an investigation under Article 53 ICC for crimes against humanity, for instance? In other words, would the Court really have been exercising jurisdiction over the crime of aggression if determining that question was vital in assessing responsibility for the deaths, in particular, of civilians in the military attack?³⁷

In light of this, perhaps we should take a closer look at the connection between the allegation of a crime of aggression and other crimes within the jurisdiction of the ICC. In particular, there might be an immediate evident distinction between war crimes and crimes against humanity. In the former, the test for ICC jurisdiction under Article 8(1) is 'in particular' when war crimes are 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'. There may be little scope here, then, for connecting war crimes to a war in breach of international law. But for crimes against humanity the wording is slightly more ambiguous, reflecting a broader conception at play.

Article 7(1) of the ICC Statute defines a crime against humanity as 'any of the following acts [which are listed as including murder, extermination, enslavement, imprisonment etc] when committed as part of a widespread or systematic attack directed against any civilian population'. The last phrase in this formulation is then defined in Article 7(2)(a) as 'a course of conduct involving the multiple commission of acts [listed in Article 7(1)] against any civilian population, pursuant to or in furtherance of a State or organization policy to commit such an attack'. Unlike for war crimes under Article 8, the attack may present itself as a contextual issue. Although we will examine the details of the crime against humanity below, for present purposes it is important to see how ICL has addressed this matter. Therefore, it is relevant that in the ICTY, 'attack' has been defined as 'a course of conduct involving the commission of acts of violence'.³⁸ This does not necessarily suggest that the legality of a conflict has any relevance. However, when considering whether the attack was 'directed against a civilian population' there might be cause to contemplate the nature of aggressive war engaged. In *Blaskić*, for instance, it was confirmed that for a crime against humanity to be established, the civilian population had to be the primary object of attack.³⁹ To determine this, one

³⁶ Art 5(2) of the ICC Statute.

³⁷ Equally, one could enquire whether it would have been exercising jurisdiction if the legality of war was considered relevant in the assessment of the 'gravity' of the case under the admissibility criteria in Art 17(d) or Art 53(1)(c) of the ICC Statute. I shall consider the matter of 'gravity' in section VI below.

³⁸ *Prosecutor v Blagojevic and Jokic*, Trial Chamber, No IT-02-60 T (17 January 2005) para 543.

³⁹ *Prosecutor v Blaskić*, Appeals Chamber, No IT-95-14 (29 July 2004) para 106.

would need to consider various factors, some of which were repeated in *Blaskić* to include 'the means and method used in the course of the attack, the status of the victims, their number, [and] the discriminatory nature of the attack'.⁴⁰ There might be a case in these circumstances for considering the lawfulness of any military invasion where a determination of illegality flowed from the object of such an intervention. In other words, if the civilian population was the target of a military action and it was this quality that rendered the action of dubious legality and an act of aggression, then the nature of the action in theory must be brought into an evaluation of an allegation of crimes against humanity.

In relation to Iraq, the UK Attorney-General admitted in his opinion to the Prime Minister of 7 March 2003 that 'regime change cannot be the objective of military action'⁴¹ and that there existed the (remote) possibility that a 'prosecution for murder' could flow from an assessment that 'the military action is unlawful'.⁴² This is a tentative acknowledgement that indeed the legality of any attack under international law could be considered of material importance not just for assessing a crime of aggression but also other crimes under the ICC Statute.

Was the Prosecutor's analysis adequate in the light of these comments? The Office of the Prosecutor has imposed upon itself the responsibility in any investigation to 'put emphasis on a *comprehensive* analysis of crimes committed' (emphasis added).⁴³ Potentially, that could imply an assessment of the *jus ad bellum* context, particularly if the link between crimes within the practising jurisdiction of the Court and the crime of aggression presented an important legal consideration. It seems highly contentious to ignore the question altogether and provide no analysis of the law in this field whatsoever. Although the report to the ICTY was generally found to be suspect, it nonetheless represented an attempt by the Prosecutor of that Tribunal to seek some kind of legal guidance.⁴⁴ If that was also sought by Mr Moreno-Ocampo, or the issue was considered by his team, then surely it would have been sensible to publicise such advice. A bland dismissal on the basis of jurisdiction does not seem to do justice to the situation.

In sum, therefore, if the two possibilities for reviewing the allegation of a crime of aggression presented above possess force then it would have been appropriate for the Prosecutor to consider the nature of the military action. This would apply with particular emphasis where the aim of a conflict was to unseat an existing civilian regime and/or a significant amount of targeting was directed at civilian locations. It would not have been a question of exercising jurisdiction over the

⁴⁰ *Ibid.*

⁴¹ See UK Attorney-General's Opinion, n 35, at para 36.

⁴² *Ibid* para 34.

⁴³ ICC Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, (September 2003) at 7 <http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf>.

⁴⁴ For a critique of the report, see N Ronzitti, 'Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?' (2000) 82 *IRRC* 1017.

crime of aggression. Rather, it would have been fully contemplating the context within which the commission of other crimes could have been properly assessed. However, ICL has failed to develop any sophisticated process of judgment with regard to the most serious international crime. Although Nuremberg gave cause for optimism that aggression would be subjected to judicial scrutiny, there has been little development since. The lack of a readily acknowledged definition, despite some attempts to remedy this, confirms the tepid nature of the approach. The Prosecutor's total dismissal is thus perhaps made more understandable. It does not make it any more palatable. Indeed, it suggests that the Iraq example has given added force to the separation of the crime of aggression from all other international crimes. The former remains a legal concept-in-waiting. It does not even register as a matter of context.

IV. Genocide and Crimes Against Humanity

The Prosecutor's second dismissal was related to claims of genocide and crimes against humanity. The former held little substance under predictable interpretations of the definitions in the Genocide Convention 1948⁴⁵ and the ICC Statute alike. Mr Moreno-Ocampo restated that the information provided demonstrated 'no reasonable indicia that Coalition forces had "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such"'.⁴⁶ Indeed, it is hard to counter this conclusion, if only because it has been notoriously difficult in the past to persuade international bodies to countenance a designation of genocide for even the most horrendous mass killings.⁴⁷ Nonetheless, what evidence there is would be unlikely in any circumstances to support an objective identification of a specific intent to destroy in whole or part the people of Iraq. It might have been sensible for the Prosecutor to spell out why in a little more detail but perhaps we can forgive his brevity on this particular occasion. The state of ICL is such that only in the most extreme circumstances does 'genocide' acquire legal purchase. This has been given added emphasis since the ICJ's ruling in *Bosnia and Herzegovina v Serbia and Montenegro*.⁴⁸

⁴⁵ Convention on the Prevention and Punishment of the Crime of Genocide GA Res 260A(III) 9 December 1948.

⁴⁶ Prosecutor, n 6, at 4.

⁴⁷ The unworthy failure by the international community to recognise initially the events in Rwanda and Darfur as amounting to genocide are examples of this tendency.

⁴⁸ The ICJ's ruling in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia And Herzegovina v. Serbia and Montenegro)* 26 February 2007 <<http://www.icj-cij.org/docket/files/91/13685.pdf?PHPSESSID=eb075713e63df511753e241bf526d130>> reaffirms the difficulty in not only identifying genocide but also ascribing responsibility for that crime.

For crimes against humanity, however, we might pause for a moment—something Mr Moreno-Ocampo appears not to have done. Although we might not expect any hard-pressed prosecutor to engage in endless speculation about the theoretical parameters of this crime, his lack of commentary reflects the continuing ambivalence that suffuses international law on the subject. But what did the Prosecutor say? First, he noted that a ‘widespread or systematic attack directed against any civilian population’ was necessary for such a charge to acquire some credibility. He then announced, by way of analysis, that ‘the available information provided no reasonable indicia of the required elements.’⁴⁹ Of course conjoining genocide and crimes against humanity does have some precedent in ICL. The ICTY in *Tadić*, for instance, recalled that both the Nuremberg judgment and subsequent ‘codifications of international law’ identify genocide and apartheid as two examples of the crime against humanity’s ‘most egregious manifestations.’⁵⁰ This does not, however, preclude lesser atrocities from qualifying as crimes against humanity: a position recognised, in effect, in the ICC Statute itself, which separates the crime from those others within the Court’s jurisdiction. Such delineation suggests the Prosecutor should have been circumspect about conflating the two concepts in this way. It should not have precluded a more considered analysis of the applicability of Article 7 of the ICC Statute to events in Iraq. Indeed, a valuable contribution to the understanding of this slightly amorphous international crime could have been the outcome if he had been more forthcoming.⁵¹

Of course, the Prosecutor could have been of the opinion that allegations of crimes against humanity before him were manifestly ill founded. He might have dismissed the claim simply on the basis that the deaths of civilians in Iraq bore no comparison with perceived notions of ‘atrocious’ notoriously attributed to incidents of mass violence over the past half century. The supposition would have been that the number of people killed in the conflict by Coalition forces could not encroach upon our innate understanding of what amounts to such a crime and thus could not offend ‘humanity’ in a sufficiently impressive way. That might have been the Prosecutor’s view. If so this would not have been unduly out of step with ICL and IHL precedents. Antonio Cassese, for instance, has reminded us that ICL is only concerned with those responses to ‘serious violations of international standards on human rights or humanitarian law that reach the legal threshold of international crimes.’⁵² The ICC Statute similarly restricts itself to ‘the most serious crimes of international concern.’⁵³

The tendency of ICL therefore is not to consider the deaths of civilians during a conflict as *prima facie* qualifying as an atrocity under these criteria. Rather, one

⁴⁹ Prosecutor, n 6, at 4.

⁵⁰ *Prosecutor v Tadić*, Trial Chamber II, Opinion and Judgment No IT-94-1-T (7 May 1997) para 622.

⁵¹ The uncertainty of definition of crimes against humanity has been well reviewed, for instance, in B van Schaak, ‘The Definition of Crimes Against Humanity; Resolving the Incoherence’ (1999) 37 *Columbia Journal of Transnational Law* 787–850.

⁵² See Cassese, n 7, at 3.

⁵³ ICC Statute Art 1.

has to prove that the intention was to target the civilian population as an abstract whole and as a separate entity from the opposing military forces. Similarly, such attack must be considered heinous in its intent. But such a test does not imply a simplistic and unsophisticated legal approach to the possibility of atrocity having taken place. One should not assume that the aims of military action are pure from a legal/moral perspective. On the contrary, the magnitude of any alleged crime against humanity warrants a more considered investigation, one that is at least based on the general and well-established precept of international humanitarian law that the 'civilian population and individual civilians shall enjoy general protection against dangers arising from military operations'.⁵⁴ In this respect, it is well-trodden ground that the determination of whether a crime against humanity has been perpetrated should follow a clear analytical path.⁵⁵ This is a logical consequence of the definition of the crime stated in Article 7 of the ICC Statute, which requires a 'widespread or systematic attack directed against any civilian population' to have taken place, during which various specified abuses have been committed. The Prosecutor could have followed this schema. Four particular enquiries should have been prompted.

First, the presence of an 'attack' against a civilian population is a precondition and should have been assessed. This concept, included in Article 7 of the ICC Statute, has been subject to much legal analysis in recent times, particularly in the ICTY. As we have already seen, here we find that the principle at stake is whether through a 'course of conduct', rather than particular heinous acts, the civilian population was targeted.⁵⁶ Guénaél Mettraux has observed that this entails a determination that 'the attack was directed primarily against the civilian population, and was not simply the consequence of an overzealous use of military power'.⁵⁷ But this is subject to some qualification, particularly as it might appear to encourage a less than scrupulous approach to the conduct of any military operations. Mettraux thus quotes from the ICTY's judgment in the case of *Kupreškić* that 'the cumulative effects' of repeated attacks that might individually be given the benefit of the doubt in relation to their intent 'may not be in keeping with international law'.⁵⁸ The judgment concluded that such 'pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity'.⁵⁹ This in turn suggests that any conflict should be reviewed to consider the possibility of a crime against humanity having been committed, a process that

⁵⁴ See in particular Art 51(1) of the First Additional Protocol to the Geneva Convention IV 1977 ('Additional Protocol I').

⁵⁵ See, eg, van Schaak, n 51.

⁵⁶ *Tadić*, n 50, at para 644.

⁵⁷ G Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 *Harvard International Law Journal* 237, 247.

⁵⁸ *Ibid*, at 248.

⁵⁹ *Prosecutor v Kupreškić*, Trial Chamber, Judgment, No IT-95-16 (14 January 2000) para 524, quoted in Mettraux, n 57, at 248.

should involve assessing the whole extent of civilian suffering inflicted (and the weapons deployed) rather than a series of individual and isolated allegations of atrocity.

Second, whether ‘a pattern or methodological plan’ could have been interpreted to disclose ‘a deliberate attempt to target a civilian population’ should have been assessed.⁶⁰ The scale of civilian casualties inflicted might well be crucial here. *Tadić* confirmed that the ‘number of victims’ would be an important indicator in assessing the presence of such a ‘plan’. But in contrast to his analysis of ‘war crimes’, the ICC Prosecutor makes no mention of the numbers of civilian deaths under the rubric of ‘crimes against humanity’. Even in relation to war crimes, the extent of his acknowledgement that ‘a considerable number of civilians died’ in the conflict is initially restricted to casualties ‘during the military operations’.⁶¹ Such a constrained admission incorrectly limits the potential scope of criminal activity. The obligations of the Coalition continued after the formal cessation of hostilities and included the occupation, a fact recognised indeed by the Prosecutor in relation to charges of unlawful killing against the UK that took place during that period.⁶² Although the ICTY is burdened by a restriction based on a nexus between the attack and an armed conflict,⁶³ the ICC Statute imposes no such requirement. It is, in any event, common ground that crimes against humanity do not require war to be the exclusive context.⁶⁴ The mounting death toll since the war ended is therefore relevant, as is the independent analysis that has estimated that approximately 31 per cent of civilian casualties have been the result of Coalition action.⁶⁵ Although many of the post-war casualties have been a product of the ‘insurgency’, numerous deaths have resulted directly from continuing military-type action by Coalition forces and as a result of the destruction of civilian infrastructure caused by its operations.⁶⁶ Naturally, such ‘regrettable’ collateral damage does not of itself indicate that the civilian population was the target. It does, however, provide evidence of some form of plan that has seen the civilian population under attack. Of course, one has to admit that any conflict is likely to produce such evidence. But this should not preclude its consideration in any legal assessment.

Third, even if the scale of casualties did not provoke concern the Prosecutor should then have applied himself to consider whether other indicators (combined

⁶⁰ *Tadić*, n 50, at para 653.

⁶¹ Prosecutor, n 6, at 6.

⁶² Prosecutor, n 6, at 7, where, in relation to allegations of war crimes, he refers to ‘civilians ... killed during policing operations in the occupation phase’.

⁶³ See ICTY Statute Art 5.

⁶⁴ See Cassese, n 7, at 73.

⁶⁵ See G Burnham, R Lafta, S Doocy and L Roberts, ‘Mortality after the 2003 Invasion of Iraq: a Cross-sectional Cluster Sample Survey’ (2006) *Lancet* 69491–9 at 69496.

⁶⁶ Iraq Body Count, whom the Prosecutor cites in n 6, identified 10,000 or more civilian deaths to February 2004 due to Coalition forces (see <http://www.iraqbodycount.org/editorial_feb0704.php>). He merely refers to 3,900 casualties reported during the invasion. Why did he limit his reference in this way?

with the civilian casualty figures) might have established if the nature of attack against the civilian population was ‘widespread or systematic’. Given that both torture⁶⁷ and imprisonment,⁶⁸ are itemised crimes against humanity under the ICC Statute, the Prosecutor should have considered that significant numbers of detainees had been abused by US⁶⁹ and UK forces⁷⁰ during the occupation. These would have provided further evidence—‘indicia’, to use his word—of the widespread effect upon the civilian population, particularly as these latter abuses could not be characterised or passed off as simply ‘collateral damage’.

Fourth, if one accepts that evidence of heavy civilian losses and of other large-scale abuse provided the basis for further scrutiny, the Prosecutor should have contemplated whether there was any indication of the *mens rea* of the offence present. Was a widespread or a systematic attack against the civilian population ‘intended’? The ICTY case of *Blaskić* identified four key elements that should be taken into account.⁷¹ First, ‘the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community’. Second, ‘the perpetration of a criminal act on a very large scale against a group of civilians’. Third, ‘the preparation and use of significant public or private resources’. And fourth, ‘the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan’. The Prosecutor provided no analysis in relation to any of these elements. But if the circumstantial evidence pointed to a disproportionate suffering by the civilian population (if only after the war ended), should this have been enough to provoke further enquiry?

This returns us to the theme of the aims of the conflict. For these Mr Moreno-Ocampo might have examined the UK’s officially stated purposes of intervening in Iraq. The overall objective was ‘to create the conditions in which Iraq disarms in accordance with its obligations under UNSCRs and remains so disarmed in the long term.’⁷² That would certainly suggest that the target was military. However, among the tasks allocated to this adventure was the removal of ‘the Iraqi regime’. Whether or not the subsequent Coalition Provisional Authority was sanctioned by the UN Security Council, the initial intention to displace the ‘regime’ in its entirety, thus including all civilian manifestations such as might have existed including its administrative, judicial and governmental structures, ensured that the ‘attack’ (which has

⁶⁷ ICC Statute Art 7(1)(f).

⁶⁸ ICC Statute Art 7(1)(e).

⁶⁹ Human Rights Watch, ‘The Road to Abu Ghraib’ (Report) (June 2004) <<http://hrw.org/reports/2004/usa0604/>> since followed by ‘By the Numbers; Findings of the Detainee Abuse and Accountability Project’ <<http://hrw.org/reports/2006/ct0406/>>.

⁷⁰ Amnesty International, ‘Beyond Abu Ghraib; Detention and Torture in Iraq’ (March 2006) <<http://web.amnesty.org/library/index/engmde140012006>>: much of the information contained therein was widely available before the Prosecutor issued his Communication.

⁷¹ *Prosecutor v Blaskić*, Trial Chamber, No IT-95-14 (3 March 2000) para 203.

⁷² Ministry of Defence Operation Telic repeated in ‘Operations in Iraq: First Reflections’ (July, 2003) <http://www.globalsecurity.org/military/library/report/2003/iraq-ops_1st-refs_ukmod_july03_index.htm>.

to encompass all aspects of the operation)⁷³ was not restricted to overcoming the resistance of Iraqi security forces. There was at least an indication here that the civilian population as a whole, represented in part by its structural manifestations and its burden of casualties, was a politically identified collective target. The United Nations Special Rapporteur on the Right to Food, Jean Ziegler, has added to this sense of victimisation through his analysis of the plight of the civilian population as a result of Coalition activities.⁷⁴ He reported on the ‘cutting of food and water supplies to cities under attack’, which would be a breach of international humanitarian law.⁷⁵ He might also have referred to the parallel contravention of Article 8(2)(b)(xxv) of the ICC Statute.⁷⁶ Similarly, the inhumane treatment of a significant number of detainees and the denial of their basic human rights has been widely reported to the extent that it suggests ‘an established and apparently authorized part of the detention and interrogation processes in Iraq for much of 2003–2005’.⁷⁷

Taking all this into account, it seems odd that the Prosecutor should dismiss out of hand any and all claims that a crime against humanity had taken place in Iraq. Even when operating within the confines of the legal definition of this crime, there was sufficient cause for him to take the allegations seriously. Admittedly this would not necessarily have resulted in a charge of crimes against humanity being substantiated. But it would suggest a context within which a more complete factual and legal assessment would have been warranted. Certainly, the information that abounded concerning the history of the invasion and occupation demanded more than two lines of legal analysis that the Prosecutor provided. Given that the crime of aggression, which might otherwise have captured liability in this respect, remained steadfastly outside the Prosecutor’s concern, there was every reason to reflect upon the circumstances, if only to assess the possible scope of international criminal law.

These questions probably occurred to Mr Moreno-Ocampo but there was a clear determination to avoid their implications. His approach was indeed presaged by the first communication he delivered about the Iraq War in 2003.⁷⁸ The message dictated that the conflict was outside the ICC’s domain. Iraq was not a party; nor was the United States. How it could have escaped his notice at this time that the United Kingdom was both a willing partner in the Coalition, along with other

⁷³ *Prosecutor v Brdjanin*, Trial Chamber, No IT-99-36-T (1 September 2004) para 132 concluded that the ‘acts of the accused do not “need to be committed in the midst of the attack”’. As long as they ‘are sufficiently connected to’ the attack then post-conflict matters must be included.

⁷⁴ See UN Doc E/CN.4/2005/47.

⁷⁵ *Ibid*, at para 14.

⁷⁶ This states that ‘[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival’ could qualify as a war crime.

⁷⁷ Human Rights Watch “No Blood, No Foul”: Soldiers’ Accounts of Detainee Abuse in Iraq’ (July 2006) <<http://hrw.org/reports/2006/us0706/>>. UK forces have been accused of similar treatment: see, for instance, Amnesty International, ‘Beyond Abu Ghraib: Detention and Torture in Iraq’ <<http://web.amnesty.org/library/index/engmde140012006>>.

⁷⁸ See Office of the Prosecutor, n 9.

states, and a party to the ICC Statute remains a mystery. It is as if he was attempting to deny any possibility that the conflict could attract his or the Court's interest and concern. Of course that, as I have said, would have been an understandable political decision. Nonetheless, the failure to treat the matter with a degree of seriousness, at least as regards the Communication's reasoning, opens the Office of the Prosecutor to considerable critique. Would it not have been of greater political value, for the ICC as a whole, for the Prosecutor to go beyond the bland and dismissive approach he adopted and treat with caution the claim communicated to him? Even if he identified grey areas of the law, this would have been a useful contribution to the ICC's aim 'to guarantee lasting respect for and the enforcement of international justice'.⁷⁹ Similarly, it would have assisted those interested ('victims', human rights NGOs, individuals, even states) in providing information concerning other possible international crimes in whatever location.

The over-arching concern, however, is whether ICL has yet come to terms with its own criminal categories. There may well be clarity on particular elements of the crime against humanity but the case of Iraq has demonstrated that there is substantial uncertainty when it comes to considering casualties and abuses that occur during a 'professionally' executed military campaign. When can the number of civilian casualties and victims of defined abuse as a whole attract interest under ICL? Specific incidents may still be of concern in terms of war crimes (a matter I turn to in the next section) but when does the overall picture and context register? When, indeed, should damage cease to be viewed only as collateral? Should the aims of a conflict have any bearing in this respect or are we again slave to the *jus ad bellum* and *jus in bello* distinction? The Prosecutor's reluctance to engage in any discussion on the matter echoes and reinforces the lack of confidence that ICL possesses particularly in the matter of civilians caught up in a war. It can operate effectively at the level of the extreme, the clear 'evil' intent and execution. But it has less capacity for addressing potential moral wrongs that occur in the 'grey zone' as Primo Levi might have described it,⁸⁰ where military action is undertaken knowing civilians will bear the brunt of the suffering not only during direct conflict but as an on-going condition under occupation.

V. War Crimes

When we turn to the Prosecutor's treatment of alleged war crimes we do at last encounter an area of greater certainty for international criminal law as a discipline. Two areas attract his attention; the treatment of detainees and unlawful killings on the one hand, and attacks causing civilian casualties on the other.

⁷⁹ ICC Statute Preamble.

⁸⁰ See P Levi, *The Drowned and The Saved* (London, Abacus, 1999) in which the 'grey zone' typified the moral dilemma where the judgement of particular actions became next to impossible.

The first of these did not detain the Prosecutor long. Not this time because of a willingness to dismiss allegations but because for both the treatment of detainees and unlawful killings he was happy to conclude that ‘there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed’.⁸¹ Indeed, this should not have caused him any degree of anxiety, particularly as the incidents to which he referred had already been the subject of political condemnation by the UK government, the UK civil courts, and specific cases before Courts Martial.⁸² The evidence was not rehearsed by the Prosecutor, even though a conservative estimate of victims is referred to that does not accord with the numbers of complaints of abuse allegedly committed by the Coalition noted by the ICRC, Amnesty International and Human Rights Watch among others.⁸³ Nonetheless, ‘crimes’ are acknowledged.⁸⁴

However, it was in relation to the more difficult war crime of ‘intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians’⁸⁵ that the Prosecutor displayed a deeper degree of analysis otherwise absent in his Communication. His point of departure was the declaration that under ‘international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime’.⁸⁶ While not technically incorrect, this statement sits uneasily with the general notion of protection afforded to a civilian population during armed conflict by the Geneva Conventions. Non-combatant immunity, which is a central premise of IHL, is based on a position that it is morally objectionable to attack anyone who is not participating in hostilities, who poses no direct threat, who is ‘innocent’ in the sense of being harmless to opposing forces. There may well be a process of evaluation to be undertaken to see if any particular death or deaths fall foul of specific legal provisions but the underlying proposition is that civilians should not be the object of attack. This is a persistent initial position that serves to place a continuing obligation on armed forces to assess whether or not their tactics and use of weaponry are legitimate. By starting with a reversal of that principle, implying instead a prima facie immunity for armed forces, in effect, sends an odd message from an officer of the ICC. It implies that international humanitarian law norms have only technical application. Although, again, this might be true in practice, does it communicate

⁸¹ Prosecutor, n 6, at 8.

⁸² See, eg, *Al Skeini and others v Secretary of State for Defence* [2004] EWHC 2911, [2005] 2 WLR 1401. The case was later heard in the Court of Appeal ([2005] EWCA Civ 1609, [2006] HRLR. 7) and the House of Lords ([2007] UKHL 26). See also Court Martial of Corporal Payne and others in relation to the same facts held end 2006 <<http://news.bbc.co.uk/1/hi/uk/5363320.stm>>.

⁸³ See, for instance, Amnesty International, ‘Iraq: Killings of Civilians in Basra and al-’Amara’ (Report) (11 May 2004) <<http://web.amnesty.org/library/index/engmd140072004>> and UN Committee against Torture 33rd Session Conclusions and Recommendations CAT/C/CR/33/3.

⁸⁴ I return to the subsequent conclusions as to possible action when I consider the Prosecutor’s reflections on the ‘gravity’ of these offences.

⁸⁵ ICC Statute Art 8(2)(b)(iv).

⁸⁶ Prosecutor, n 6, at 5.

the message of protection that surely inspired significant elements of the 'war convention' as Michael Walzer has called it, the Geneva Conventions, and indeed the ICC? The Prosecutor seems to have forgotten the roots of his discipline, his chosen language undermining any sense of justice attaching to contemporary notions of the purposes of ICL.

Perhaps, though, this is too harsh a critique to level against a hard-pressed prosecutor. But it does question the angle of concern that he intends to take. In that sense, he is not out of step with most international criminal law initiatives, which on the whole have not been instituted with a view to finding justice for those 'unfortunately' killed as a result of military conflict. Their aim has been fixed to a significant degree on designated atrocities. It might even be possible to infer that the Prosecutor's opening line on war crimes reflects the moral position of ICL at present, one that does not adhere to the notion of 'innocence' resting blanket-like over a state's civilian population.⁸⁷ That judgment is left in abeyance until evidence can be shown that brings to the fore the innocent nature of a victim as a result of heinous actions by one side to the conflict. Until that moment when forces can be seen to drift beyond the pale, civilians occupy a position akin to objects in a battlefield terrain. They are no different from buildings, landmarks, background, or earth.⁸⁸ Their destruction causes no legal outrage unless and until tested according to particular analysis.

This form of analysis was reasonably well referenced by the Prosecutor, at least with regard to the ICC Statute. He focused on the identification of a war crime under Article 8 in the event that either the principles of distinction or proportionality had been breached. His treatment was then directed against the particular complaint made to him concerning the use of 'cluster-munitions'. According to the Prosecutor there was insufficient information to demonstrate either 'clear excessiveness in relation to military advantage' or the 'involvement of nationals of States Parties'.⁸⁹ He did not countenance the possibility of complicity of UK personnel in the acts of US forces, as I have already noted. Nor indeed did he see fit to counter the general proposition of ICL that if a weapon system is not specifically prohibited its 'use per se does not constitute a war crime under the Rome Statute'.⁹⁰ Again, this might not be incorrect but it paints a very partial picture of international humanitarian law. It does little to recognise the substantial concern expressed by international humanitarian organisations such as the International Committee of the Red Cross, which doubts that such weapons can

⁸⁷ For a moral philosophical view on 'killing the innocent' during war, see R Norman, *Ethics, Killing & War* (Cambridge, Cambridge University Press, 1995) 159–206.

⁸⁸ There is even a case to suggest that their protection is less secure than other terrain or objects. The destruction for instance of buildings using the 'distinctive emblems' of the Geneva Conventions is apt to spark instantaneous and particular condemnation, something that is not reserved for general civilian casualties that are otherwise unlikely to be reported let alone investigated.

⁸⁹ Prosecutor, n 6, at 6.

⁹⁰ *Ibid*, at 5.

be used legally given their effects on civilian populations.⁹¹ It fails to acknowledge the Additional Protocol I point of first principle that ‘the right of the Parties to the conflict to choose methods or means of warfare is not unlimited’.⁹² It ignores that it ‘is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering’.⁹³ And it fails to recognise the reversal of the notion that explicit prohibition is required to render a weapon illegal that could be inferred from Additional Protocol I provisions requiring states parties to take precautions against the possibility of civilian targets being hit during an engagement.⁹⁴ Indeed, it is common practice, and a requirement under Article 36 of Additional Protocol I, for new weapons to be assessed in this respect in order to establish a veneer of legality that presumably otherwise remains in doubt. These are such established principles of international humanitarian law that their absence in the publicised analysis represents a glaring omission. It also sends out a signal that is a distortion of the underlying basis for examining the behaviour of armed forces during a conflict.

Nonetheless, the Prosecutor does chose to outline the information that he had gleaned from publicly available sources and direct from the UK government in response to a request for additional information. The latter was presumably on the question of precautions taken against causing civilian casualties. The Prosecutor was able to tell us that UK forces used precision-guided weapons, that they were aware of their legal responsibilities, that they used ‘computer modelling’ in assessing targets, and that they identified targets in advance. These all went to suggest to him that the attacks made were not excessive and thus not intentionally directed against civilians.

On the face of it, this displays a fairly innocuous conclusion. But there might be one troubling aspect that again reflects a trend in international criminal, and indeed international humanitarian, legal thinking. This lies in the undercurrent assumption that technology has resolved the issue of inferred intent. The good grace of the military is taken for granted by employing lawyers at the front and deploying smart weapon systems. There is a message here that a modern army, which pays attention to its legal responsibilities, as indeed required by Additional Protocol I, and deploys sophisticated weapons, will be untroubled by any investigation that seeks to examine whether civilian casualties are excessive. Collateral damage that may occur is almost presumed to be acceptable within this analytical environment.

⁹¹ See what is the latest call for action against cluster munitions by the International Committee of the Red Cross: <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/cluster-munition-statement-061106?opendocument>>. See also <www.stopclustermunitions.org> and the conference attempting to construct a Treaty banning the use of such munitions.

⁹² Additional Protocol I Art 35(1).

⁹³ *Ibid* Art 35(2).

⁹⁴ *Ibid* Art 57(2)(a)(ii). Art 36 also states that ‘[i]n the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party’.

The danger of such a position is clear. It suggests that with technology one can solve the moral *and* legal difficulties that attach themselves to the conduct of war at least with regard to civilian casualties. But should ICL impose a greater burden as a result of improvements in technology? Is there an implication that those states possessing the most advanced weaponry will rarely if ever be assessed negatively for inadvertent civilian deaths whereas those who do not possess such resources will not be so protected? Or does it imply that varying standards should be applied in ICL terms when it comes to military forces of differing sophistication?

Peter Rowe warned of the difficulties that technology now posed for IHL following NATO's air strikes in 1999.⁹⁵ He remarked that Additional Protocol I provisions might not have kept up with developments in military hardware in the sense that they might 'control "crude" methods of bombing, but they do not deal effectively with attacks using smart weapons, targeted at an alleged military objective'.⁹⁶ And he proposed that the Geneva Conventions would benefit from redrafting along the lines suggested by Article 2(3) of Protocol III to the 1981 Conventional Weapons Convention that prohibits making 'any military objective located within a concentration of civilians the object of attack, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the effects of the attack'.

None of this thinking is reflected in the Prosecutor's Communication. Again, this is not to say that the assessment of the information acquired would have necessarily led to a different conclusion. Rather, the point worth repeating is that a reflective prosecutor, sensitive to the impact on and import of his pronouncements both for those who have suffered during the Iraq conflict and the development of international criminal law generally, should have at least demonstrated an awareness of the uncertainties surrounding IHL interpretation.

VI. Gravity of the Alleged Offences

The final issue worthy of concern in the Communication relates to the conclusion regarding the gravity of those crimes the Prosecutor does recognise as having been committed by a state party. He accepted that the UK had committed war crimes. He accepted that 'wilful killing and a limited number of victims of inhuman treatment' would condemn certain UK military personnel.⁹⁷ He accepted that these were 'grave' crimes. But nonetheless he dismissed the allegations as worthy of provoking any further investigation by the ICC. Why? Not because the matter was being dealt with by UK authorities. This aspect of 'complementarity' was not

⁹⁵ P Rowe, 'Kosovo 1999; the Air Campaign—Have the provisions of Additional Protocol I withstood the test?' (2000) 82 *IRRC* 147–64.

⁹⁶ *Ibid.*, at 162.

⁹⁷ Prosecutor, n 6, at 7–8.

considered. Instead, the reason provided was that there were simply not enough victims. He stated that the number of those who suffered at the hands of UK troops 'was of a different order than the number of victims found in other situations under investigation or analysis' by his office.⁹⁸ He pointed to the thousands of killings being scrutinised in Uganda, the millions displaced in the Congo and Darfur. 'Other situations under analysis also feature hundreds or thousands of such crimes', he said.⁹⁹ The situation in Iraq therefore 'did not appear to meet the required threshold of the Statute' to be counted as involving crimes of sufficient gravity. He relied on an interpretation of Article 8(1) of the ICC Statute that jurisdiction for the Court only flows from the 'large-scale commission' of war crimes. Although he noted that this requirement is not absolute (the words 'in particular' attached to 'large-scale' mean that this threshold is not a 'strict' one) he nevertheless decided that it gives him significant guidance in deciding whether to promote further investigation. Consequently, the Prosecutor felt able to dismiss the allegations as failing to indicate crimes of sufficient gravity.

There can be little doubt that a prosecutor of the ICC must exercise a degree of discrimination in deciding whether to advise the Pre-Trial Chamber to pursue an investigation or not. The simple economics of the situation require him to reach judgements on information collated and received. Christopher Keith Hall suggested in the consultation process instituted by the ICC with regard to the Office of the Prosecutor, that 'the priority for preliminary examinations or investigations should be situations where there were large numbers of victims of crimes'.¹⁰⁰ He also noted that such 'priority would ensure that there were economies of scale' in the Prosecutor's activities.¹⁰¹

Equally, the whole tenor of the language of ICL is imbued with a sense of scale. Bruce Broomhall, for one, refers to international criminal law as a response to crimes, which 'by their exceptional gravity "shock the conscience of humanity"'.¹⁰² The ICC Statute reflects this by addressing 'the most serious crimes of concern to the international community as a whole'.¹⁰³ Gravity in the sense applied by the Prosecutor, therefore, relates to the overall appreciation of the crimes allegedly committed. It does not relate to the severity of individual suffering in any particular incident following a breach of international humanitarian law. This accords with international criminal law in general and the principle of complementarity enshrined within the ICC Statute in particular. In his conclusion to the Communication the Prosecutor confirmed that national 'effectively functioning legal systems are in principle the most appropriate and effective forum for addressing allegations of crimes of this nature'.¹⁰⁴

⁹⁸ *Ibid.*, at 9.

⁹⁹ *Ibid.*

¹⁰⁰ C Keith Hall, 'Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations' (March 2003) <<http://www.icc-cpi.int/library/organs/otp/hall.pdf>>.

¹⁰¹ *Ibid.*

¹⁰² Broomhall, n 15, at 10.

¹⁰³ See para 4 of the Preamble to the ICC Statute.

¹⁰⁴ Prosecutor, n 6, at 9.

The difficulty in this specific conclusion, and indeed the whole doctrine of complementarity as promoted with vigour by the Office of the Prosecutor generally,¹⁰⁵ is significant. Most crucially it denies the importance and variability of context. That context could be legal as well as political. For the former, the various issues of concern raised in this article suggest that there are important areas of doubt (particularly in relation to joint responsibility, the lawful use of weapon systems, the deaths of civilians) that would warrant greater exposure and investigation. It is not just a factual matter, or at least should not be so. As Christopher Hall continued with his advice to the ICC, it should not just be about numbers.¹⁰⁶ Investigations might also be justified 'where the number of victims would be relatively small in comparison to other situations, but where the impact was devastating to the countries concerned'.¹⁰⁷ Undoubtedly this would have been difficult to establish on the available evidence in relation to Iraq but its possibility given the large number of deaths of civilians, the impact of those deaths on the population as a whole,¹⁰⁸ and the arguable complicity of citizens of State Parties in relation to the actions of non-State Parties could have been considered.

As it stands, however, it would appear that only numbers count, a point paradoxically both emphasised and denied by the Prosecutor more generally in his February 2006 update on his work. There he may have stressed that he 'considers various factors' in assessing gravity but the only one mentioned is 'the number of victims of particularly grave crimes'.¹⁰⁹ The other factors are left undefined. They should at least include the 'interests of victims' and the 'interests of justice' that are supposed to be at the forefront of the Prosecutor's mind in his review, according to Article 53(1)(c) of the ICC Statute. Mireille Delmas-Marty has told us that the Office of the Prosecutor has produced a memorandum dealing with other influential factors including 'feasibility and effectiveness of an investigation and its impact, inter alia, on the stability and security of the country concerned'.¹¹⁰ The 'pertinence of various forms of alternative justice (negotiation, mediation and reconciliation) ... with respect to the interests of the victims' is also noted. None of these were mentioned by the Prosecutor in his Iraq communication. Perhaps they were not considered relevant, in which case the matter of numbers seems to have predominated.

But does this reflect ICL in general? Delmas-Marty suggests it should not, at least in the sense that the purpose of such international endeavour is in part to

¹⁰⁵ See Office of the Prosecutor, n 43.

¹⁰⁶ See Hall, n 100.

¹⁰⁷ *Ibid.* It is interesting to note that the responsibility of superior political leaders has been attached to relatively small-scale crimes at the ICTY. See, for instance, the amended indictment in *Boskoski* Case No IT-04-82 <<http://www.un.org/icty/indictment/english/bos-ai051102.pdf>>.

¹⁰⁸ See L Roberts, R Lafta, J Khudhairi and G Burnham, 'Mortality before and after the 2003 invasion of Iraq: cluster sample survey' (2004) 364 *Lancet* 1857–64.

¹⁰⁹ See ICC Office of the Prosecutor, Update on Communications received by the Prosecutor, (10 February 2006) <http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf>.

¹¹⁰ M Delmas-Marty, 'Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC' (2006) 4 *Journal of International Criminal Justice* 2, 9.

respond to attacks 'on universal values'.¹¹¹ And William Schabas in this volume points us to the ICC Pre Trial I's decision that 'social alarm' might also be a significant issue.¹¹² It should be noted here that such alarm is to be that of 'the international community'. The question to be asked therefore is: did the invasion of Iraq and the subsequent treatment of its civilian population in anyway contravene those values and create that social alarm? If we took a strict legal approach it would be difficult to answer that with any certainty. But international criminal justice, a related but distinct concept I would suggest, might provoke a more assured response. Less concerned with assessing the likelihood of success in prosecution and more concerned with a range of factors (memorialisation, reconciliation etc) such a sense of justice could not be deaf to the public and global opposition to the invasion and occupation. The mass response on the streets of Europe and around the world might not be a relevant factor but the very fact that the UN Security Council would not sanction military intervention explicitly surely indicated sufficient alarm felt by the international community. But to what extent does such a concept of international criminal justice really exist or indeed to what extent can an appreciation of social alarm be discerned? Perhaps the Iraq War has merely reinforced a potential characteristic of this domain. When power and justice clash, power overcomes. But what happens to justice then?

VII. Conclusion

In 2006 Antonio Cassese, that doyen of international criminal law, remarked that the ICC in general and the Prosecutor in particular had to 'become more alert to the current and pressing demands of international justice'.¹¹³ His main concerns focused on the Prosecutor's responses to the situation in Darfur. But his position is no less applicable when it comes to the Communication that was issued on Iraq.

However, Cassese might have missed the point through his critique. There may well be substantial grounds for lamenting the particular responses of the Prosecutor, criticisms that demand specific attention and analysis. But what fault can be laid at Mr Moreno-Ocampo's door if his responses fit well within the current demands not of international justice but international criminal law? Perhaps then our only criticism would be that he had failed to use his position to develop ICL along lines that challenged rather than solidified all those restrictions and negative aspects that have plagued the discipline.

¹¹¹ *Ibid.*

¹¹² *Prosecutor v Thomas Lubanga Dyilo* ICC Case No ICC-01/04-01/06, decision of the Prosecutor's Application for a warrant of arrest, Art 58, 24 February 2006.

¹¹³ A Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 *Journal of International Criminal Justice* 434, 441.

It would of course be legal folly to expect Mr Moreno-Ocampo to take up a position as a legal-philosopher for the benefit of an emerging legal field. But equally, we surely do not want his office to become associated with an absence of critique, legal reflection and transparent consideration of those politically sensitive issues that might come before it. On the contrary, if the ICC really is to become the reference institution for international criminal law, it is not only the judgments produced by the Trial Chamber that will count. The Prosecutor's responses to issues of admissibility, to investigations that suggest the legal threshold for further examination, to matters that perhaps deserve to be dismissed, will all feature as significant elements in the development of the discipline. At present, there is a danger that ICL will stall before it has had a chance of firmly emplacing itself in the global legal consciousness. Existing tribunals have limited shelf-lives and there is little to suggest that the international community has the appetite to introduce new initiatives. When the ICTY, ICTR, Sierra Leone tribunals begin to disappear from the scene we will only have the ICC to provide the litmus test for the strength and vitality of international criminal law. Given that the ICC cannot hope to provide judgments with any great regularity to resolve difficult issues of legal interpretation it is surely sensible that the Office of the Prosecutor responds to this demand. It does not require massive resources. But it does require a commitment to treat seriously the legal issues placed before it by concerned citizens of the world.

The Prosecutor's Communication on Iraq represents a poor appreciation of such a role. His 10-page communication was a risible response both legally and politically to the gravity of the circumstances by any reasonable interpretation. One might argue that this does not fall within the proper role of the Prosecutor. And perhaps he was attempting to avoid the kind of criticism that was levied against the report on the NATO bombing campaign.¹¹⁴ But this chapter has attempted to show, in part, how it is impossible to separate deep legal analysis from the factual circumstances presented. One does not exist in isolation of the other. They are mutually constructive.

If he had embarked on such an analysis we might then have seen the beginnings of a discourse that helped substantiate the judicial evolution of ICL. Much as we have seen with the Advocate General system employed in the European Court of Justice, the Prosecutor might have developed his role as a resource to the Court, and to other tribunals, rather than just act as a Kafkaesque gatekeeper.

Perhaps also it is a pity that the awkward political environment created by the Iraq war had to be encountered by the ICC at such an early stage in its development. But the fact that no response is likely to be forthcoming suggests more forcefully that ICL has been set back by this encounter. Even the marginal gains of the previous fifteen years or so have been eroded, underlying concerns about

¹¹⁴ See, eg, N Ronzitti, n 44.

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ICL's effectiveness and universal applicability being emphasised at the expense of optimism. The questions now are whether ICL can attain any credibility globally, and whether it can develop as a universally acknowledged, supported and effective institution in terms of international law. The Prosecutor's Communication has hardly encouraged a positive reply to these queries.

6

Complicity before the International Criminal Tribunals and Jurisdiction over Iraq

WILLIAM A SCHABAS

I. Introduction

There can be little doubt, as other chapters in this volume make clear, that both the crime of aggression and serious violations of international humanitarian law have been committed by armed forces of the United States, the United Kingdom and other states who have participated in the 2003 invasion of Iraq and its subsequent occupation. In February 2006, responding to complaints filed pursuant to Article 15 of the Rome Statute of the International Criminal Court, the Prosecutor concluded that there was a reasonable basis to investigate:

During the course of analysis, allegations came to light in the media concerning incidents of mistreatment of detainees and wilful killing of civilians. General allegations included brutality against persons upon capture and initial custody, causing death or serious injury. In addition, there were incidents in which civilians were killed during policing operations in the occupation phase. The Office collected information with respect to these incidents as well as with respect to the relevant national criminal proceedings undertaken by the governments of States Parties with respect to their nationals. Analysis was conducted in the light of the elements of wilful killing (Article 8(2)(a)(i)) and torture or inhumane treatment (Article 8(2)(a)(ii)). After analyzing all the available information, it was concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment.¹

The Prosecutor nevertheless decided not to proceed because he felt that the crimes committed were not sufficiently serious, in terms of the scale of their perpetration, to justify prosecution. He said that other situations being analysed by the Prosecutor were more deserving because of the numbers of victims involved.²

¹ 'Letter of Prosecutor dated 9 February 2006' (Iraq) 7–8.

² The position taken is difficult to reconcile with the Prosecutor's initiative, taken at almost the same time, to make non-homicidal war crimes, namely the enlistment, conscription and active use of child soldiers, the object of his first prosecution: *Prosecutor v Lubanga* (Case No ICC-01/04-01/06-8),

One of the shortcomings of the Prosecutor's analysis is its failure to consider complicity in war crimes as a basis for further investigation. His response to the complaints dealt with allegations of direct participation in violations of the Rome Statute of the International Criminal Court by nationals of States Parties, and more particularly nationals of the United Kingdom, over whom there is no doubt about the tribunal's jurisdiction. However, thorough examination of the problem required him to consider, in addition, the possibility that nationals of States Parties to the Statute were accomplices in crimes committed by nationals of other states, especially the United States of America. Britain is very much the junior partner in the military activities, with considerably less than 10 per cent of the number of troops used by the United States. Moreover, reports of atrocities attributable to soldiers of the United States are a matter of common knowledge.³ Important questions arise concerning the possible complicity of British nationals in war crimes and other atrocities perpetrated by American nationals. The stone is left unturned, however, in the assessment by the Prosecutor of the International Criminal Court.

This chapter is concerned with the forms of participation in war crimes, other serious violations of international humanitarian law, and the crime of aggression, within the particular context of the conflict in contemporary Iraq since the 2003 invasion. After examining general principles of responsibility for complicity in international crimes, applicable within the growing discipline of international criminal law, it considers the legal implications with respect to such liability that flow from the illegality of the war itself. There is, the chapter concludes, a reasonable basis for the Prosecutor to review his decision not to investigate further.

II. Precedents for Complicity in International Criminal Law

'Complicity' is defined by the *Oxford English Dictionary* as 'partnership or involvement in wrongdoing'. Doudou Thiam, the Special Rapporteur of the International Law Commission charged with drafting the Code of Crimes Against the Peace and Security of Mankind, described the law of complicity as 'a drama of great complexity and intensity'.⁴ Probably all criminal law systems punish accomplices, that is, those who aid, abet, counsel and procure or

Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006. On the issue of gravity for the purposes of establishing prosecutorial priorities, see: R Murphy, 'Gravity Issues and the International Criminal Court' (2006) 17 *Criminal Law Forum* 281.

³ SM Hersh, *Chain of Command, The Road from 9/11 to Abu Ghraib* (New York, Harper Collins, 2004) R Falk, I Gendzier and R Jay Lifton, *Crimes of War, Iraq* (New York, Nation Books, 2006).

⁴ Eighth Report on the draft Code of Crimes against the Peace and Security of Mankind, by D Thiam, Special Rapporteur, UN Doc A/CN.4/430 and Add 1, para 38, at 32.

otherwise participate in criminal offences, even if they are not the principal offenders.⁵ As a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia declared in the ‘Celebici’ case, ‘that individuals may be held criminally responsible for their participation in the commission of offences in any of several capacities is in clear conformity with general principles of criminal law’.⁶ Another Trial Chamber has identified a customary law basis for the criminalisation of accessories or participants.⁷

The word ‘complicity’ itself does not seem to be much favoured by legal drafters in modern times, as can be seen in its absence in the statutes of the various international criminal tribunals. There, the preferred nomenclature includes such terms as ‘planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime’,⁸ ‘[o]rders, solicits or induces the commission of a crime’,⁹ ‘aids, abets or otherwise assists...including providing the means for [a crime’s] commission’¹⁰ and ‘[c]ommitted, participated as accomplice, organized or directed others’.¹¹ However, the 1948 Genocide Convention uses the term ‘complicity’ in its enumeration of ways in which an offender may contribute to the intentional destruction of a national, ethnic, racial or religious group, in whole or in part.¹² The Convention’s reference to complicity in genocide is reprised without modification in the statutes of the Yugoslavia and Rwanda Tribunals,¹³ though not in the Rome Statute of the International Criminal Court or the newer courts for Sierra Leone and Lebanon. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment refers to ‘complicity or participation’.¹⁴

⁵ *United Kingdom v Schonfeld et al*, (1948) 11 LRTWC 64 (British Military Court) 69–70; *United Kingdom v Golkel et al*, (1948) 5 LRTWC 45 (British Military Court) 53.

⁶ *Prosecutor v Delalić et al* (Case No IT-96-21-T), Judgment, Nov 16, 1998 para. 321.

⁷ *Prosecutor v Tadić* (Case No IT-94-1-T), Opinion and Judgment, 7 May 1997 paras. 666, 669. The Trial Chamber provided several examples of post-Second World War cases to support its assertion: *France v Wagner et al.*, (1948) 3 LRTWC 23, 40–2, 94–5 (Permanent Military Tribunal at Strasbourg); *United States v Weiss* (1948) 11 LRTWC 5 (General Military Government Court of the United States Zone); ‘Provisions Regarding Attempts, Complicity and Conspiracy’ (1948) 9 LRTWC 97–8; ‘Inchoate Offences’ (1948) 15 LRTWC 89; ‘Questions of Substantive Law’ (1948) 1 LRTWC 43.

⁸ Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc S/RES/827 (1993), Annex, Art 7(1); Statute of the International Criminal Tribunal for Rwanda, UN Doc S/RES/955 (1994), Annex, Art 6(1); Statute of the Special Court for Sierra Leone, Art 6(1).

⁹ Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, Art 25(3)(b).

¹⁰ *Ibid*, Art 25(3)(c).

¹¹ Statute of the Special Tribunal for Lebanon, UN Doc S/2006/893 (2006), Art 3(a).

¹² Convention on the Prevention and Punishment of the Crime of Genocide (1951) 78 UNTS 277, Art 3(e). The term is reproduced in the genocide provisions of the Statute of the International Criminal Tribunal for the former Yugoslavia, above n 8, Art 4(3); and the Statute of the International Criminal Tribunal for Rwanda, above n 8, Art 2(3).

¹³ Statute of the International Criminal Tribunal for the former Yugoslavia, above n 8, Art 4(3)(e); Statute of the International Criminal Tribunal for Rwanda, above n 8, Art 2(3)(e).

¹⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) 1465 UNTS 85, Art 4(1). See also International Convention on the Suppression and Punishment of the Crime of Apartheid (1976) 1015 UNTS 243, Art III, which uses the following: ‘[c]ommit, participate in, directly incite or conspire’ and ‘[d]irectly abet, encourage or co-operate in the commission of the crime of apartheid’.

The responsibility of accomplices was recognised in the Statute of the International Military Tribunal, which undertook prosecution of Nazi leaders at Nuremberg, only in a general way:

[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.¹⁵

However, the Nuremberg Tribunal seems to have given its Charter a liberal interpretation informed by general principles of law. In fact, many of those convicted at Nuremberg were held responsible as accomplices rather than as principals.¹⁶ According to a United States Military Tribunal,

[t]his is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.¹⁷

A provision in Control Council Law No 10, which applied to post-war trials by German courts and courts of the occupying powers after the Second World War, established criminal liability of an individual who was an accessory to the crime, took a consenting part therein, was connected with plans or enterprises involving its commission or was a member of any organisation or group connected with the commission of any such crime.¹⁸ The ‘Nuremberg Principles’ formulated by the International Law Commission state that ‘[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law’.¹⁹

Sometimes complicity is described as ‘secondary’ perpetration or ‘accessory liability’.²⁰ But when large-scale violations of human rights are being committed, generally with the involvement of the state or its agencies, ‘secondary’ is hardly an appropriate adjective to capture the nature of the involvement in the crime. As explained by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia:

Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the

¹⁵ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) (1951) 82 UNTS 279, Art 6 *in fine*.

¹⁶ Formulation of Nuremberg Principles, Report by J Spiropoulos, Special Rapporteur, UN Doc A/CN.4/22, para 43. In *Prosecutor v Tadić* (Case No IT-94-1-T), Opinion and Judgment, 7 May 1997, para 674, the Trial Chamber noted that the post-Second World War judgments generally failed to discuss in detail the criteria upon which guilt was determined.

¹⁷ *United States of America v Alstötter et al* (‘Justice trial’) (1948) 6 LRTWC 1, 62.

¹⁸ Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946, 50–550, Art II.2.

¹⁹ Principles of the Nuremberg Charter and Judgment Formulated by the International Law Commission, GA Res. 177A(II); Report of the International Law Commission covering its second session, 5 June to 29 July 1950, UN Doc A/1316 12, Art VII.

²⁰ *Prosecutor v Kunarac et al* (Case No IT-96-23-T & IT-96-23/1-T), Judgment, 22 February 2001.

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participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.²¹

Therefore, a provision authorising prosecution for complicity seems important in order to reach those who organise, direct or otherwise encourage genocide but who never actually wield machine guns or machetes.

The applicable texts of the Statutes of the United Nations *ad hoc* tribunals for the former Yugoslavia, Rwanda and Sierra Leone employ identical formulations:

[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [...] shall be individually responsible for the crime’.

Explaining the rationale for the provision, the Secretary-General’s Report to the Security Council states ‘that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.’²²

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has given Article 7(1) a very broad interpretation:

An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to all those ‘responsible for serious violations of international humanitarian law’ committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or ordering to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including conspiracy, incitement, attempt and complicity) ... it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable.²³

The Appeals Chamber noted that such an interpretation was compelled by the nature of the crimes being addressed by the Tribunal. These generally result not

²¹ *Prosecutor v Tadić* (Case No IT-94-1-A), Judgment, 15 July 1999 para 191.

²² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) UN Doc S/25704 (1993) para 54.

²³ *Prosecutor v Tadić* (Case No IT-94-1-A), Judgment, 15 July 1999 paras 189–90.

from the criminal propensity of single individuals but are manifestations of collective criminality, carried out by groups of individuals acting in pursuance of a common criminal design. While some members of the group physically perpetrate the criminal act, the participation and contribution of the other members of the group is often vital in facilitating its commission. 'It follows that the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question', concluded the Appeals Chamber.²⁴

III. Complicity and the International Criminal Court

The post-Second World War precedents and the judicial work of the more recent United Nations *ad hoc* tribunals are of interest to the extent that they develop general principles of international criminal law. These may be of some relevance to national and international jurisdictions with authority over events in Iraq committed since the invasion, although obviously the *ad hoc* tribunals cannot exercise jurisdiction because of their territorial and temporal limits. The International Criminal Court may, however, exercise jurisdiction over all acts committed since 1 July 2002, when the Rome Statute entered into force, providing certain conditions are met. The Court, which has been operational since mid-2003, is potentially competent to deal with serious violations of international humanitarian law committed in Iraq as a result of the invasion and occupation by the United States, the United Kingdom and their allies.²⁵

Pursuant to Article 12 of the Rome Statute, the Court may exercise jurisdiction over the territory of a state party. Iraq has neither signed nor ratified the Statute, so this provision does not now find application. Nevertheless, the Court may be given jurisdiction retroactively by a declaration made by the government of Iraq in accordance with Article 12(3) of the Rome Statute. This hypothesis does not appear to have been considered by the Prosecutor. In other situations, such as Uganda and Côte d'Ivoire, the Prosecutor has solicited such retroactive declarations from states. Their validity has been acknowledged in decisions of the Court.²⁶ Thus, it cannot be ruled out that the Court may exercise jurisdiction over acts perpetrated in Iraq since the 2003 invasion, although this will require a declaration by the government. A future government of Iraq that is sufficiently independent of the United States and the United Kingdom might contemplate

²⁴ *Ibid*, para 191.

²⁵ On the International Criminal Court generally, see: WA Schabas, *Introduction to the International Criminal Court* (Cambridge, Cambridge University Press, 3rd edn, 2007).

²⁶ See, eg, *Situation in Uganda* (ICC-02/04-53), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 para 32.

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such a measure. Given the ‘social alarm’²⁷ created in the international community by the Iraq invasion, the Prosecutor might publicly invite Iraq to make a retro-active declaration accepting jurisdiction in accordance with Article 12(3) of the Rome Statute.

The Court may also exercise jurisdiction over the territory of a state that has neither signed nor ratified the Statute where a situation concerning the territory of that state is referred by the Security Council, acting under chapter VII of the Charter of the United Nations. The precedent for this is Resolution 1693 (2005), by which the Security Council referred the situation in Darfur, Sudan to the Court. Referral would seem highly unlikely because the United States and the United Kingdom have the power to veto such action by the Security Council.²⁸

Finally, the Court may also exercise jurisdiction over nationals of a state party. Because the United Kingdom has ratified the Rome Statute prior to the invasion, its nationals are liable to prosecution. It was on this basis that the Prosecutor examined allegations concerning Iraq and reported upon them, as mentioned at the beginning of this chapter. It is clear that the Court may exercise jurisdiction over nationals of the United Kingdom without further action or declaration, because the United Kingdom is a state party to the Statute. The only further initiative required is for the jurisdiction in such cases to be ‘triggered’. This may take place at the initiative of a state party to the Rome Statute, in accordance with Article 14, or of the Prosecutor, acting *ex proprio motu* pursuant to Article 15. No state party has triggered the jurisdiction against the United Kingdom. The Prosecutor’s initial examination of the question of British liability for war crimes committed in Iraq was on the basis of Article 15.

Complicity is addressed in Article 25(3) of the Rome Statute:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

²⁷ The expression is used by Pre-Trial Chamber I as a standard for determinations of the gravity of cases: *Prosecutor v Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006 para 46. The Pre-Trial Chamber did not subscribe to the Prosecutor’s purely quantitative approach to gravity, expressed in various statements, including his reply to the Iraq complaints.

²⁸ In accordance with Art 27(3) of the Charter of the United Nations.

- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide

The text is more detailed than the equivalent provisions in the statutes of the *ad hoc* tribunals. There can be little doubt that it provides a relatively seamless enumeration, capable of covering the criminal behaviour not only of the primary perpetrators but also those who have been involved in ordering, soliciting or otherwise facilitating the commission of crimes. These provisions also apply 'equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute'.²⁹ Superiors may also be prosecuted for failure to prevent or punish crimes committed by their subordinates.³⁰

Where guilt is alleged based on complicity, there is no requirement that the Court have jurisdiction over the actual perpetrator of the atrocity. Even where an atrocity is committed by a national of a state that is not a party to the Rome Statute, the Court has jurisdiction to the extent that a national of a state party was a participant. This is a well-understood and generally accepted dimension of the law of complicity. As the judges of the International Criminal Tribunal for Rwanda have noted, 'all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven'.³¹ Under more banal circumstances, this principle enables courts to convict an adult of complicity in a crime committed by a child or by someone else to whom criminal liability does not apply, such as a diplomat or an insane person.

Applying this concept to Iraq, nationals of the United Kingdom can be held liable for violations of the Rome Statute committed by troops of the United States. Where it can be shown that nationals of the United Kingdom were knowing participants in war crimes or crimes against humanity committed by American soldiers, the application of the Rome Statute is relatively straightforward. In his response to the complaints about Iraq, the Prosecutor did not refer to any incidents

²⁹ Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, Art 27(1).

³⁰ *Ibid*, Art 28.

³¹ *Prosecutor v Akayesu* (Case No ICTR-96-4-T), Judgment, 2 September 1998, para 530. Also: *Prosecutor v Musema* (Case No ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para 174.

where such complicity, in the form of aiding and abetting, was alleged, and it may be that the many complaints to him did not provide sufficient indications of this to justify further action.

More generally, the complicity provisions were of little practical interest to the Prosecutor, given his conclusion that the underlying crimes themselves, attributable to British nationals, were not of sufficient gravity to justify further action. If the hypothesis is that war crimes of much greater magnitude may have been committed by United States troops, the gravity threshold may be more easily satisfied. Thus, the possibility that British nationals participated in such crimes as accomplices begs further consideration. More specifically, the question of British participation in American war crimes by virtue of involvement in a 'joint criminal enterprise' arises.

IV. Joint Criminal Enterprise

Of particular interest is Article 25(3)(d), which sets out a concept of complicity that is often referred to in national justice systems as 'common purpose' liability. Basing itself upon Article 25(3)(d), the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has crafted a form of complicity that it has said is implicit in the relevant text of its Statute. The Appeals Chamber has given such a form of complicity the name 'joint criminal enterprise'.³² There is as yet no judicial interpretation of Article 25(3)(d) of the Rome Statute by the International Criminal Court. But given the references to the provision in the case law of the *ad hoc* tribunals concerning 'joint criminal enterprise', such decisions are obviously of considerable interest.

According to the Appeals Chamber of the Yugoslavia Tribunal, Article 25(3)(d) of the Rome Statute indicates that 'international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design'.³³ It is distinct from aiding and abetting, in that there is no requirement that the accomplice actually have knowledge of the intent of the principal perpetrator. The accomplice must share a 'common purpose' of a criminal nature with the principal perpetrator, and the acts of the principal perpetrator must be a natural and foreseeable consequence of the common purpose. This judge-made concept, whose existence is explained with reference to customary international law, has provided the Prosecutor with a powerful tool to address crimes committed by groups and organisations, where proof of the individual *mens rea* of specific acts is not always available.³⁴

³² *Prosecutor v Tadić* (Case No IT-94-1-A), Judgment, 15 July 1999 para 220.

³³ *Ibid*, para 193.

³⁴ A Marston Danner and JS Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' (2005) 93 *California Law Review* 77, 102–12, 131–46; M Elewa Bader, "'Just Convict Everyone!'" Joint Perpetration: From *Tadić* to *Stakić* and Back Again' (2006) 6 *International Criminal Law Review* 293.

In the *Tadić* appeal judgment, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia noted that often ‘collective criminality’ will involve situations where all co-defendants, acting pursuant to a common design, possess the same criminal intention. *Tadić* found authority for three categories of joint criminal enterprise liability. The first category involves cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention.³⁵ The second category is similar to the first category, with the common purpose being applied ‘to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps.’³⁶ In both the first and second categories, the participant must actually have had the criminal intent to commit the particular crime. Only in the third category, sometimes called the ‘extended form’ of joint criminal enterprise, is it required that the act be a foreseeable consequence of effecting the common purpose, which is an essentially objective standard of knowledge. As the Appeals Chamber explained, there are atrocities

where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect ‘ethnic cleansing’) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.³⁷

In other words, the third category allows the conviction of an individual who did not actually intend for the crime to be committed or have actual knowledge that his or her accomplices would commit it.

Under the ‘common purpose’ or ‘joint criminal enterprise’ form of participation, liability may arise where the accomplices did not participate knowingly in the crimes, as long as the offence, ‘while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose’, to use the words of the Appeals Chamber, cited above. However, not every ‘common purpose’ will result in criminal liability. It must be a ‘common purpose’ that is ‘made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court.’³⁸ To summarise, the Rome Statute

³⁵ *Prosecutor v Tadić* (IT-94-1-A), Judgment, 15 July 1999 para 196.

³⁶ *Ibid*, para 202.

³⁷ *Ibid*, para 204. Also: *Prosecutor v Ntakirutimana et al* (Case Nos ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004 para 465.

³⁸ Rome Statute, Art 25(3)(d)(i).

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establishes jurisdiction on the basis of 'joint criminal enterprise' liability for all crimes perpetrated in pursuit of a 'common purpose' to commit a 'crime within the jurisdiction of the Court'. On this basis, a person may be convicted for a crime in which he or she did not actually participate, as long as it is a natural and foreseeable consequence of the joint criminal enterprise to commit a crime within the jurisdiction of the Court. It is necessary, therefore, to interpret the scope of the expression 'crime within the jurisdiction of the Court'.

The expression 'a crime within the jurisdiction of the Court' is defined by Article 5(1) of the Rome Statute:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.

Article 5(2) goes on to explain that the Court may not exercise jurisdiction over the crime of aggression until certain conditions have been fulfilled, including definition of the crime. Taken in its entirety, Article 5 recognises that aggression is one of four 'crimes within the jurisdiction of the Court', but it does not allow actual prosecution for the crime of aggression pending satisfaction of the criteria in Article 5(2). The reference to aggression in Article 5(1) must be given some meaning, some useful effect (*effet utile*). Otherwise, the reference would be entirely extraneous and aggression would merely be one of an endless list of crimes not included in the jurisdiction of the Court, along with terrorism, drug crimes, adultery, shoplifting and driving while impaired. The reference to aggression in Article 5(1) as a 'crime within the jurisdiction of the Court' invites application with respect to the other provisions of the Statute where the same expression is employed, including Article 25(3)(d). By prosecuting nationals of the United Kingdom for war crimes and other serious violations of the Rome Statute committed by troops of the United States that were a 'natural or foreseeable consequence' of commission of another crime within the jurisdiction of the Court, namely aggression, the Court would not be exceeding the terms of Article 5(2), because it would not be prosecuting the crime of aggression.

It would be difficult to demonstrate that such a consequence of Article 25(3)(d) was intended by those who drafted the Rome Statute. Nor, however, can it be shown that the drafters meant to exclude such an interpretation of this provision. That is because Article 5 of the Rome Statute was dropped into the final draft on the last day of the Diplomatic Conference. It resulted from unrecorded negotiations and was not subject to the sort of public debate that enables meaningful conclusions about the intent of the drafters to be drawn. The intent of the drafters, that is, of the more than 160 states who participated in the negotiations, of the 120 who voted in favour of the Statute, and of the much smaller number who abstained or voted against, cannot be accurately divined from the record of

the Conference and the negotiations that preceded it. If anything, the *travaux préparatoires* indicate that a very large number of states felt strongly that the Court should exercise jurisdiction over the crime of aggression from the outset. When the Bureau of the Conference suggested that the reference to aggression be dropped because of a failure to reach consensus, considerable outrage was expressed about the establishment of a Court that would not be in a position to address what the Nuremberg judgment had called ‘the supreme crime’.³⁹ Article 5 is the attempt at compromise that resulted from this tension.

Other serious arguments reinforce the interpretation of Article 25(3)(d) by which the ‘common purpose’ may include the crime of aggression. Common-purpose liability has a powerful deterrent effect. As a general principle of criminal justice, it serves to discourage collective crimes by warning participants of dire consequences that may result not from their own behaviour but rather from that of their collaborators. A man who agrees to rob a bank with others, and who believes that violence will not be used, must recognise that he may be punished for unplanned violence perpetrated by his partners. The principle is just as valid, perhaps more so, when the use of force by powerful countries is employed. It is not enough for the British armed forces to take reasonable care to ensure that their own members act in accordance with international humanitarian law. To the extent that their associates, the United States armed forces, may commit war crimes or crimes against humanity, they may be held liable if these are perpetrated as part of a ‘common purpose’ to invade a sovereign state in violation of the Charter of the United Nations. This view is entirely consistent with the philosophy of the Rome Statute, which is to contribute to prevention of the ‘most serious crimes of concern to the international community as a whole’. It cannot be gainsaid that aggression figures among such ‘crimes of concern’, another important consequence of its inclusion in Article 5(1).

Thus, the Prosecutor may well have been in error when he made the following statement as part of his reply to the complaints on Iraq:

In other words, the International Criminal Court has a mandate to examine the *conduct during the conflict*, but not whether the *decision to engage* in armed conflict was legal.

As the Prosecutor of the International Criminal Court, I do not have the mandate to address the arguments on the legality of the use of force or the crime of aggression.⁴⁰

The suggestion that it would be improper for the Prosecutor to apply the crime of aggression in the manner proposed because it has not yet been defined as part of

³⁹ See, eg, UN Doc A/CONF.183/C.1/SR.33 para 17 (Movement of Non-Aligned Countries), para 29 (Syria), para 63 (Ghana), para 73 (Germany); UN Doc A/CONF.183/C.1/SR.34 para 9 (Trinidad and Tobago), para 43 (Azerbaijan), para 54 (Southern African Development Community), para 61 (Iran), para 68 (Cuba), para 72 (Jordan), para 94 (Sudan), para 98 (Poland); UN Doc A/CONF.183/C.1/SR.35 para 1 (Egypt), para 10 (Greece), para 12 (Nigeria), para 18 (Tunisia), para 29 (Afghanistan), para 30 (Algeria), para 33 (Indonesia), para 47 (Tanzania), para 57 (Qatar), para 58 (Philippines), para 64 (Iraq), para 70 (Mozambique), para 83 (Madagascar); UN Doc A/CONF.183/C.1/SR.36 para 9 (Angola), para 11 (Congo), para 19 (Oman), para 27 (Malta), para 32 (Zimbabwe), para 38 (Bolivia), para 45 (Cameroon).

⁴⁰ ‘Letter of Prosecutor dated 9 February 2006’ (Iraq) 4.

an amendment of the Rome Statute cannot be sustained. The crime of aggression already exists under customary international law. No more authority is required for such a proposition than a reference to the judgment of the International Military Tribunal sitting at Nuremberg. There, British and American jurists dismissed similar arguments formulated by counsel for the Nazi defendants. But there are also more recent references. In 2003, in his opinion to British Prime Minister Tony Blair on the legal issues involved in invading Iraq, Attorney-General Goldsmith warned of possible prosecution for the crime of aggression, which he recalled was recognised under customary international law.⁴¹ Note might also be taken of the proposals by the British and American governments in 1990 to prosecute Saddam Hussein for aggression before an international criminal tribunal.⁴²

There is much evidence to suggest that war crimes and crimes against humanity were perpetrated by United States military personnel. The most notorious are the crimes committed in Abu Ghraib prison, which became public knowledge by early 2004. Could British personnel, including the military and political leaders responsible for the invasion of Iraq, have foreseen the possibility of such abuse by United States troops? Case law establishes that such crimes be natural and foreseeable consequences of the joint criminal enterprises. Here, too, much of the evidence is already part of the public record. As early as 2001 and 2002, well before the invasion of Iraq, the masters of war in the Pentagon and the White House had made clear their contempt and disdain for the Geneva Conventions, which are the 'gold standard' for proper conduct during armed conflict.⁴³ At the very least, there is already enough evidence to create a presumption that the United Kingdom had been put on notice about the likelihood that American troops would violate the laws or customs of war and the 'principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'.⁴⁴

V. Conclusion

International criminal justice as it now stands is seriously constrained in its capacity to address serious violations of human rights committed during the Iraq invasion and subsequent occupation. An international court with comprehensive jurisdiction

⁴¹ Lord Goldsmith, Attorney-General, 'Iraq: Resolution 1441', 7 March 2003 para 34.

⁴² For British Prime Minister Margaret Thatcher, see her television interview of 1 September 1990: (1990) 61 *British Yearbook of International Law* 602; M Weller, 'When Saddam is brought to court ...' *The Times* (London 3 September 1990). For US President George Bush, see: *US Department of State Dispatch*, 22 October 1990, vol I(8) 205; *US Department of State Dispatch*, 12 November 1990, vol I(11) 260.

⁴³ T Golden, 'After Terror, a Secret Rewriting of Military Law' *New York Times* (New York 24 October 2004).

⁴⁴ The so-called 'Martens clause', which appears in the preamble of the 1907 fourth Hague Convention.

over the conflict could be created with the consent of the states involved, but this is a highly improbable scenario. It can also be created by Security Council resolution, but this too is equally unlikely, for essentially the same reasons. The limitations of the International Criminal Court are frustrating, and cause us to lose sight of the remarkable fact that for the first time in history we actually have a permanent international judicial organ capable of dealing with crimes committed during the conflict, at least in part.

The limitations on the International Criminal Court concern its subject-matter jurisdiction, as well as its jurisdiction over persons and territory. But the jurisdiction of the Court may be larger than it first appears once a creative approach is taken to the issue of secondary participation, that is, 'complicity'. Those over whom the Court has jurisdiction may be prosecuted not only for the crimes they themselves commit, but also those of their accomplices. The concept of joint criminal enterprise, as spelled out in Article 25(3)(d) of the Rome Statute, enables nationals of the United Kingdom to be prosecuted for crimes against humanity and war crimes perpetrated by nationals of non-party states, such as the United States of America. In its most extended form, joint criminal enterprise establishes liability not only over acts for which there is evidence of knowledge and intent of the accomplice, but also over acts that were objectively foreseeable. The 'common purpose' underlying such liability may be the aggressive war itself, an act listed in the Rome Statute as one of the crimes over which the Court has jurisdiction. In this manner, the Court may indirectly consider the issue of aggressive war, despite its inability at present to prosecute the crime itself.

The Prosecutor of the International Criminal Court has decided not to pursue investigations into violations of the Rome Statute committed in Iraq as part of the invasion and subsequent occupation of that country by the United States and the United Kingdom, and their allies. His explanation betrays a narrow approach that is devoid of imaginative interpretation. He justified the decision on the ground that many more victims had been killed in the Democratic Republic of Congo and northern Uganda as a result of violations of the Rome Statute than had perished in Iraq as a result of action by United Kingdom nationals. But this decision is difficult to reconcile with the real priorities of the Prosecutor, as manifested in the first case to proceed before the Court. It concerns the enlistment, conscription and active use of child soldiers in armed conflict. In contrast with the Prosecutor's own conclusion concerning British forces in Iraq, where it is conceded that there are reasonable grounds that wilful killing of civilians has taken place, there are no allegations of homicide in the first charges to be laid by the Prosecutor.⁴⁵ Issues concerning child soldiers are of serious concern and deserve the attention of the Court, but is the gravity of such acts at all comparable with the wilful killing of civilians by forces belonging to a permanent member of the Security Council acting in an aggressive war? One of the Pre-Trial Chambers of the new Court has said

⁴⁵ *Prosecutor v Lubanga* (Case No ICC 01/04-01/06), Decision on the confirmation of charges, 29 January 2006.

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that the litmus test of gravity is 'social alarm'.⁴⁶ Arguably, the social alarm resulting from atrocities committed by the world's superpower, one who proclaims its contempt for established norms of international humanitarian law, perpetrated with the involvement and encouragement of another permanent member of the Security Council, is a source of 'social alarm' that is at the very least comparable to that of the ancient practice of child soldiers, only recently condemned in international human rights, and conducted by private warlords in obscure conflicts. Aside from the gravity of the killing itself, surely the context of aggressive war ought also to contribute to the calculation of gravity that the Court is to make in ruling on admissibility of cases. All of this justifies moving the 'situation in Iraq' to the very top of the prosecutorial agenda, rather than relegating it to the category of 'cold case files'.

⁴⁶ *Prosecutor v Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006 para 46.

The Continuing Occupation?

Issues of Joint and Several Liability and Effective Control

CHRISTINE CHINKIN

I. Introduction

The military action against Iraq in March 2003 and its subsequent occupation, and more broadly the war on terror, have created many new situations of joint activity by states in which the United Kingdom has been an active participant.¹ In 2003 it joined the Coalition of Willing States in the invasion of Iraq² and with the United States was an occupying power operating through the Coalition Provisional Authority (CPA) after the end of active military operations.³ In 2007 UK forces remain in Iraq as part of the multinational force (MNF) under unified command, first authorised by Security Council Resolution 1511.⁴ There have been allegations of acts contrary to international humanitarian and human rights law being committed by the USA, the UK and their allies in Iraq, in Afghanistan and on the territory of third states, for example assertions that European states (including the UK) have allowed access to US aircraft carrying detainees to unknown destinations and fates.⁵

The focus of this chapter is not to determine the legality or otherwise of particular acts, whether committed by the UK, the USA or any other state (member of the Coalition or otherwise), but rather the basis for potential UK responsibility

¹ Of course, collective action in accordance with Security Council authorisation is at the core of the international order structured by the UN Charter.

² The European Court of Human Rights noted that ‘the greater part of the forces and support came from the United States (“US”) and the United Kingdom (“UK”): *Saddam Hussein v UK, and others* (App no 23276/04), inadmissible, 14 March 2006.

³ United Nations Security Council (UNSC) Res 1483 (22 May 2003) UN Doc S/RES/1483 differentiates between the USA and the UK as ‘occupying powers’ in Iraq and other states ‘working under the Authority’.

⁴ UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511 para 13. Other foreign personnel are part of the United Nations Assistance Mission for Iraq authorised by UNSC Res 1500 (14 August 2003) UN Doc S/RES/1500.

⁵ Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report: Explanatory memorandum’ Special Rapporteur Dick Marty, 7 June 2007.

under international law for the commission of internationally wrongful acts in Iraq, not committed directly by itself.⁶ It is unarguable that a state is responsible for an internationally wrongful act directly attributable to it through commission by its armed forces or other authorised personnel.⁷ It is also accepted that more than one state may be responsible for separate wrongful acts arising out of the same set of facts.⁸ But can a state that is engaged in common activity with other states also be held jointly and severally responsible for international wrongful acts committed by the public officials of those other states? In other words, are all states involved in a joint enterprise responsible for the wrongful acts of all others, or does a state bear responsibility solely for any internationally wrongful acts directly attributable to itself?⁹ In concrete terms: could the UK be held responsible for the acts of the USA, or other Coalition states, in Iraq?

These questions are made more complex by the hotly contested differing opinions about the legal basis of the UK presence in Iraq and the applicable legal regime there at different times since March 2003.¹⁰ In the eyes of many international lawyers the lack of any explicit UN Security Council (SC) authorisation means that the invasion and occupation of Iraq were illegal.¹¹ In contrast, the subsequent occupation and exercise of authority by the CPA were endorsed by UNSC Resolution 1483 with explicit reference to the 'authorities, responsibilities and obligations under applicable international law'.¹² After 28 June 2004 when the occupation formally ended, the CPA ceased to exist and the Interim Iraqi government 'assumed full responsibility and authority for governing Iraq', the basis for the UK continued military presence is the SC authorisation of the MNF at the 'request' of the Interim government.¹³ In addition, the UK and the USA both

⁶ State responsibility is in addition to individual responsibility for international crimes, which is not the subject of this chapter.

⁷ International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 28 January 2002 annex Arts 1 and 2.

⁸ Eg, in *Ilaşcu v Moldova and Russia* the European Court of Human Rights held both Russia and Moldova responsible for violations of the European Convention of Human Rights committed in Transnistria: (App no 48787/99) Judgment, 7 May 2004.

⁹ Conduct committed by an organ of the state is attributable to the state; ILC Articles on Responsibility of States Art 4. This includes the armed forces: see JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* vol 1: Rules (Cambridge, Cambridge University Press, 2005) 530.

¹⁰ The legality of UK and US actions in Iraq prior to March 2003 is also disputed, for example the no-fly zones over Southern Iraq and the 1998 bombing in Operation Desert Fox; D Malone, *The International Struggle over Iraq* (Oxford, Oxford University Press, 2006) 100, 160.

¹¹ This view was supported by UN Secretary-General Kofi Annan in a BBC interview, September 16 2004 <http://news.bbc.co.uk/2/hi/middle_east/3661134.stm>.

¹² This law was not spelled out but UNSC Resolution 1483 para 5 refers to the Geneva Conventions 1949 and the Hague Regulations 1907, presumably those provisions relating to occupied territories. The International Court of Justice has affirmed that human rights law is also applicable during military occupation: *Armed Activities on the Territory of the Congo* (DRC v Uganda) 2005 ICJ Reports (Judgment of 19 December 2005) especially paras 216–21.

¹³ UNSC Res 1546 (8 June 2004) UN Doc S/Res/1546. UNSC authorisation of the MNF has been reaffirmed by UNSC Resolution 1637, 11 November 2005 and UNSC Resolution 1723, 28 November 2006 until 31 December 2007.

established formal diplomatic relations with Iraq through the opening of their Embassies on 28 June 2004 and each maintains a large staff there.

However, in reality, it seems that in some ways the occupation has continued after June 2004, raising the question of whether occupation law could remain applicable. The preamble to UNSC Resolution 1546 notes the obligation of all forces in Iraq to comply with international law, including ‘humanitarian law’, and the annexed letter from Colin Powell to the President of the Council affirms the commitment of all forces in Iraq to act consistently with the ‘law of armed conflict, including the Geneva Conventions.’ Precisely what is referred to by these expressions is not clarified and there are a number of possibilities: the laws applicable to international armed conflict; those applicable to non-international armed conflict; those relating to occupation; or some non-specified amalgamation of laws. Indeed the Iraq War and its aftermath have challenged traditional understandings about the post-conflict scope and content of humanitarian law.¹⁴ In these circumstances the already uncertain regime for joint responsibility for international wrongful acts becomes even more problematic.

II. Joint Responsibility Under International Law

The International Law Commission’s (ILC’s) Articles on Responsibility of States for Internationally Wrongful Acts are generally accepted as providing the authoritative statement on the subject.¹⁵ However, the principles relating to joint responsibility are indistinct¹⁶ and there are comparatively few examples of relevant state practice or judicial determination.¹⁷ It is helpful to identify some different factual and theoretical bases that may give rise to joint responsibility. Some different scenarios are the following¹⁸:

- Each state has its own obligations giving rise to its direct or independent responsibility for the acts of another state (or non-state actor).¹⁹
- Joint state action in which two or more states engage in a common enterprise which might in itself be illegal, or which although legal might involve

¹⁴ G Fox, ‘The Occupation of Iraq’ (2005) 36 *Georgetown JIL* 195.

¹⁵ Eg, the application of some articles by the ICJ in the Gabcikovo-Nagymaros Project (Hungary/Slovakia) 1997 ICJ Reports (Judgment of 25 September 1997); generally JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* vol 2: Practice (Cambridge, Cambridge University Press, 2005), Pt II, 3508.

¹⁶ I Brownlie, *Principles of Public International Law* (Oxford, Oxford University Press, 6th edn, 2003) 440.

¹⁷ J Noyes and B Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 *Yale JIL* 225. In this seminal article Noyes and Smith consider the consequences of joint responsibility through the duty to make reparation—jointly and/or severally.

¹⁸ *Ibid*, at 228–31.

¹⁹ Eg, responsibility for providing support to, harbouring and otherwise failing to take coercive measures against entities or persons involved in terrorist acts: UNSC Res 1373 (12 September 2001) UN Doc S/Res/1373. The chapter’s focus is joint responsibility for the acts of another state, not those of non-state actors.

the commission of illegal acts; two or more states act through a common organ to commit an internationally wrongful act.

- A state is complicit in, or aids and assists, an internationally wrongful act committed by another state.
- A state acts under delegated authority from the UN or some other international organisation.
- A state acts on behalf of another state, or dependent territory.

These different possibilities, save for the last, which is not applicable to the situation in Iraq, are considered in the following sections.

III. Direct Responsibility of One State for the Acts of Another

A. Direct Responsibility Under the Geneva Conventions

A state may be held responsible for its own acts or omissions with respect to the acts of another state where those acts breach its own direct obligations. For instance, under international humanitarian law states have accepted positive obligations to ensure the application of the treaty standards by another state. Common Article 1 of the Geneva Conventions on the Laws of War imposes such direct obligations, requiring states parties to ‘undertake to respect and to ensure respect for the present Convention in all circumstances’. The Geneva Conventions were clearly applicable to the active hostilities in Iraq (an ‘armed conflict between two or more of the High Contracting Parties’²⁰) and SC Resolution 1483 affirmed their applicability, as well as that of the Hague Regulations 1907, throughout the period of occupation. The obligation ‘to ensure respect’ goes beyond requiring the state to comply itself with the treaty provisions and extends to imposing a positive obligation to prevent violations committed by others.²¹ The International Committee of the Red Cross’s Commentary states:

The proper working of the system of protection provided by the Convention demands ... that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally. ... It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention.²²

²⁰ Geneva Conventions, 12 August 1949, Common Art 2. Iraq, the USA and the UK are all parties to the four Geneva Conventions.

²¹ In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ emphasised that Art 1 entails that ‘every State party to that Convention, ... is under an obligation to ensure that the requirements of the instruments in question are complied with’: 2004 ICJ Reports (Advisory Opinion 9 July 2004) para 158.

²² <<http://www.icrc.org/ihl.nsf/WebCOMART?OpenView>>.

Joint and Several Liability and Effective Control

Accordingly, arguments for UK direct responsibility could be raised as a consequence of alleged violations of the Geneva Conventions committed by Coalition partners during the military operations and subsequent occupation in Iraq,²³ as well as for any violations committed by itself. But the content of this obligation is not clear. Is it sufficient for a state merely to protest what it sees as violations of the Geneva Conventions by another state, or must it take positive steps to stop them? Is the obligation higher where the states are acting together in armed conflict? For example, military lawyers may differ on their interpretation of permissible military targets or of what constitutes a proportionate response. If the UK considers US military (or other) action to overstep the legal requirements of the Geneva Conventions, must it challenge it, or take stronger steps to cause it to cease? In the *Nicaragua* case the ICJ adopted a somewhat restrictive view, asserting that the obligation to ‘ensure respect’ for the Geneva Conventions ‘imposed an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions.’²⁴ This negative phraseology and comparatively low level of obligation—not to encourage illegal acts—may be explained by the context of determining state responsibility for the actions of non-state insurgents rather than clarifying a state’s positive obligations vis-à-vis another contracting state. In contrast the ICJ indicated a higher level of multi-layered obligation in its advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. It was of the view that:

all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.²⁵

Particular articles of the Geneva Convention are more precise in setting out direct obligations, for example in the handing over of prisoners to another state. This is of direct relevance to the UK which has transferred prisoners to US custody.²⁶ Under

²³ Eg, alleged violations of the Geneva Conventions through the use of cluster bombs by the USA; the military operations against insurgents in Fallujah in November 2004; the abuses committed against prisoners at Abu Ghraib.

²⁴ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) (merits) 1986 ICJ Reports para 220.

²⁵ 2004 ICJ Reports para 159. States parties are also required to ‘take measures necessary for the suppression of all acts contrary to provisions’ of the four Conventions: Geneva Convention I Art 49; Geneva Convention II Art 50; Geneva Convention III Art 129; Geneva Convention IV Art 146.

²⁶ HL Debate 24 June 2004, cl50W.

Geneva III Article 12 the UK has a positive duty to satisfy itself that the USA is willing to apply the Geneva Conventions before handing over any prisoners of war.²⁷ If the USA (as transferee state) fails to respect the Convention (for example by engaging in torture or other abuse) Article 12 requires the UK (as transferring state) to 'take effective measures to correct the situation' or to request the prisoners' return.²⁸ Failure to do so is a breach of the subsidiary responsibility of the transferor as set out in Article 12.²⁹

B. Direct Responsibility under the European Convention on Human Rights

Handing prisoners to the USA could also engage the direct responsibility of the UK under the European Convention on Human Rights (ECHR). The House of Lords³⁰ has held that a person in UK custody, even outside UK territory, comes within the jurisdictional requirement of Article 1³¹ of the ECHR and can therefore claim Convention rights. In *Soering v UK*³² the European Court famously held that submitting a person to the USA where there was a danger that he would suffer inhuman or degrading treatment through long-term detention on Death Row constituted a violation of Article 3 of the Convention. The UK was responsible for 'having taken action which had as a direct consequence the exposure of an individual to proscribed ill-treatment'.³³ It would seem that the extra-territorial application of the Convention to UK detention abroad must extend to a prohibition on transferring a detainee to the custody of another state (without necessarily crossing state borders) without guarantee of Convention rights.³⁴

²⁷ An Agreement, made on 18 December 2005 allowing the Canadian government to transfer detainees in Afghanistan to the Afghan government has become controversial after the Canadian press exposed the torture of terror suspects by Afghan security forces after their transfer from the custody of Canadian troops. Further reports showed that the government was aware of torture in Afghanistan. The Canadian government has now arranged for Canadian officials to have access to Afghan jails. L Parsons, 'Reports Confirm Canada's Complicity in Afghan State Torture' Global Research, 27 April 2007.

²⁸ A parallel obligation with respect to civilian detainees is contained in Geneva IV Art 45.

²⁹ *Commentary, Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC 1960) 137. Article 12 is described as a compromise between joint responsibility and sole responsibility: *ibid*, at 131.

³⁰ *R on the Application of Mazin Jumaa Gatteh Al Skeini v MOD* [2007] UKHL, 13 June 2007.

³¹ 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

³² *Soering v UK* (1989) 11 EHRR 439.

³³ *Al-Adsani v UK*, 12 Butterworths HRC para 39.

³⁴ The removal of suspected terrorists from Bosnia–Herzegovina to US custody and ultimately to detention in Guantánamo Bay after a ruling from the Bosnian Human Rights Chamber that this would be illegal is the background to *Boumediene v Bosnia-Herzegovina* (ECHR App no 38703/06). The applicants allege that Bosnia and Herzegovina have not taken all reasonable measures to protect their wellbeing and obtain their return to Bosnia and Herzegovina.

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The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (to which the UK is a party) also imposes positive obligations.³⁵ Under Article 2(1) states must 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [the state party's] jurisdiction' and Article 3 prohibits expelling or returning a person to another state 'where there are substantial grounds for believing' that he might be tortured. The words 'to another State' should not be limited to a state's territory but should encompass handing a person into the extra-territorial custody of another state.

In all these cases the crucial question is the required level of knowledge as to the likely ill-treatment of the person in the other state. International jurisprudence offers some guidance. In *Corfu Channel* the ICJ did not require evidence that Albania had laid the mines that caused damage to UK battleships, or even that Albania knew of the mines. Albania was responsible for the damage because the laying of the minefield could not have been accomplished without its knowledge.³⁶ The European Court of Human Rights has also accepted constructive knowledge as sufficient. For example, in *Ilaşcu v Moldova and Russia* the applicants were first detained and interrogated by the Russian Federation and then handed over to the Transnistrian police.³⁷ The European Court held the Russian Federation to be responsible for all their acts contrary to the Convention, including the applicants' transfer to the Transnistria regime and their subsequent ill-treatment by the police where 'the agents of the Russian government knew, or at least should have known, the fate which awaited them'.³⁸ Similarly, the Committee Against Torture found Sweden to be in violation of Article 3 of the Torture Convention for its return of Mr Agiza to Egypt when 'it was known, or should have been known, to the State party's authorities ... that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons'.³⁹

This jurisprudence indicates that if the UK knew, or should have known, that abuse was occurring in US detention facilities when it handed over prisoners to US authorities, it would be in violation of its human rights obligations.⁴⁰ The public

³⁵ Another controversial question is whether receiving 'diplomatic assurances' that a transferred person will not be treated contrary to international legal standards is sufficient to discharge a state's obligation. In *Agiza v Sweden* the Committee against Torture held that 'procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk': CAT/C/34/D/233/2003, 24 May 2005 para 13.4.

³⁶ *Corfu Channel (United Kingdom v Albania)* 1949 ICJ Reports 4, 22. There was conjecture that the mines had been laid by Yugoslav ships but as Yugoslavia was not before the Court there were no findings on this point.

³⁷ *Ilaşcu v Moldova and Russia*, ECHR, (App no 48787/99) paras 384, 385.

³⁸ *Ibid.*

³⁹ *Agiza v Sweden*, CAT/C/34/D/233/2003 (24 May 2005) para 13.4.

⁴⁰ The House of Commons Research Paper 04/59, *Iraq: Legal Issues at the Handover* provides a detailed breakdown of the UK's basis for knowledge of US abuse of prisoners based upon reports from the International Committee of the Red Cross, Amnesty International and Human Rights Watch.

rejection by the US of the extra-territorial application of the International Covenant on Civil and Political Rights⁴¹ and the Convention against Torture⁴² strengthens the case for constructive knowledge and, certainly after the publicity given to abuses in Abu Ghraib and elsewhere, the UK cannot plead ignorance.

IV. Joint Commission of an Internationally Wrongful Act

In the *Oil Platforms* case before the ICJ Judge Simma concluded from a comparative survey of national tort laws that ‘the principle of joint-and-several responsibility ... can properly be regarded as a “general principle of law” under article 38(1)(c) of the Statute of the ICJ’.⁴³ The ILC has also determined that where more than one state is responsible for an internationally wrongful act, the responsibility of each can be invoked by the injured state. In the words of the Special Rapporteur James Crawford, Article 47 of its Articles on State Responsibility states the ‘general principle that ... each state is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act’.⁴⁴ The article is directed at joint activity whereby ‘a single course of conduct is at the same time attributable to several states and is internationally wrongful for each of them’.⁴⁵

Article 47 applies where more than one state is responsible for a particular action. It ‘requires both States to be responsible for the same internationally wrongful act’. It does not apply where either one state or the other alone was responsible for the wrongdoing. Judge Simma clarified this distinction in the context of the 1980s Iran–Iraq war. He explained that Article 47 would apply if Iran and Iraq had acted jointly in attacks on shipping in the Gulf, having together planned and coordinated attacks on treaty-protected commerce. However, since the two states were at war this was not the case. Although the actions of both states contributed to the negative economic, political and safety conditions in the Gulf, they ‘never acted in concert with respect to a specific incident’ and Article 47 could

⁴¹ In Annex I to its Third Periodic Report the US set out its ‘inescapable conclusion that the obligations assumed by a State Party to the [ICCPR] apply only within the territory of the State Party’. UN Doc CCPR/C/USA/3 (28 November 2005). The Human Rights Committee noted ‘with concern’ this restrictive interpretation of the ICCPR; Human Rights Committee, Concluding Observations, United States of America, 87th Session, July 2006.

⁴² The Committee against Torture ‘considers that the [US] view that those provisions are geographically limited to its own de jure territory to be regrettable’: CAT, Concluding Observations, UN Doc. CAT/C/USA/CO/2 (25 July 2006).

⁴³ *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) (6 November 2003) Separate Opinion Judge Simma, para 74.

⁴⁴ J Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge, Cambridge University Press, 2002) 272.

⁴⁵ *Ibid.*

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not be applied to any such specific incident. But in the context of the US generic counter-claim Judge Simma took account of the overall wrongdoing in the Gulf:

The bringing about of this environment, taken as a whole, is attributable to both States, as it is common knowledge that they both participated in the worsening of the conditions prevailing in the Gulf at the time. The difference is clear: unlike the specific claim, where only one state is responsible for the act of violating international law, the generic claim falls within the scope of ILC Article 47 because the two States are responsible for the same act.⁴⁶

The ICRC is quite clear that joint military action—that is, where there is planned and coordinated activity—incur responsibility in more than one state, at least in some circumstances. Its authoritative Commentary on the Third Geneva Convention states that:

Whether the case involves a coalition of States, an international armed force or any other organization within which military personnel of several States fight side by side, one general principle prevails: wherever it is impossible or difficult, for any reason, to determine which is the State which has captured prisoners of war and consequently is responsible for them, this responsibility is borne jointly by all the States concerned. In such a case, the broadest obligations in the humanitarian field of one or several of the States concerned must of course be applied by all of them; it is therefore of little significance if one of these States is not a party to the Conventions.⁴⁷

The Commentary explains that ‘[a]ny other solution would be inconsistent with Article 1’. Nor is it legally acceptable for ‘a group of States which are fighting together to agree to hand over to one of their members not a party to the Convention all or some of the prisoners whom they have captured jointly, thus evading the application of the Convention’. This would constitute ‘a flagrant violation of the spirit and the letter of the Convention’.⁴⁸

An early arbitral tribunal considered the claims brought by Germany with respect to harm to German citizens arising out of bombardment by British and American warships in Samoa, followed by joint military operations.⁴⁹ Sailors and marines from both states participated. The Tribunal was asked to determine whether and to what extent either of the governments ‘is bound alone or jointly’ to make reparation for the harms. The arbitrator found the USA and the UK responsible for the losses incurred, without specifying the extent of their responsibility. This last question was never formally answered as the UK and the USA agreed to pay half each.

Two cases before the ICJ have concerned joint state action,⁵⁰ but in neither case was the substantive issue adjudicated. The joint military action in Serbia

⁴⁶ *Oil Platforms*, Separate Opinion Judge Simma para 77.

⁴⁷ 3 Commentary, *Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC 1960) 135–6. The Commentary is in the context of Art 12 (transfer of prisoners of war) as discussed above.

⁴⁸ *Ibid*, at 136.

⁴⁹ *Samoan Claims Arbitration (Germany v US and UK)* 9 RIAA (1902) 15.

⁵⁰ During the Cold War the USA commenced separate proceedings against the USSR and Hungary in the *Treatment of Aircraft and Crew of the United States of America* cases, claiming damages from each state with respect to the detention of a US military plane and crew. The ICJ found it did not have jurisdiction: 1954 ICJ Reports 99; 1954 ICJ Reports 103.

with respect to Kosovo in 1999 gave rise to separate applications by Serbia and Montenegro⁵¹ against each of the NATO states, alleging violations of the *jus ad bellum* and the *jus in bello*. In its applications Serbia and Montenegro claimed that 'by taking part' in the NATO bombing attacks and associated activities, each state had acted in breach of international law. Serbia and Montenegro did not attempt to allocate any single allegedly illegal act to any particular respondent state but relied on general assertions of allegedly illegal activities throughout the bombing campaign.

In December 2004 the ICJ determined that it did not have jurisdiction to hear the cases. It did not, however, indicate any concern about the multiple cases arising out of a joint military action. It merely noted in each case that:

Whether or not the Court finds that it has jurisdiction over a dispute, the parties 'remain in all cases responsible for acts attributable to them that violate the rights of other States' ... When, however, as in the present case, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made in the Application, it can make no finding, nor any observation whatever, on the question whether any such violation has been committed or any international responsibility incurred.⁵²

The NATO cases failed to explore the substantive proposition that all members of the Coalition of the Willing were responsible for all violations of international law through their joint military action against Serbia, but neither does it offer any bar to it. Serbia and Montenegro had sought in separate claims to assert the individual responsibility of all NATO states arising out of collective military action within the framework of a regional organisation, NATO. In other instances, the injured state has made a claim against only one of a number of states that had acted in conjunction with other states, or at least against fewer than the total number engaged in the enterprise. This has led to a blurring of the substantive question (joint and several responsibility for joint action) and procedural issues (the admissibility of proceedings against a single state for action involving other states acting in collaboration).⁵³ In consequence the substantive principles with respect to joint responsibility have not been clarified by the Court. However, the 1978 ILC opinion is apposite:

If, for example, State A and State B are allies and proceed in concert to make an armed attack on a third State, each acting through its own military organs, two separate acts of aggression are committed by the two States.⁵⁴

In a case that is perhaps more relevant to the operation of the CPA in Iraq than to the preceding military action, *Certain Phosphates in Nauru*, Australia, New

⁵¹ On 21 May 2006 Montenegro voted in a referendum for independence from Serbia. It was admitted as a member of the UN on 28 June 2006.

⁵² Eg, *Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium)* Preliminary Objections, 2004 ICJ Reports para 128.

⁵³ The UK expressed this distinction in its pleadings in the *Legality of the Use of Force (Serbia and Montenegro v UK)* paras 6.18–6.19.

⁵⁴ Report of the ILC at its Thirtieth Session (1978) 2 YBILC Part II, 99.

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Zealand and the UK had jointly constituted the Administering Authority over Nauru, although Australia had actually administered the territory on its own.⁵⁵ In this role Australia had performed both 'joint acts' and 'single acts' (for example day-to-day administration) which were nevertheless performed on behalf of all three states comprising the Administering Authority.⁵⁶ Nauru claimed that by mining out the phosphates Australia had violated the provisions of the Trusteeship Agreement over Nauru. However the case was complicated by procedural issues and offered little clarification of the substantive law with respect to state responsibility for joint action. Nauru commenced proceedings in the ICJ only against Australia for acts that Australia had committed 'on the joint behalf' of all three states. Australia, relying on the so-called *Monetary Gold*⁵⁷ principle, argued at the jurisdictional stage that the case could not be heard against itself alone since any ruling would necessarily impinge upon the rights of New Zealand and the UK, which were not before the Court. Rejecting this argument, the ICJ held that the *Monetary Gold* principle did not apply and that it had jurisdiction. However, the case was settled before the proceedings on the merits.

Australia also argued that the liability of itself, New Zealand and the UK was 'solidary', that is it could not be separated to make each one individually responsible. The Court stated:

Australia has raised the question whether the liability of the three States would be joint and several' (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely ... some ... proportionate share. This ... is independent of the question whether Australia can be sued alone. ... It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three states forming the Administering Authority, and there is nothing in the character of the Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.⁵⁸

In his separate opinion, Judge Shahabuddeen had no doubts that the obligations of the three governments were joint and several, although even if they were determined to be only joint this would not prevent Australia from being sued alone. Judge Shahabuddeen noted the ILC's 1978 view that where states act through a common organ each state is separately answerable for the wrongful act of the common organ.⁵⁹ He considered that this supported 'Nauru's contention that each of the three States ... is jointly and severally responsible for the way Nauru

⁵⁵ *Certain Phosphates in Nauru (Nauru v Australia)* Preliminary Objections 1992 ICJ Reports 240.

⁵⁶ Crawford, n 44, at 145.

⁵⁷ *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States)* Jurisdiction 1954 ICJ Reports 19. The principle is that the ICJ will not accept jurisdiction in a case where the interests of a third party not before the Court would form the very subject-matter of the case.

⁵⁸ *Certain Phosphates in Nauru* see n 55, para 48.

⁵⁹ (1978) 2 YBILC Part II, 99.

was administered on their behalf by Australia, whether or not Australia may be regarded as a common organ.⁶⁰

Despite the procedural limitations caused by the rules of jurisdiction of the ICJ it seems that joint liability for what ILC Special Rapporteur James Crawford has called 'common adventures'⁶¹ is accepted. Crawford explains that:

Where two persons jointly engage in a common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants on the common sense ground that the victim should not be required to prove which particular elements of damage were attributable to each of them.⁶²

The European Court of Human Rights has been mindful to 'take into account any relevant rules of international law'⁶³ when issues arising before it come within the ambit of international law. On this basis it might be expected to consider international law principles on joint and several responsibility when claims before it arise out of joint action. However procedural questions have prevented consideration of the substantive principles. For example, *Hess v UK* concerned the long detention of Hitler's former Deputy, Rudolf Hess, in Spandau prison under an agreement between the four allied powers at the end of the Second World War. The case was brought by his wife against the UK, the only one of the four states that was then subject to the right of individual petition before the European Commission.⁶⁴ The European Commission rejected the claim and held that the agreement between the four allies made it impossible to unpack the joint administration by the allied powers into four separate jurisdictions. In the words of Frowein: 'The allied agreement rather created a sort of international jurisdiction outside the responsibility of the individual States.' The Commission's approach was opposed to that suggested by Judge Shahabuddeen. Rather than perceiving the detention as the joint and several responsibility of a common organ, the Commission perceived the arrangement as a bar to the responsibility of any state. However, Frowein also considered that 'the Commission's decision indicated that different conclusions would have to be drawn if this agreement had been adopted after the ECHR entered into force'.⁶⁵ It might also be noticed that the admissibility decision was presented *before* the ILC Report cited above.

⁶⁰ *Certain Phosphates in Nauru*, 1992 ICJ Reports 284, Separate Opinion Judge Shahabuddeen.

⁶¹ The International Criminal Tribunal for the former Yugoslavia has developed jurisprudence on individual criminal responsibility for crimes committed as part of a common criminal design, enterprise or purpose; eg *Prosecutor v Tadic* IT-94-1, 15 July 1999 para 185. Similar principles are included in the Rome Statute for an International Criminal Court, 1998, Art 25(3). See also A Cassese, *International Criminal Law* (Oxford, Oxford University Press, 2003) 179–99. Care must be taken in applying principles of individual criminal responsibility to state responsibility. Nevertheless the principles might offer some guidance in determining when there is responsibility for joint state action.

⁶² J Crawford, Third Report on State Responsibility, UN Doc A/CN.4/507/Add. 2.

⁶³ *Bankovic v Belgium, and others* (App no 52207/99), Judgment of 12 December 2001. This case also arises out of the NATO action against Serbia and was found inadmissible on the ground that there was no jurisdiction under ECHR Art 1.

⁶⁴ *Hess v UK* (1975) 2 D&R 72.

⁶⁵ J Frowein, 'The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation' (1999) 28 *Israel YB on Human Rights* 1, 14.

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In a case directly applicable to Iraq, however, the European Court took a similarly restrictive approach to joint responsibility. Saddam Hussein brought a complaint against those members of the Coalition of the Willing in Iraq that are also parties to the ECHR.⁶⁶ The Court held the complaint inadmissible because Hussein had not addressed each state's role and responsibilities or the division of labour and power between them and the USA. Factors mentioned that he should have addressed included 'the fact or extent of the military responsibility of each Division for the zones assigned to them'; the command structures between the US and non-US forces; and the role of any respondent state in his impugned arrest, detention and handover. In sum, Hussein had not 'invoked any established principle of international law which would mean that he fell within the respondent States' jurisdiction on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US'. It is not clear whether a finding of joint and several responsibility would have been upheld if evidence had been submitted on these points. Further, the issue of potential responsibility was raised in the context of whether there was jurisdiction under Article 1 of the ECHR and thus was not squarely addressed. Nevertheless it appears that the European Court would not be satisfied with general assertions of joint action.

The European Court has also found inadmissible claims made against a single state when it is acting in a collective UN-authorized mission or force. *Behrami v France* and *Saramati v Norway*⁶⁷ arose out of the international administration in Kosovo. In the former case, children were injured when an undetonated cluster bomb unit exploded in Kosovo. The claim under Article 2 of the ECHR was on the basis of the failure by French forces to clear the area of undetonated cluster bomb units, or to mark their sites. France was the lead state in the relevant area. In the latter case the applicant was arrested and detained by the Commander of KFOR (who at that time was a Norwegian officer) giving rise to claims under Articles 5 and 6 of the ECHR. The UK (along with a number of other states) entered a third-party submission that argued that the UN was responsible for administration in Kosovo through the UN Mission in Kosovo (UNMIK) and the NATO-led Kosovo Force (KFOR), pursuant to UNSC Resolution 1244, dated 10 June 1999. UNMIK's responsibility for civil administration in Kosovo meant that it, not individual states, were responsible for human rights. KFOR, as a multinational and international security presence, precluded any individual state from exercising effective overall control over any part of Kosovo.⁶⁸ The European Court noted that the SC was exercising its primary responsibility for the maintenance of international peace and security and was acting under UN Charter chapter VII when it created UNMIK as a UN subsidiary organ and had lawfully delegated enforcement powers to KFOR. Their actions

⁶⁶ *Saddam Hussein v UK*, see n 2.

⁶⁷ ECHR App no 71412/01 and 78166/01, Judgment of 31 May 2007.

⁶⁸ *Ibid*, at para 113.

were directly attributable to the UN, and thus not to individual states. The cases were accordingly inadmissible and again gave rise to no judicial discussion about any joint responsibility of the states acting together in the civil and military missions in Kosovo. Their collective action was subsumed in that of the single actor—the UN.

The principles relating to responsibility for joint action are thus uncertain, making their application to the joint activities of the USA and the UK in Iraq also somewhat problematic. While the SC avoided legitimating the war in Iraq retroactively,⁶⁹ Resolution 1483 did recognise the ‘specific authorities, responsibilities, and obligations under applicable international law’ of the CPA. Accordingly, whatever the legality of the military action against Iraq, the exercise of authority by the CPA had SC recognition. Nevertheless acts carried out under its authority may have constituted violations of the law applicable to occupation or of human rights law and thus amount to internationally wrongful acts.⁷⁰

Through their joint letter of 8 May 2003 the USA and the UK informed the President of the Security Council that they, along with their Coalition partners, had created the CPA ‘to exercise the powers of Government temporarily’. The 8 May letter and SC Resolution 1483 make it clear that the CPA was not a subsidiary body of the UN answerable to the Security Council,⁷¹ in contrast, for example, to the status of UNMIK in Kosovo.⁷² This different status is important because the UK cannot claim that it had no control over the actions of the CPA because authority resided in the SC.⁷³

In Judge Shahabuddeen’s language the CPA might be considered a ‘common organ’ for the joint administration of Iraq. It may be likened to the Administering Authority in Nauru in that during the period of occupation it asserted plenary authority in the governance of Iraq.⁷⁴ But was the CPA truly a ‘common’ organ and was the occupation a genuinely ‘common’ adventure,⁷⁵ or are both more accurately understood as US ventures with some peripheral assistance? The formation of collective bodies for occupation—Coalition occupation—is a well-established

⁶⁹ As it arguably did in UNSC Resolution 1244, 10 June 1999, with respect to the NATO use of force against Serbia.

⁷⁰ The general language of UNSC Resolution 1483 makes ambiguous the extent of the authorised powers. Reference to the Geneva Conventions 1949 and Hague Regulations 1907 implies the limitations (and responsibilities) of occupiers imposed by those instruments but the activities listed in para 8 as part of the responsibilities of the Secretary-General’s Special Representative ‘in coordination with the Authority’ are wider. D Sheffer, ‘Beyond Occupation Law’ (2003) 97 *AJIL* 842, 855 lists actions that ‘if proven true’ would constitute internationally wrongful acts under occupation law.

⁷¹ Neither UNSC Res 1483 nor 1511 required the CPA to report to the UNSC but merely encouraged the UK and the USA to inform the Council of its efforts.

⁷² UNSC Res 1244, para 10 authorised the Secretary-General to establish ‘an international civil presence in Kosovo in order to provide an interim administration for Kosovo’.

⁷³ In its written pleadings in the *Legality of the Use of Force* the UK argued that ‘although it was a major contributor to KFOR’ it had no control over it since it was a UN subsidiary body answerable to the Security Council. (para 6.24 <<http://www.icj-cij.org/icjwww/idocket/iyuk/iyukframe.htm>>.) See also the UK’s arguments in *Behrami v France and Saramati v Norway*, n 67.

⁷⁴ G Fox, ‘The Occupation of Iraq’, n 14, at 195.

⁷⁵ The same question can be asked about the military action that commenced in March 2003 under US Central Command, with the US supplying the majority of the personnel and military equipment.

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practice,⁷⁶ usually involving allocation of responsibility for particular areas. In Iraq the UK's military and civil presence was greater in CPA South, established at the end of May 2003 as the regional office responsible for the four southern Iraqi provinces. From 28 July 2003 regional coordinators of CPA South were retired British ambassadors and most of the personnel were British. British troops were deployed in Multi-National Division (South East) which coincided with CPA South's area of administrative responsibility. British troops were to maintain security in MND (SE) and to support the civil administration, including liaison with the CPA. The USA has played the dominant role in other Coalition occupations and there is no doubt that it did so in the CPA, including supplying the majority of its personnel and the Administrator, Ambassador Bremer. However, the CPA was not apparently established as a branch of the US government⁷⁷ and the UK was recognised as one of the occupying powers by the SC in Resolution 1483. Similarly in Nauru, one state—Australia—played the most active role in the Administering Authority. Further, UK officials recognised UK responsibilities under the CPA. For example, the UK Permanent Representative to the UN, Jeremy Greenstock, accepted 'that the United States and the United Kingdom in particular must carry the responsibilities of occupation'.⁷⁸ Minister for Foreign Affairs, Jack Straw, told the House of Commons that the task of the UK's special representative in Iraq was to 'work with US representatives and a wide range of Iraqi people'.⁷⁹ Orders and Regulations were issued in the name of the CPA, not that of the USA. Adam Roberts concluded that the 'evidence all points to the fact that the CPA was under the authority of the US *and* UK governments, with the Pentagon and the UK Ministry of Defence as the principal government agencies responsible for it'.⁸⁰ (emphasis added) A House of Commons research paper concluded that since the UK was a partner in the CPA, if it 'committed unlawful acts as a matter of policy, then the British government would share responsibility for these. If individual unlawful acts occurred, then British officials might be liable if they were involved'.⁸¹ While it is evidently more straightforward to assert UK responsibility for any internationally wrongful act committed within its particular area of operations,⁸² it seems that the CPA may be regarded as a 'common organ'

⁷⁶ M Kelly, *Restoring and Maintaining order in Complex Peace Operations: The Search for a Legal Framework* (The Hague, Kluwer, 1999) 168–72.

⁷⁷ Congressional Research Service, *The Coalition Provisional Authority (CPA): Origin, Characteristics and Institutional Authorities*, 6 June 2005.

⁷⁸ Comments by UK Permanent Representative to the UN Sir Jeremy Greenstock after the UK–US Presentation of Joint Draft of Security Council Resolution on Iraq, UN, New York, 9 May 2003.

⁷⁹ Hansard 12 May 2003, col 22.

⁸⁰ A Roberts, 'The End of Occupation: Iraq 2004' (2005) 54 *ICLQ* 27, 35. Similarly, 'The two occupying powers were thus designated [by UNSC Res. 1483] to shoulder primary responsibility': D Sheffer, 'Beyond Occupation Law' n 70, at 844.

⁸¹ House of Commons, Research Paper, 04/59, *Iraq: Legal Issues at the Handover*.

⁸² The legal requirements for establishing UK responsibility for the commission of an internationally wrongful act must be satisfied, which may be specified by the relevant treaty, eg the assertion of jurisdiction under the European Convention on Human Rights Art 1; see *R on the Application of Mazin Jumaa Gatteh Al Skeini v MOD*, n 30.

for co-ordinating planning and policy to establish joint and several responsibility for violations of international law that were committed in its name.

A further question we need to consider is when that joint responsibility terminates. The apparently straightforward answer is that the 'common adventure' of occupation finished when the CPA ceased to exist and Iraq re-asserted its full sovereignty.⁸³ However, there are various factors that weaken this conclusion.

First, and most evidently, is the continued large foreign military presence⁸⁴ in Iraq,⁸⁵ exercising de facto control,⁸⁶ albeit 'at the request of the incoming interim Government of Iraq'.⁸⁷ Because there was no government with which to conclude a Status of Forces Agreement, on 27 June 2004 (the day before the 'handover' to the Iraqi Interim government) the CPA promulgated Revised Order 17 that continued the immunity from the Iraqi legal process previously accorded to Coalition forces⁸⁸ into the period of the Interim Iraqi government. The Order also extended the immunity of CPA personnel, as well as its scope. It appears somewhat contradictory to continue the immunity of CPA personnel after it has formally ceased to exist.

Second, the Law of Administration for the Transitional Period (TAL), adopted by the Governing Council out of a process to which the CPA, the UN and other groups contributed purported to apply from the period beginning 30 June 2004 until the elections for the Iraqi Transitional government and, in a second phase, until the formation of an Iraqi government pursuant to a permanent constitution. The TAL limited the Interim Iraqi government's powers, notably in external relations.⁸⁹ Further, under Article 3 of the TAL it could only be amended through special procedures. Thus, the CPA sought to retain some considerable direction over Iraqi affairs even after its formal demise. Somewhat ironically, Adam Roberts considered that the limitations on the Interim government made its status 'analogous to that of an occupying power'. However, SC Resolution 1546 (setting out the terms of the transfer) did not endorse the TAL and indeed made no mention of it. Instead it

⁸³ UNSC Resolution 1546, 8 June 2004. The envisaged date for these changes was 30 June 2004 but they took place on 28 June 2004. Since the instruments refer to 30 June 2004, I will continue to use the latter date.

⁸⁴ As of July 2007, US military strength in Iraq stands at approximately 160,000 following the 29,600 troops added as part of the 2007 'surge': Col D Smith, 'Counting Troops in Iraq' (Washington DC Foreign Policy In Focus 17 July 2007). Over 5,000 British troops remain in Iraq: Margaret Beckett, Foreign Secretary, House of Commons debate on Iraq, 11 June 2007.

⁸⁵ This echoes earlier history; although Iraq gained its independence in 1932 British troops remained until the 1950s.

⁸⁶ In his individual complaint (found inadmissible) to the ECHR, Saddam Hussein argued that he came within the jurisdiction of the occupying powers in Iraq, within the terms of the ECHR Art 1, even after 28 June 2004, because they remained in de facto control of the country.

⁸⁷ UNSC Resolution 1546, 8 June 2004; UNSC Res 1637 (11 November 2005) UN Doc S/Res/1637 states that the continued presence of the MNF is at the request of the government of Iraq.

⁸⁸ CPA Order 17, 27 June 2003.

⁸⁹ TAL, Annex, section 2 stated that 'The Interim Government will represent Iraq in its external relations, but its powers in concluding international agreements will not extend beyond Iraq's diplomatic relations, international loans and assistance, and Iraq's sovereign debt'.

imposed its own limitations on the Interim government, for example requiring it to refrain from 'taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional government of Iraq assumes office'.

Third, the SC purported to continue some aspects of the legal regime of occupation for the former occupiers after its supposed termination, for example 'internment where this is necessary for imperative reasons of security'.⁹⁰ This wording echoes that of Geneva Convention IV Article 78, applicable to occupation but has no counterpart in human rights law.⁹¹ Acting under UN Charter chapter VII, the SC first extended the powers of Iraq's occupiers beyond those set out in Geneva Convention IV and The Hague Regulations.⁹² Subsequently, it has attempted simultaneously to terminate occupation while allowing the 'former' occupiers to retain some of those extended powers. The UK government has successfully argued that use of SC chapter VII powers overrides other international obligations,⁹³ including human rights law, thereby removing the question of state responsibility, whether sole or joint, for their violation.⁹⁴ This is a blatant example of what David Malone has called the geo-strategic use of the SC by the permanent members, in particular the USA and the UK: to use the SC 'as a resource for their own purposes'⁹⁵ and to ensure appropriate language within a resolution where it supports their interests while bypassing the Council when it does not do so.

Adam Roberts has concluded that:

Iraq is clearly not a case of an occupation coming to an end when an occupying power withdraws from a territory, or is driven out of it. From 28 June 2004 the formal occupation of the whole of Iraq has ended, but the factual situation has not changed completely overnight.

This should carry the corollary that where the USA and the UK have continued to act in common purpose in Iraq, albeit without the formal structure of the CPA, joint and several responsibility for the commission of any internationally wrongful acts should persist.⁹⁶

⁹⁰ The wording is quoted in a letter from Colin Powell, US Secretary of State, to the President of the Security Council which is annexed to UNSC Resolution 1546. Para 11 authorises the multinational force to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the annexed letter.

⁹¹ It is widely accepted that human rights law applies during armed conflict alongside international humanitarian law; *Legality of the Threat or Use of Nuclear Weapons* (Adv Op) 1996 ICJ Reports para 25. However, if the occupation ended on 30 June 2004 and IHL ceased to apply, human rights law would be the only applicable international regime with respect to the treatment of individuals.

⁹² There is disagreement as to the extent of this but bestowing upon the CPA the authority to direct disbursement of the Development Fund for Iraq is one example: UNSC Resolution 1483 para 13; D Sheffer, 'Beyond Occupation Law' (2003) 97 *AJIL* 842, 846.

⁹³ UN Charter Art 103.

⁹⁴ See *R on the application of Al-Jedda v Secretary of State for Defence* [2006] EWCA Civ 327. The case was determined by the House of Lords in December 2007: [2007] UKHL 58.

⁹⁵ Malone, n 10, at 19.

⁹⁶ This does not consider the substance of Iraqi sovereignty after 28 June 2004, nor any question of responsibility by a dominant state for any internationally wrongful acts committed by a 'puppet' state: Report of the ILC at its Thirtieth Session, (1978) 2 *YBILC* Part II, 100.

V. Complicity, Aiding and Assisting

Even if the CPA is considered insufficiently a 'common adventure' to support joint and several responsibility, international law has evolved principles of state complicity and aiding or abetting the wrongful acts of another state.⁹⁷ This is a distinct situation from that of joint action and is another form of direct responsibility in that it is founded on a state's own wrongdoing in assisting the commission of wrongful acts by another state: 'The assisting state is responsible for its own act in deliberately assisting another state to breach an international obligation by which they are both bound.'⁹⁸ Nevertheless, in practice it may be difficult to distinguish joint action from assistance or complicity in the commission of a wrongful act. While recognising that there may be grey areas, Ian Brownlie has described the difference:

Thus the supply of weapons, military aircraft, radar equipment and so forth, would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However the supply of combat units, vehicles, equipment and personnel for the specific purpose of assisting an aggressor, would constitute a joint responsibility.⁹⁹

In 1978 the ILC considered that:

recent practice of States show[s], moreover, that whatever may have been the situation formerly, the idea of participation in the internationally wrongful act of another by providing 'aid' or 'assistance' and thus in this sense of 'complicity', has now become accepted in international law.¹⁰⁰

The Articles on Responsibility of States 2001 Article 16 set out the conditions for such responsibility:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act and
- (b) the act would be internationally wrongful if committed by that State.

The *chapeau* to Article 16 envisages one state as the primary actor in the commission of an internationally wrongful act and another state as voluntarily acting in assistance. The two subsections to Article 16 set out the requirements. Under (b) it is necessary to show that there are internationally wrongful acts committed by the primary state, for which that state is responsible under international law.¹⁰¹ Subsection

⁹⁷ 'Since the Second World War a norm has emerged to hold a State responsible for aiding another State to violate [internationally protected] rights': J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1987) 57 *BYBIL* 77.

⁹⁸ Crawford, n 44, at 151.

⁹⁹ I Brownlie, *System of the Law of Nations: State Responsibility* Part 1 (New York, Clarendon/Oxford University Press, 1983) 191.

¹⁰⁰ Report of the ILC to the General Assembly (1978) 2 *YBILC* 103.

¹⁰¹ Thus if there are circumstances precluding the wrongfulness of the act committed by the primary state there is no internationally wrongful act vis-à-vis the assisting state. Circumstances

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(a) determines the responsibility of the ‘assisting’ state. The ILC commentary on Article 16 states that subsection (a) imposes two conditions: the assisting state must be aware of the circumstances (‘knowledge’) making the act of the primary state internationally wrongful and the assistance must be given with the view of facilitating the commission of a wrongful act, that is in fact committed.¹⁰² Assistance generally involves some positive act.¹⁰³ Examples of such assistance include knowingly providing an essential facility or financing the activity. Attempting to prevent the unlawful act would militate against a finding of assistance. In *Ilaşcu v Moldova and Russia* the Court had to determine whether the acts of the Transdniestrian police were imputable to Moldova. Although this case concerned the attributability of the acts of breakaway authorities to the state government rather than whether one state is assisting another in the commission of a wrongful act, the dicta of a number of partly dissenting judges may offer guidance in determining the appropriate standard in the latter case. They looked to the behaviour of the Moldovan officials and found significant that ‘there is nothing to suggest any collusion or acquiescence on their part in any of the acts in violation of the Convention of which complaint is made. The evidence shows that, on the contrary, the executive and judicial authorities of the State took a number of steps to emphasise the unlawfulness of what had occurred and to secure the release of the applicants.’¹⁰⁴

As is clear from *Ilaşcu*, for there to be any form of responsibility—joint or individual—an internationally wrongful act must be attributable to the state, that is committed by an organ of the state.¹⁰⁵ In the *Bosnian Genocide* case the ICJ¹⁰⁶ considered whether the acts of genocide committed at Srebrenica could be attributed to Serbia so as to incur that state’s responsibility. The ICJ held in the negative,¹⁰⁷ in that no organ of the FRY (for example, its army or political leaders) had taken part in the massacres or had had a hand in preparing, planning or in any way carrying out the massacres.¹⁰⁸ While there had been direct and indirect participation by the Serbian army in military operations in Bosnia prior to Srebrenica, no such participation in relation to those massacres had been shown. The Republika Srpska was not a *de jure* organ of Serbia, nor did it act ‘in complete dependence on the State’ of Serbia such as to amount to an instrument of that state.

precluding wrongfulness are included in the ILC’s Articles on State Responsibility, 2001, Arts 20–26 and include the use of force in self defence under UN Charter Art 51.

¹⁰² Crawford, n 44, at 149.

¹⁰³ However, in the context of terrorism UNSC Resolution 1373 decides that states shall ‘[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist activities.’

¹⁰⁴ ECHR (App no 48787/99) Judgment, 7 May 2004, partly dissenting opinion, para 12.

¹⁰⁵ ILC’s Articles on State Responsibility, 2001 Art 2(a).

¹⁰⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (merits), 2007 ICJ Reports, Judgment of 26 February 2007.

¹⁰⁷ The Court did find Serbia to be in violation of the obligation to prevent genocide with respect to Srebrenica: *ibid*, operative clause, para 5.

¹⁰⁸ *Ibid*, at para 386.

It is clear from the Court's analysis that had the Republika Srpska been deemed to have been 'acting on behalf of Serbia'¹⁰⁹ or under its 'effective control'¹¹⁰ in the commission of genocide at Srebrenica, Serbia would have been responsible in international law for that internationally wrongful act in addition to those individuals found guilty of the crime. The ICJ also considered the different question of complicity in genocide. It focused on whether Serbia had provided the means to commit genocide or had 'knowingly' furnished 'aid or assistance' for its commission.¹¹¹ The Court found that it had not been conclusively determined that at the crucial time the FRY had 'supplied aid to the perpetrators of genocide in full awareness that the aid supplied would be used to commit genocide'.¹¹²

The test applied by the ICJ in the *Genocide* case, like that of the ILC in its Articles on State Responsibility, is a strict one that does not appear to be easily satisfied. On this basis, could the UK be held responsible for complicity in or assisting the commission of internationally wrongful acts by, for example, the USA? Assuming in any particular case that a finding could be made of violations of international law by the USA, the question would be whether condition (a) is satisfied, that is whether the UK had knowledge of the circumstances of the internationally wrongful act and knowingly assisted the US in the commission of those acts. This would require detailed evidence of each situation but some illustrations indicate some of the complex issues that might arise. For example, it appears likely that in its November 2004 military operations against insurgents in Fallujah the USA violated principles of international humanitarian law. Just prior to the commencement of the attack, the UK reportedly agreed to an American request that the Black Watch regiment be redeployed from Basra to an area south of Baghdad where it would take over operations previously carried out by US forces.¹¹³ Many questions would have to be asked before it could be concluded that by acceding to this request the UK 'aided and assisted' in the commission of internationally wrongful acts in Fallujah. Did the UK know of the imminent attack? Did the UK know of the circumstances of the assault that would constitute internationally wrongful acts? Was it foreseeable that violations might be perpetrated in the attack? Did the UK accept the risk that this might be so? What constitutes knowledge or constructive knowledge? Did the UK ask for details of the reasons for the US request? Did the movement of the Black Watch in fact assist in the commission of internationally wrongful acts?

Similar questions can be asked about other incidents, not just in Iraq. For example it has been noted that the UK provided 'an enabling environment' for the

¹⁰⁹ *Ibid*, at para 391.

¹¹⁰ *Ibid*, at paras 400–07.

¹¹¹ 'The Court sees no reason to make any distinction of substance between "complicity in genocide" within the meaning of Article III, paragraph (e) of the [Genocide] Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16' [of the ILC Articles on Responsibility]: *ibid*, at para 420.

¹¹² *Ibid*, at para 423.

¹¹³ 'British troops begin move north' *BBC News* (27 October 2004) <http://news.bbc.co.uk/2/hi/middle_east/3957455.stm>.

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escalating violence in Somalia since the beginning of 2007. Evidence given to an Information Gathering Mission stated that the UK had given ‘moral, political and financial support’ to Ethiopia and the Transitional Federal Institutions despite the evidence of attacks on civilian areas, including bombing of hospitals, rapes and interference with humanitarian supplies. The European Union has warned that ‘war crimes might have been committed’ and that if this is the case it ‘would be complicit’.¹¹⁴ A full legal assessment of such complicity would require a similar analysis to that suggested above.

In another example, there have been allegations of the use of British air space and facilities by the USA for transport of prisoners to third countries where they are likely to face torture, so-called ‘extraordinary rendition’.¹¹⁵ If substantiated extraordinary renditions would constitute internationally wrongful acts. If the British government knew that its facilities were being used for this purpose it might be held responsible for complicity in or aiding and abetting these acts. What is more difficult is if it suspected such acts but failed to ask any questions or to seek any clarification. Does failing to ask questions offer passive or moral support? Does giving a ‘blank cheque’ to the US government amount to assistance? To avoid such potential responsibility the government should take positive measures to ensure that it is not offering assistance, for example by following the strong recommendation of the House of Commons Foreign Affairs Committee and deal with rendition in a transparent manner and to provide timely answers to relevant questions.¹¹⁶

Finally, in his account of arrest and detention by US authorities at various locations, including eventually Guantánamo Bay, Moazzem Begg describes how UK officials appeared at pertinent moments both before his detention and afterwards.¹¹⁷ Their role in his arrest, interrogation and detention remained unclear. Again, questions would have to be asked to determine whether UK officials had assisted US authorities in the commission of internationally wrongful acts.

VI. Conclusion

The previous sections have shown that international law provides some bases for the determination of joint and several responsibility for internationally wrongful acts

¹¹⁴ UK Home Office, Border and Immigration Agency, Report of Information Gathering Mission, 27–30 April, 2007 (Somalia, 17 May 2007) para 5.10.

¹¹⁵ The Committee against Torture noted with satisfaction the US assertion in its Report to the Committee ‘that it does not transfer prisoners to countries where it is “more likely than not” that they will be tortured’: CAT, Concluding Observations, UN Doc CAT/C/USA/CO/2, 25 July 2006.

¹¹⁶ House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism*, HC 573, 2 July 2006, para 5.

¹¹⁷ M Begg and V Brittain, *Enemy Combatant: My Imprisonment at Guantanamo, Bagram, and Kandahar* (London, New Press, 2006).

that were committed by one state but in which other states participated. However, many uncertainties about the basis of responsibility and the required standard of behaviour remain unanswered. It must also be remembered that intelligence sharing, cooperation in such matters as immigration controls, policing and criminal enforcement are essential tools against the threats of terrorist attacks. Indeed SC Resolution 1373, adopted under UN Charter chapter VII in the aftermath of 11 September 2001, calls upon states to 'find ways of intensifying and accelerating the exchange of operational information' and to cooperate on administrative and judicial matters to prevent terrorist acts. Governments have an obligation to exercise due diligence in ensuring the safety of their citizens. Assisting other states in these tasks is part of the duty of cooperation and of fostering good relations between states. Similarly, in the context of post-conflict administration 'burden sharing and unity of command are the twin pillars of successful nation-building'¹¹⁸ that is needed to restore failed states and thus to protect against potential further instability and violence. To this end

Governments, regional organisations, multilateral bodies, international financial institutions and non-governmental organizations must define their respective responsibilities to develop a shared understanding, reduce redundancy and maximise resources.¹¹⁹

But such cooperation and common responses to the shared struggle against global insecurity and terrorism must not spill over into assisting in the commission of internationally wrongful acts. The dividing line is hard to determine when counter-terrorist activities too often come right to the brink of lawful behaviour or overstep it altogether. Requirements that states comply with their human rights obligations in carrying out counter-terrorist activities are insufficiently precise to offer real guidance to states.¹²⁰ Further, the determination of responsibility in any particular case must be context-specific and fact-dependent. It would require detailed analysis of the facts and the level of actual or constructive knowledge of the state that did not carry out the alleged acts, including whether they were committed as part of a joint policy or plan.

The constraints on ICJ jurisdiction mean that the particular issues of state responsibility for acts committed in Iraq are unlikely to be formally tested before an international judicial forum¹²¹ but there are at least three consequences for the UK for its actions in Iraq. First, its participation in the invasion and occupation of Iraq has meant that it has incurred vast material and non-material costs in its

¹¹⁸ D Phillips, *Losing Iraq Inside the Postwar Reconstruction Fiasco* (Boulder, Westview Press, 2005) 226.

¹¹⁹ *Ibid.*

¹²⁰ Eg, UNSC Res 1456 (20 January 2003) UN Doc S/Res/1456 requires a sustained and comprehensive approach against terrorist activity, with the active collaboration of all states and regional organisations, while para 6 requires the adoption of measures in accordance with international law, including human rights law.

¹²¹ This is in stark contrast to the response after the 1990 Iraqi invasion of Kuwait, when Iraq's responsibility for loss, damage and injury was spelled out in UNSC Resolution 674, 29 October 1990 and the UN Compensation Commission set up to determine claims.

reconstruction. Government officials have recognised this responsibility. Second, the UK is a party to the Rome Statute of the International Criminal Court. Although the Chief Prosecutor has not indicated any intention to prosecute any UK individuals for events arising out of the war against Iraq, this possibility cannot be ruled out for the future.¹²² Individuals could be subject to indictment for the commission of war crimes, crimes against humanity or genocide arising out of a joint or common enterprise in which they participated, even if they themselves had not carried out the acts. Third, perceptions of joint responsibility do not depend upon legal analysis. The insistence by the Blair government of the importance of the 'special relationship' between the USA and the UK has meant that the UK appears a willing, albeit junior, partner of the USA in the war in Iraq and in its pursuit of the war on terror. However much former Prime Minister Blair insists otherwise,¹²³ news reports¹²⁴ and other commentators have made the link between the joint US/UK activities in Afghanistan, Iraq and elsewhere in the war on terror and heightened dangers of terrorist attacks against the UK.¹²⁵ The niceties of legal argument are not relevant to such perceptions of joint responsibility. Acquiring Security Council authorisation for collective actions ensures that they will not be tainted with illegality (although controversies over precisely what actions the Security Council authorised may persist) but entering into a joint enterprise of dubious legality without such authorisation may incur responsibility under international law. In determining their international policies states should take account of the potential for legal responsibility as well as such other consequences of joint activity.

¹²² See W Schabas and AT Williams in this collection (chs 6 and 5 respectively) for further discussion on the role of the ICC.

¹²³ 'Three official reports into the July 2005 bombings suggest that Britain's establishment is evading the connection between the attacks and the Iraq war' P Rogers, 'London's intelligence failure', *Open Democracy*, 18 May 2006.

¹²⁴ Eg, M Townsend, 'Official: Iraq war led to July bombings' *The Observer* (London 2 April 2006).

¹²⁵ M Rai, *7/7: The London Bombings, Islam and the Iraq War* (London, Pluto Press, 2006) cites a UK FCO Report on Young Muslims and Extremism, April 2004, that identified UK foreign policy, in particular the war in Iraq, as a major factor in the alienation of young British Muslims.

A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq

STEFAN TALMON

I. Introduction

From mid-April 2003 to 28 June 2004, Iraq was *de jure* under belligerent occupation by the United States of America and the United Kingdom acting ‘as occupying powers under unified command’.¹ Although a good case can be made that the occupation *de facto* continued after 28 June 2004, the transfer of full governing authority and responsibility to the Iraqi Interim government (IIG) on that date was considered by the UN Security Council to mark the (at least formal) end of the occupation.² For most of the 15-month occupation, Iraq was governed by the occupying powers through the vehicle of the Coalition Provisional Authority (CPA). In a joint letter to the President of the Security Council, dated 8 May 2003, the two countries’ permanent representatives to the United Nations wrote that:

the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority [...] to exercise powers of government temporarily and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.³

¹ United Nations Security Council Resolution 1483 (22 May 2003) UN Doc S/RES/1483, preambular para 13; reproduced in S Talmon (ed), *The Occupation of Iraq: The Official Documents of the Coalition Provisional Authority* (Oxford, Hart Publishing, 2008) Doc 208.

² See UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546 para 2, and the Press Statement by the Security Council President on Handover of Sovereignty to Iraq, delivered on 28 June 2004, UNSC ‘Press Statement by the Security Council President on Handover of Sovereignty to Iraq’ (28 June 2004) Press Release SC/8136; reproduced in Talmon, n 1, Docs 221, 222. See also *R (Al-Jedda) v Secretary of State for Defence* [2006] 3 WLR 954, 961, para 14.

³ ‘Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council’ UN Doc S/2003/538 (8 May 2003) 1; reproduced in Talmon, n 1, Doc 233.

During the period when it was governing Iraq the CPA may have violated the laws of occupation, as laid down in the Hague Regulations and the Geneva Conventions, and human rights law, or may have contravened binding UN Security Council resolutions. This chapter will not primarily examine whether and, if so, which rules of international law the CPA actually violated, but will seek to determine who may be held responsible for any transgression of international law by the CPA. The statement by the Mexican representative to the Security Council that the 'Authority formed by the Occupying Powers bears the responsibility for ensuring the safety and security of the population in the occupied territory'⁴ gives the misleading impression that it is the CPA itself that is responsible under international law. Since the CPA as an administrative body is not even a partial subject of international law,⁵ the question arises as to whom its actions may be attributed. Several states and the United Nations were involved in the occupation of Iraq. One state that clearly does not bear any responsibility for the CPA's actions is Iraq itself. The CPA was not its organ, neither was it placed at its disposal by the occupying powers, nor did it exercise any element of Iraqi governmental authority. This is analogous to the German–American Mixed Claims Commission's denial that Germany had any responsibility for the acts of the Australian occupying power in its colonies during the First World War, on the grounds that it 'is fundamental that in the absence of an express stipulation to the contrary a state or person can be held responsible only for its own acts or those for whom it is responsible'.⁶ This leaves the two occupying powers, either jointly or separately, their Coalition partners and the United Nations as possible subjects of attribution. The international responsibility for the CPA's actions in Iraq thus raises intricate questions of state responsibility and the responsibility of international organisations.

II. The Coalition Provisional Authority

Conflicting explanations as to when, how and by whom the CPA was established have left many questions open, particularly in the area of international responsibility.⁷ It is thus necessary first to establish the CPA's status under international law as well as its functions and organisation.

⁴ 'Statement by the Mexican representative to the UN Security Council', UN Doc S/PV.4808 (14 August 2003) 5.

⁵ Compare Supplementary Memorandum Submitted by the Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee, 5 April 2004, Ev 35; reproduced in Talmon, n 1, Doc 248.

⁶ *Paula Mendel and Others (United States) v Germany* (1926), RIAA VII, 372 at 385. See also 'First Report on State Responsibility by Mr James Crawford, Special Rapporteur', Addendum (22 July 1998) UN Doc A/CN.4/490/Add.5, at 33, para 252.

⁷ For example, in a Memorandum from the Foreign and Commonwealth Office in Response to Questions Put by the House of Commons Foreign Affairs Committee, dated 18 June 2003, the FCO stated that the CPA 'was set up at the beginning of June'. The Memorandum is reproduced in Talmon, n 1, Doc 238.

A. Occupation Government of Iraq

The Commander of Coalition Forces in Iraq, US General Tommy R Franks, created the CPA as an administrative mechanism through which the Coalition partners could fulfil their responsibilities as occupying powers in control of Iraq only days after the occupation of Baghdad. In his 'Freedom Message to the Iraqi People', issued on 16 April 2003, he stated:

Therefore, I am creating the Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction.⁸

That the CPA was created in April 2003 and not, as often claimed, in May 2003 is also shown by CPA Order No 1 on the 'De-Baathification of Iraqi Society', which states in Section 1, paragraph 1: 'On April 16, 2003 the Coalition Provisional Authority disestablished the Baath Party of Iraq'.⁹ The American and British representatives referred to General Franks' act in their joint letter of 8 May 2003 to the President of the Security Council.¹⁰ The CPA was neither created nor explicitly authorised by an act of the US Congress or the British Parliament, nor was it established pursuant to a UN Security Council resolution.¹¹ It was established by General Franks as supreme commander of the Coalition forces 'under the laws of war for the occupation of Iraq'.¹² The CPA was an occupation government, that is 'a government imposed by force, and the legality of its acts is determined by the law of war' irrespective of whether it consisted of a military, civil or mixed administration.¹³ That the CPA served as the temporary government of Iraq is also shown by early CPA documents which speak, for example, of the 'CPA Ministry of Justice'¹⁴ and by a statement by the CPA Administrator, Ambassador L Paul Bremer III, that 'Coalition officials ran Iraq's ministries'.¹⁵

⁸ The 'Freedom Message to the Iraqi People' is reprinted in Talmon, n 1, Doc 149.

⁹ 'CPA Order No. 1, De-Baathification of Iraqi Society' (CPA/ORD/16 May 2003/01), published in *Al-Waqai Al-Iraqiya. Official Gazette of Iraq*, vol 44, no 3977 (17 June 2003) 2-3; reproduced in Talmon, n 1.

¹⁰ See Joint Letter of 8 May 2003, n 3 above.

¹¹ Article 1.3 of the Iraq Mobile Cellular Public Telecommunications License Authorization and Agreement somewhat misleadingly states: "'CPA" means the Coalition Provisional Authority recognized as the temporary government in Iraq pursuant to United Nations Security Council Resolution 1483 (2003)'.

¹² Statement by US President on HR 3289, 6 November 2003 <<http://www.whitehouse.gov/news/releases/2003/11/20031106-12.html>> accessed 1 August 2007.

¹³ US Department of the Army, *The Law of Land Warfare*, FM 27-10 para 368.

¹⁴ See, eg, CPA, Ministry of Justice National Policy Guidance, 26 June 2003, reproduced in Talmon, n 1, Doc 159. See also Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, US Army, *Legal Lessons Learned from Afghanistan and Iraq: Volume II, Full Spectrum Operations (2 May 2003-30 June 2004)* (2005) 25.

¹⁵ Statement by the CPA Administrator http://www.cpa-iraq.org/transcripts/20040329_bremer_health.html> accessed 1 August 2007.

B. Separation of Civil and Military Responsibilities

Coalition Provisional Authority was initially the overall name for the joint military–civilian presence in Iraq, not just for the civilian occupation government.¹⁶ That the CPA also included the Coalition forces in Iraq is shown, for example, by the existence of a ‘Coalition Provisional Authority Forces Apprehension Form’ (the CPA’s version of the traditional capture card for prisoners of war used by armies in the field) to be filled in by the capturing Coalition forces.¹⁷

The CPA originally comprised two wings: ‘security and support’ and ‘non-security’. The ‘security and support’ wing was identical to the Coalition armed forces in Iraq under unified command, first the Coalition Forces Land Component Command (CFLCC), then the Coalition Joint Task Force 7 (CJTF-7) and finally the Multinational Corps and Multinational Force in Iraq (MNF-I).¹⁸ It was responsible for security/military forces, support services and the Iraq Survey Group.

The ‘non-security’ wing consisted of the Office of Reconstruction and Humanitarian Affairs (ORHA), which had already been established under the authority of the US Department of Defense by US President George W Bush in January 2003.¹⁹ It was headed by a civil administrator and was responsible for reconstruction, humanitarian assistance and civil administration or government affairs, ie the day-to-day running of the country. In its latter capacity, ORHA was running or controlling the ministries in Baghdad and the administrations in the 17 governorates. The Office of Reconstruction and Humanitarian Affairs was headed by Jay M Garner, a retired Lieutenant General, US Army.²⁰ That ORHA was but a part of the joint military–civilian presence referred to as ‘CPA’ can also be seen in the joint letter of 8 May 2003, mentioned above, in which the United States and the United Kingdom informed the Security Council President that they ‘have created the Coalition Provisional Authority, which *includes* the Office of Reconstruction and Humanitarian Assistance’²¹(emphasis added). Both wings were initially under the operational control of General Franks, Commander, US Central Command (CENTCOM), as ‘head of the CPA’;²² ie both the civil

¹⁶ See US Department of Defense, Coalition Postwar Government in Iraq, Organizational Chart, July 2003, reproduced in Talmon, n 1, Doc 164.

¹⁷ For a specimen of the form, see Center for Law and Military Operations, n 14 above, at app A-1, pp 289–90.

¹⁸ CJTF-7 was created on 14 June 2003 and replaced CFLCC. It itself was replaced on 15 May 2004 by MNF-I. CFLCC was commanded by Lt Gen David McKiernan, US Army; CJTF-7 was initially commanded by Lt Gen William S Wallace. From July 2003, CJTF-7 and, later, MNF-I were commanded until the end of June 2004 by Lt Gen Ricardo Sanchez, US Army.

¹⁹ ORHA was established in National Security Presidential Directive (NSPD) 24, Post-War Iraq Reconstruction, which is not publicly available.

²⁰ US Department of Defense, Organizational Diagram of the Department of Defense Office of Reconstruction and Humanitarian Assistance, 11 March 2003, reproduced in Talmon, n 1, Doc 145.

²¹ See Joint Letter of 8 May 2003, n 3, at 1.

²² Compare the Prepared Statement, dated 15 May 2003, for the Committee on International Relations of the House of Representatives by US Under Secretary for Policy, Department of Defense, Douglas J Feith, <http://www.defenselink.mil/policy/sections/public_statements/speeches/archive/former_usdp/feith/2003/may_15_03.html> accessed 1 Aug 2007.

administrator and the military commander on the ground reported to General Franks who, in turn, reported to the US Secretary of Defense. US President Bush had determined that the Department of Defence (DoD) would lead the post-war efforts in Iraq and would have direct authority for the administration and rebuilding of the country.

In October 2002, the US Secretary of Defense, Donald Rumsfeld, had decided in favour of overall military command.²³ A document entitled 'A Commitment to Post-War Iraq: Basic Principles', published by the US Department of Defense on 12 March 2003, stated: 'The immediate responsibility for administering post-war Iraq will fall upon the Commander of the U.S. Central Command, as the commander of the U.S. and coalition forces in the field'²⁴ This was in line with the age-old strategy that military officers must have overall responsibility in all active theatres of operation. The civil administrator was subordinate to the military commander. This is shown by the fact that Garner reported to Franks through Lt General David McKiernan, the commander of Coalition land forces in Iraq.

The situation changed with the appointment by US President George W Bush of Ambassador L Paul Bremer III as 'Presidential Envoy to Iraq' and his appointment by the US Secretary of Defense as head of the CPA with the title of 'Administrator'. A White House press release dated 6 May 2003 summarised Bremer's position as Presidential Envoy as follows:

Ambassador Bremer is [...] is to oversee Coalition reconstruction efforts and the process by which the Iraqi people build the institutions and governing structures that is to guide their future. General Franks is to maintain command over Coalition military personnel in the theatre. Ambassador Bremer is to report to Secretary of Defense Rumsfeld and is to advise the President, through the Secretary, on policies designed to achieve American and Coalition goals for Iraq.²⁵

As Administrator of the CPA, Ambassador Bremer was now responsible for the temporary governance of Iraq, and oversaw, directed and coordinated all executive, legislative, and judicial functions necessary to carry out that responsibility, including humanitarian relief and reconstruction and assisting in the formation of an Iraqi interim administration. In a Memorandum to Ambassador Bremer, dated 13 May 2003, the US Secretary of Defense stated that the Commander, US Central Command, acting as Commander of Coalition Forces, was to support the CPA directly by deterring hostilities; maintaining Iraq's territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out US policy generally.²⁶ While the civil administrator was

²³ See M Gordon and B Trainor, *COBRA II: The Inside Story of the Invasion and Occupation of Iraq* (New York, Pantheon, 2006) 161.

²⁴ The document may be found in Talmon, n 1, Doc 224.

²⁵ 'President Names Envoy to Iraq', Statement by the Press Secretary (6 May 2003) <<http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html>> accessed 1 Aug 2007.

²⁶ See also CPA Regulation No 1 [The Coalition Provisional Authority] (CPA/REG/16 May 2003/01), published in *Al-Waqai Al-Iraqiya. Official Gazette of Iraq*, vol 44, no 3977 (17 June 2003) 4-5; reproduced in Talmon, n 1.

no longer subordinate to the military commander, the CPA remained dependent on the military for many of the resources needed to accomplish its mission.

With the appointment of Ambassador Bremer, the civilian wing was separated from the military wing of the occupation government, and from then on only the former continued to be known as 'CPA'.²⁷ This is shown by the fact that Coalition forces in Iraq that were formerly part of the CPA were now to support it. The new CPA, however, was not identical to ORHA. Its remit was much wider and included all civilian US government programmes and activities in Iraq.²⁸ The ORHA continued to exist as part of the CPA until 16 June 2003.²⁹ Technically speaking, Bremer did not succeed or replace Garner, but partly took the position of Franks.³⁰

Since mid-May 2003, a distinction must be made between (a) the occupying powers and their Coalition partners as such, (b) the Coalition forces in the field, and (c) the civilian presence entrusted with governmental functions. Only the latter traded under the name of 'CPA'.

C. Organisation and Staffing

While on the military side there were four sectors of control or areas of operations,³¹ on the civilian side there were fully integrated structures of government. There were thus no national zones of occupation government. Besides its main headquarters in the Green Zone in Baghdad, the CPA was organised in four regional offices: Baghdad Central, North, South Central and South East (later renamed 'CPA South'). The latter was identical in geographical scope to the British military area of operations, comprising the four southernmost governorates of Iraq. However, 'CPA South', with its regional headquarters in Basra, was not the United Kingdom's sector of the CPA. It was initially led by a senior Danish official

²⁷ See US President, *Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11)*, *Update Report on United States Strategy for Relief and Reconstruction in Iraq* (14 October 2003) 28. See also Merritt CJ in *Elias v Gonzales*, 490 F3d 444 at n 1 (CA6, 2007) and *Youkhana v Gonzales*, 460 F3d 927 at 933 (CA7, 2006).

²⁸ See Letter from US President George W Bush to Ambassador L Paul Bremer, dated 9 May 2003, reproduced in Talmon, n 1, Doc 234.

²⁹ On 16 June 2003, US Deputy Secretary of Defense Wolfowitz issued a memorandum to Department of Defense officials, entitled 'Authority of the Administrator of the Coalition Provisional Authority and Supporting Relationships', by which ORHA was dissolved and all of its remaining functions, responsibilities and legal obligations were formally assumed by the CPA. So-called 'Public Service Announcements' and 'Fact Sheets' continued to be issued in the name of the ORHA until late May and early June 2003.

³⁰ Lt Gen (ret) Garner continued to work in Iraq as Director of ORHA until 3 June 2003.

³¹ The Coalition forces were composed of Divisions, each with military responsibility for a particular zone of Iraq. The US Divisions controlled the North and Central zones and the two multinational Divisions, one commanded by the UK and the other by Poland, were charged with the Southern and South Central zones, respectively.

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with a British deputy.³² The staff of CPA South came from numerous countries, including the United States, Australia, Spain, the Czech Republic, Korea, Romania, Japan and the United Kingdom.³³ By September 2003, the approximately 90 officials of CPA South included 27 British civilian staff members.³⁴ Only one of the governorate teams for the four provinces in CPA South was headed by a British coordinator; the remaining three were headed by US and Italian personnel.³⁵

The CPA was staffed by an assortment of active US civilian and military employees, retired American officials, seconded civilian and military personnel from Australia, the Czech Republic, Denmark, Italy, Japan, Poland, Romania, Spain, the United Kingdom,³⁶ Ukraine and other Coalition member countries, Iraqi expatriates from the Iraq Reconstruction and Development Council, and civilian contractors. For example, officials seconded by the British government were placed at the disposal of the CPA and were acting on its behalf. The government in London paid their salaries, travel costs and other incidental expenses. The US government funded the provision of food and other basic services to all CPA staff.³⁷ The CPA had direct contracts with eight private security companies (PSCs), which, in turn, had numerous contracts with other PSCs as subcontractors.³⁸ While the large majority of positions in the CPA were filled by American citizens, most of whom were also US government employees, an average of some 15 per cent of CPA personnel came from other Coalition partners. As of 11 July 2003, the CPA had a total staff of 1147, of which 332 came from the US Department of Defense, 268 from the US military, 34 from the US Department of State and 36 from other US government agencies. In addition, there were 284 US contractors paid for by USAID, making a total of 954 US personnel and 193

³² On 29 July 2003, the Danish and British governments announced that British Ambassador Sir Hilary Synnott was appointed as new Regional Coordinator for the CPA Southern Region, replacing Danish Ambassador Ole Wohlers Olsen who had resigned the day before; see CPA Southern Region, Press Release No 11, 1 August 2003. Sir Hilary was replaced on 1 February 2004 by another British diplomat, Ambassador Patrick Nixon. On CPA South, see generally H Synnott, 'State-building in Southern Iraq' (2005) 47 *Survival* 33.

³³ See Memorandum from the Foreign and Commonwealth Office in Response to Questions Put by the House of Commons Foreign Affairs Committee (18 June 2003) n 7 para 16; House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism*, Tenth Report of Session 2002–03, Report, together with formal minutes, oral and written evidence. Ordered by The House of Commons to be printed 15 July 2003 (HC (2002–03) 405, 31 July 2003) Ev 69.

³⁴ HC Debs, vol 410, col 676W (16 September 2003).

³⁵ *R (Al Skeini and others) v Secretary of State for Defence*, House of Lords, Statement of Case on Behalf of the Respondent/Cross-Appellant 102, para 200.

³⁶ On the British involvement in the CPA, see HL Debs, vol 650, col 131 (24 Jun 2003); vol 657: WA146 (10 February 2004); vol 668, WA145 (25 January 2005); HC Debs, vol 410, col 676W (16 September 2003); vol 413, col 39W (10 November 2003); vol 417, col 915W (4 February 2004); vol 422, col 63W (7 June 2004); vol 424, col 1613W (15 September 2004).

³⁷ Compare HC Debs, vol 417, col 1304W (10 February 2004) (Foreign Secretary Jack Straw). It was, however, stated that the seconded British officials remained answerable to HMG for what they did.

³⁸ See CPA Discussion Paper: Private Security Companies Operating in Iraq, April 2004, reproduced in Talmon, n 1 above, Doc 179.

from other Coalition countries.³⁹ During a press briefing on 23 August 2003, Ambassador Bremer claimed to have citizens of 25 different countries on his staff in the CPA.⁴⁰ However, of the 11 administrative departments of the CPA only one was headed by a non-US (past or present) official or private-sector contractor.⁴¹

D. A US Government Enterprise

Despite the involvement of other countries, the CPA was a US government enterprise through and through. During an interview with *The Guardian* in June 2007, Andrew Bearpark, the CPA's Director of Operations and the most senior British figure within the CPA hierarchy, said: 'Throughout its entire existence, the CPA was a US government department.'⁴² This assessment is supported by the fact that, at all times, the CPA was headed by a US military or civilian government official who reported to and was subject to the orders of the US Secretary of Defense.⁴³ The CPA remained a Pentagon responsibility even when it was no longer in the CENTCOM chain of command, and was widely regarded as one of the 'administrative units of the Department of Defense.'⁴⁴ This is shown, inter alia, by the email addresses of CPA officials ending 'centcom.mil' and the fact that, initially, CPA operations were funded from Department of Defense (DoD) accounts.⁴⁵ Later, funds appropriated by the US Congress to the President under the heading 'Operating Expenses of the Coalition Provisional Authority' were apportioned to 'the CPA in Iraq (in its capacity as an entity of the United States Government)'⁴⁶

³⁹ *Iraq: Status and Prospects for Reconstruction—Resources*, Hearing before the Committee on Foreign Relations, United States Senate, 108th Congress, 1st Session, 29 July 2003 86. ORHA had started in mid-March 2003 with fewer than 200 staff.

⁴⁰ Press Briefing of 23 August 2003 <<http://www.cpa-iraq.org/pressconferences/Pressconference23AugwithQAs.html>> accessed 1 Aug 2007. For a similar statement before the Senate Appropriations Committee on 22 September 2003, see US Senate, *Fiscal Year 2004 Supplemental Request for Reconstruction of Iraq and Afghanistan*, Hearings before the Committee on Appropriations, 108th Congress, 1st Session, 22, 24, 25 September 2003, 22.

⁴¹ See Organization Charts of the CPA of July and November 2003, reproduced in Talmon, n 1 above, Docs 164 and 174.

⁴² P Wintour, 'US Authority Accused of Ignoring Allies in Iraq' *The Guardian* (London 16 June 2007) 12. Similarly, the Iraqi Minister of Trade during the occupation, Ali Allawi: 'In practice, the CPA was always treated as part of the US federal government' (AA Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace* (London, Yale University Press, 2007) 106). But see also the statement of the British Minister of State, Department of International Development, Hilary Benn, that the CPA is 'a coalition body and not an agency of the US Government' (HC Debs, vol 415, col 1558 (17 December 2003)).

⁴³ Cp *Sudnick v Department of Defense* FSupp2d, 2007 WL 419619 (DDC, 2007) 1–2.

⁴⁴ Cp statement by US President on HR 3289, 6 November 2003 <<http://www.whitehouse.gov/news/releases/2003/11/20031106-12.html>> accessed 1 Aug 2007. On 20 January 2003, US President Bush had signed National Security Presidential Directive (NSPD) 23, 'Post-War Iraq Reconstruction', which had established ORHA under the authority of the DoD.

⁴⁵ See the statement of Joshua Bolton, Director, Office of Management and Budget, before the Senate Foreign Relations Committee, *Iraq: Status and Prospects for Reconstruction—Resources*, Hearing before the Committee on Foreign Relations, United States Senate, 108th Congress, 1st Session, 29 July 2003, 13.

⁴⁶ HR 3289—108th Congress (2003), Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, 117 Stat 1209, at 1225.

and were transferred to the Secretary of Defense.⁴⁷ The CPA also maintained a so-called 'reach-back office' in Washington within the Pentagon and, as an entity of the DoD, conveniently had its own Department of Defense Identity Code (DoDIC) for property accountability, which simplified the process of transferring property accountability from the US military to the CPA.⁴⁸ Candidates for positions in the CPA were screened by the DoD and the drafts of CPA legislation were submitted by Ambassador Bremer to the Pentagon before signing them. In recent litigation, the US government declared that the CPA was 'an instrumentality of the United States for the purposes of the False Claims Act'.⁴⁹ Final confirmation of its status as a US government enterprise may be found in the fact that on 28 June 2004 the CPA transferred all but a few of its US government-related responsibilities to the US Department of State and its headquarters building in Baghdad became the new US Embassy to Iraq.⁵⁰

E. The British Role

In a written ministerial statement to the House of Commons on 16 July 2003, the British Secretary of State for Defence, Geoffrey Hoon, stated: 'The UK is playing a major role, and has seconded experts to work in the Coalition Provisional Authority in Baghdad in a wide range of fields: political, financial, legal, security, health, education, roads, forensics, war crimes, prisons, culture and communications'.⁵¹

On other occasions, the government spoke of the 'leading role of the US and UK in the Coalition Provisional Authority'.⁵² Such statements were, however, aimed mainly at a domestic audience. In reality, the United Kingdom was the junior partner in the Coalition, with little or no influence on the organisation of or the day-to-day decision-making in the CPA. This was understandable, as the

⁴⁷ Memorandum of December 5, 2003—Transfer of Funds Appropriated to the President under the heading Operating Expenses of the Coalition Provisional Authority, and Delegation of the Functions of the President under the heading Iraq Relief and Reconstruction Fund, in the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, 69 Federal Register 1645.

⁴⁸ Center for Law and Military Operations, n 14, at 179.

⁴⁹ Supplemental Brief of the United States, 22 April 2005 (2005 WL 1129476) in *US ex rel DRC, Inc v Custer Battles, LLC*, 472 FSupp2d 787 (EDVa, 2007). But see the opinions of Ellis DJ in that case, *ibid*, 791–2, and 444 FSupp2d 678 at 688–9 (EDVa, 2006) rejecting the view that the CPA was an 'instrumentality of the United States' and finding that the CPA may 'be described as an international body formed by the implicit, multilateral consent of its Coalition partners'. This opinion must be treated with caution as the question of the CPA's status arose in connection with the question whether it was subject to US law.

⁵⁰ See National Security Presidential Directive 36 (NSPD-36), 'United States Government Operations in Iraq', 11 May 2004 <www.fas.org/irp/offdocs/nspd/nspd051104.pdf> accessed 1 Aug 2007.

⁵¹ HC Debs, vol 409, col 34WS (16 July 2003). At the time of speaking, when the total number of CPA staff was some 1150, the UK had seconded some 70 officials to CPA offices in Baghdad, Basra and the north of Iraq.

⁵² HL Debs, vol 430, col WA178 (12 February 2004) (Baroness Symons of Vernham Dean).

United States was providing the vast majority of the staff, money and resources. Compared with the United States' contribution of some US\$980 million for the running of the CPA and some US\$18.6 billion for its reconstruction activities, the United Kingdom's financial allocations to the CPA proved to be a *quantité négligable*.⁵³ While the British government tried to give the impression that the administration and reconstruction of Iraq were a joint enterprise between the two countries, where differences of opinion were 'resolved through discussion and compromise',⁵⁴ it was the United States that was calling the shots. The following exchange between Ambassador Bremer and Senator Sarbanes during a hearing before the Committee on Foreign Relations of the US Senate, held on 24 September 2003, is revealing in this respect:

Senator Sarbanes: When the Coalition Provisional Authority makes a decision, I take it that is your decision; is that correct? [...]

Ambassador Bremer: No, it is not a one-man show. I have two very senior British diplomats, who work literally side by side with me as the—

Senator Sarbanes: And if you and they disagree, what is the outcome? [...]

Ambassador Bremer: Well, I imagine there would be discussions between London and Washington?

Senator Sarbanes: I understand that. But assuming no consensus can be achieved, how is that decision made?

Ambassador Bremer: Well, in the end—

Senator Sarbanes [continuing]: Why do you not say you are the ultimate decision-maker?

Ambassador Bremer: In the end, I have, as you said, the authority.⁵⁵

A couple of days earlier, Ambassador Bremer said in an interview: 'Well for the time being the Coalition is under US command and that is the way it's structured'.⁵⁶ The decision to appoint Ambassador Bremer as head of the CPA was taken unilaterally by the US government. The British government was 'informed' of the appointment, but was not 'consulted'.⁵⁷ Bremer received his orders from Washington and was solely 'responsible for all CPA decisions'.⁵⁸ The British Prime Minister's Special Representative in Iraq,⁵⁹ who was also based in the Green Zone

⁵³ Cp House of Commons Foreign Affairs Committee, *Foreign and Commonwealth Office Annual Report 2003–2004*, Eighth Report of Session 2003–04, 14 September 2004, Ev 60.

⁵⁴ HL Debs, vol 660, col 156 (20 April 2004) (Baroness Symons of Vernham Dean). See also HC Debs, vol 406, col 613W (9 June); col 792W (10 Jun 2003).

⁵⁵ United States Senate, *Iraq: Next Steps—What Will an Iraq 5-Year Plan Look Like?*, Hearing before the Committee on Foreign Relations, 108th Congress, 1st Session, 24 September 2003 30–1.

⁵⁶ Ambassador Paul Bremer Interview with Cox Television, 26 August 2003 <http://www.cpa-iraq.org/transcripts/0826_bremerCoxTV.html> accessed 1 Aug 2007.

⁵⁷ HL Debs, vol 430, col WA178 (12 February 2004).

⁵⁸ HC Debs, vol 421, col 1632W (26 May 2004) (UK Foreign Secretary Jack Straw).

⁵⁹ Ambassador John Sawers was succeeded as UK Special Representative on 11 September 2003 by Ambassador Sir Jeremy Greenstock.

in Baghdad, was in regular contact with Ambassador Bremer.⁶⁰ He was, however, there in an ‘independent capacity’ with no formal role within the CPA’s hierarchy and no formal decision-making power.⁶¹ Whenever Ambassador Bremer was absent from Iraq, his US deputy took charge and made decisions on his behalf.⁶² The UK Special Representative’s main role was to contribute to and support the political process leading to the establishment of a representative Iraqi government under the terms of UN Security Council Resolution 1483 (2003). He could present a British view and hope to have some influence, but he did not make any decisions. The situation is probably best summarised in an assessment of the CPA’s administration of Iraq by the US Center for Law and Military Operations: ‘Things were simply done by the US in a US manner and as they wished’.⁶³

III. International Responsibility of the Occupying Powers for the Acts of the Coalition Provisional Authority

The United States and the United Kingdom jointly occupied Iraq. In Resolution 1483 (2003), the UN Security Council recognised the ‘responsibilities, and obligations under applicable international law’ of these two states ‘as occupying powers under unified command (“the Authority”)⁶⁴. The existence of the CPA—a body without a separate legal personality—did not divest the two countries of their legal obligations as occupying powers in Iraq. To the extent that the CPA exercised governmental authority, this authority derived from the occupying powers. This raises questions of ‘multiple State responsibility’, a subject that has been noted for its paucity of authority.⁶⁵ This section explores the extent to which each occupying power may be held responsible for the actions of the CPA.

⁶⁰ HC Debs, vol 416, col 41W (5 January 2004) (Minister of States, Department for International Development, Hilary Benn). On the US side it was noted, however, that there ‘was a lack of communication between the coalition partners’ (Center for Law and Military Operations, n 14, at 151–2).

⁶¹ HC Debs, vol 431, col 1893W (9 March 2005) (Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs Bill Rammell). However, from 23 to 30 December 2003, when both Ambassador Bremer and his deputy were absent from Iraq, the UK Special Representative looked after CPA affairs. There were neither policy decisions made about Iraq, nor any legislative acts signed during this period.

⁶² US Ambassador Richard H Jones served as Deputy Administrator of the CPA.

⁶³ Center for Law and Military Operations, n 14, at 152, fn 788.

⁶⁴ UN Doc S/RES/1483, n 1, preambular para 13.

⁶⁵ See BD Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (Oxford, Clarendon Press, 1988) 46. The situation has not changed since 1988; see S Besson, ‘La pluralité d’Etats responsables. Vers une solidarité internationale?’ (2007) 17 *Revue suisse de droit international et européen* 13, 15, 17, 24, 26 and 37, who speaks of ‘le sous-développement du régime de responsabilité plurielle en droit international’.

A. Establishment of Responsibility

Article 3 of the 1907 Hague Convention IV provides that a belligerent party that violates the annexed Hague Regulations, which in section III deals with military authority over occupied territory, shall 'be responsible for all acts committed by persons forming part of its armed forces'.⁶⁶ Of course, this does not mean that occupying powers are responsible only for the actions of 'persons forming part of their armed forces'. The provision must be seen against the background of its adoption. At the beginning of the 20th century, occupation government as a rule meant military government. Today, the responsibility of an occupying power is determined in accordance with Article 1 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility) which provide that 'every internationally wrongful act of a State entails the international responsibility of that State'.⁶⁷ Thus each occupying power may be held responsible, if the conduct of the CPA is attributable to it under international law and if that conduct constitutes a breach of its international obligations.

i. Relevant Conduct of the Coalition Provisional Authority

The first question to be answered is: what counts as conduct of the CPA? It is suggested that all actions and omissions of CPA officials acting in their official capacity, irrespective of nationality and status—ie whether they are military or civilian, US, UK or foreign government secondees,⁶⁸ consultants, or contractors—may be considered conduct of the CPA proper.⁶⁹ On the other hand, the conduct of people and organisations who only support the CPA with services, contractors who are implementing projects for the CPA, military personnel doing related jobs who are part of the Coalition forces but not the CPA, and Iraqi government officials, is excluded.⁷⁰ The occupying powers cannot be held responsible for the conduct of these persons and organisations, unless they are empowered to exercise elements of occupation authority or are

⁶⁶ Convention Regarding the Laws and Customs of Land Warfare (IV), with annex of regulations, signed at The Hague, 18 October 1907 (1908) 2 *AJIL Suppl* 2, 90–117. An identical provision may be found in Art.91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Protocol I), 1125 UNTS 4.

⁶⁷ For the text of the ILC Articles on State Responsibility, see UNGA Res 56/83, (28 Jan 2002) UN Doc A/RES/56/83, Annex.

⁶⁸ Seconded foreign government officials were placed at the disposal of the CPA or, more precisely, the occupying powers. Cf Art 6 ILC Articles on State Responsibility, above n 67.

⁶⁹ Cp Art 4 ILC Articles on State Responsibility and commentary thereto, GAOR, 56th Session, Supplement No. 10 (A/56/10), 2001, 84–92.

⁷⁰ Cp HC Debs, vol 410, col 676W (16 September 2003) (Bill Rammell, Under-Secretary of State, FCO).

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subject to the occupying powers' direction or control.⁷¹ However, the occupying powers may incur responsibility in relation to external conduct for omissions on the part of CPA officials, such as a lack of proper supervision or control of private contractors.

With the separation of civil and military responsibilities in mid-May 2003, a distinction must also be made between the conduct of the CPA and the conduct of the Coalition forces. Coalition partners drew a distinction between military personnel assigned to the CPA and those working only 'under the auspices of the CPA'.⁷² For example, members of the Royal Australian Air Force providing air traffic control at Baghdad International Airport⁷³ and military advisers training the New Iraqi Army were not considered to be part of the CPA but were simply working under its auspices, and so remained the responsibility of the respective Coalition partner. Similarly, Abu Ghraib prison and other internment and detention facilities throughout Iraq did not fall within the purview of the CPA. The CPA exercised authority only over criminal justice system prisoners, not over security detainees and prisoners of war. The latter were the responsibility of the occupying power or the Coalition partner whose military forces had been detaining them.⁷⁴ Consequently, in its submission to the UN Commissioner for Human Rights, the CPA was able to state:

In accordance with Article 29 of the Fourth Geneva Convention and Article 12 of the Third Geneva Convention, and in line with the view of the ICRC, US and UK military forces retain legal responsibility for those prisoners of war and detainees in US and UK custody respectively. The US and UK will therefore respond separately on the issue of treatment of detainees within their custody.⁷⁵

Coalition Provisional Authority officials, however, took infrastructure and other decisions which led to prisoners not being processed into the criminal justice system and thus having to stay longer than necessary in detention facilities operated by the Coalition forces, where they were exposed to abuse. Such CPA conduct, if attributable, may give rise to responsibility on the part of the non-detaining occupying power also.

⁷¹ On the responsibility of the occupying power for the internationally wrongful acts committed by the organs of the occupied state in areas in which the latter were subject to the direction or control of the occupying power, see ILC Yb 1979, II/1, 15, para 20.

⁷² Commonwealth of Australia, Official Committee Hansard, Senate, Foreign Affairs, Defence and Trade Legislation Committee Estimates (Budget Estimates Supplementary Hearings), 6 November 2003, 54.

⁷³ CPA Press Release No. 9, 1 July 2003.

⁷⁴ This becomes clear from an Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia, entered into on 23 March 2003. The Agreement is reproduced in Talmon, n 1, Doc 226.

⁷⁵ Written Submission from the CPA to the UN High Commissioner for Human Rights, 28 May 2004, reproduced in Talmon, n 1, Doc 180. See also Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention (2 Feb 2007) UN Doc A/HRC/4/40/Add.1, 31, para 25; 39, para 29; 114, para 6.

ii. *The Coalition Provisional Authority as Common Organ of the Occupying Powers*

One essential requirement of the international responsibility of the occupying powers is that the conduct of the CPA is attributable to them.⁷⁶ According to Article 4, paragraph 1 of the ILC Articles on State Responsibility, which is reflective of a well-established rule of customary international law,⁷⁷ ‘the conduct of any State organ shall be considered an act of that State under international law’. The term ‘State organ’ is intended in the most general sense to include all individuals or collective entities, however classified, which make up the organisation of the state and act on its behalf.⁷⁸ Although the US government has been very cautious in domestic legal proceedings about claiming the CPA as an organ of state,⁷⁹ there can be little doubt that as a US government enterprise it qualifies as an organ of the United States for purposes of state responsibility.

The United Kingdom has stated on several occasions that it shared responsibility for the actions of the CPA.⁸⁰ However, it is more difficult to attribute the actions or omissions of the CPA to the United Kingdom, in view of the UK’s minor role. In particular, the CPA cannot be regarded as a US state organ ‘placed at the disposal’ of the United Kingdom in the sense of Article 6 of the ILC Articles on State Responsibility. While the CPA may also have been acting in the exercise of elements of British governmental authority, it did not act under the ‘exclusive direction and control’ of the United Kingdom but rather on instructions from the US government.⁸¹ Furthermore, any attribution on the basis of Article 6 of the ILC Articles would mean that the conduct of the CPA could be attributed to the United Kingdom alone.

The conduct of the CPA may be attributed to both the United States and the United Kingdom if it qualifies as a ‘common organ’ of the two states.⁸² This term is usually used interchangeably with the term ‘joint organ’ to describe a body that is an organ of two or more states simultaneously. It must be distinguished from the term ‘collective organ’, normally used to describe an organ with international legal personality. The case of a common organ is not expressly provided

⁷⁶ Cp Art 2(a) ILC Articles of State Responsibility, above n 67.

⁷⁷ See, eg, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) 26 February 2007 para 385 <<http://www.icj-cij.org/docket/files/91/13685.pdf>> accessed 1 Aug 2007.

⁷⁸ See the Commentary on Art 4, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10) 2001, 84, para 1; 85–6, para 6.

⁷⁹ See *US ex rel DRC, Inc v Custer Battles, LLC*, 376 FSupp2d 617 (EDVa, 2007), Brief of the United States in Response to the Court’s Invitation of December 21, 2004, 1 April 2005 (2005 WL 871352) and Supplemental Brief of the United States, 22 April 2005 (2005 WL 1129476).

⁸⁰ See, eg, HL Debs, vol 664, col WA108 (7 September 2004); vol 668, col WA131 (24 January 2005).

⁸¹ See the Commentary on Art 6, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 95, para 2.

⁸² On the concept of ‘common organ’, see T Perassi, *Lezioni di diritto internazionale* (Part I) 1957 144–51 (‘gli organi comuni a più stati’).

for in chapter II of the ILC Articles on State Responsibility on the ‘attribution of conduct to a State’, but the solution is implicit in it.⁸³ According to Article 4, paragraph 1, the conduct of a common organ can be considered an act of each of the states whose organ it is.⁸⁴ In the case of a common organ, a single conduct is attributed concurrently to both states. In the commentary on one of its earlier draft Articles on State Responsibility, the ILC wrote:

[T]he conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts.⁸⁵

The attribution of conduct of a common organ is therefore not a case of a state participating in the internationally wrongful act of another state. Rather, both states commit the internationally wrongful act.

It is helpful to examine some past examples of common organs in order to determine their characteristics and to decide whether the CPA qualifies as a common organ of the occupying powers. States have regularly (but not exclusively)⁸⁶ made use of common organs for the joint administration of (foreign) territory, both in peacetime and during armed conflict.

- (i) The Tangier Statute of 1923, initially concluded between France, Great Britain and Spain, provided for the joint administration of the City of Tangier while recognising the sovereignty of the Sultan of Morocco.⁸⁷ Tangier thus constituted a *coimperium*, ie a territory where two or more states—the *coimperii*—jointly exercise authority (but not sovereignty).⁸⁸ The territory was administered through a Control Commission made up

⁸³ See ‘Seventh Report on State Responsibility by Mr Roberto Ago, Special Rapporteur’, ILC Yb 1978, II/1, 54, para 58. See also ILC Yb 1999, II/2, 71, para 266 (concluding remarks by the Special Rapporteur, Mr James Crawford, on draft Art 27).

⁸⁴ Cp ‘Second Report on State Responsibility by Mr James Crawford, Special Rapporteur’, Addendum (1 April 1999) UN Doc A/CN.4/498/Add1, at 3, para 159.

⁸⁵ Commentary on draft Art 27, adopted by the ILC at its session of 8 May to 28 July 1978: ILC Yb 1978, II/2, 99, para 2. See also *Turkey—Restrictions on Imports of Textiles and Clothing Products*, Report of the Panel, WT/DS34/R, 31 May 1999 [adopted as modified by the Appellate Body report on 19 November 1999] para 9.43.

⁸⁶ For example, institutions created by the agreement establishing the EC–Turkey customs union were regarded as ‘common organs’ of the two parties (*Turkey—Restrictions on Imports of Textiles and Clothing Products*, Report of the Panel, WT/DS34/R, 31 May 1999 [adopted as modified by the Appellate Body report on 19 November 1999] para 8.3). In the *Eurotunnel Arbitration* the tribunal held that the Intergovernmental Commission (IGC) established by the Treaty of Canterbury constituted a ‘joint organ’ of the United Kingdom and France and that both countries would be responsible for a breach of an agreement by the IGC (Partial Award of 30 January 2007 paras 179, 187 and 317; <<http://www.pca-cpa.org/>> accessed 1 Aug 2007).

⁸⁷ Convention regarding the organization of the Tangier zone, signed at Paris on 18 December 1923 (28 LNTS 541).

⁸⁸ On the concept of co-imperium generally, see A Coret, *Le condominium* (1960) 70–2; VP Bantz, ‘The International Legal Status of Condominia’ (1998) 12 *Florida JIL* 77, 102.

of the consuls of the signatory powers of the Statute which was considered the common organ of those powers. In a legal opinion on international responsibility for injuries caused in the Tangier zone, dated 30 April 1952, the Swiss Federal Political Department held that: ‘Le Comité de contrôle se composant des représentants des puissances participant à l’administration de la zone de Tanger [...], on doit en tirer la conclusion que ce sont ces puissances qui exercent conjointement le pouvoir effectif à Tanger. [...] Le Comité de contrôle est ainsi un *organe commun* aux puissances cessionnaires qui sont responsables de ses actes’⁸⁹ (emphasis added).

- (ii) There is no general agreement on the question of whether a *condominium*, ie a territory where two or more states—the *condominii*—jointly exercise sovereignty, has an international legal personality distinct from that of its Member States. Authors who consider, for example, that the Anglo–French *condominium* of the New Hebrides⁹⁰ does not have an international legal personality treat the condominiumal organs as common organs, the internationally wrongful acts of which are the direct responsibility of France and the United Kingdom.⁹¹
- (iii) The Trusteeship Agreement for the Territory of Nauru, approved by the United Nations General Assembly on 1 November 1947, provided in Article 2 that the ‘Governments of Australia, New Zealand and the United Kingdom (hereinafter called “the Administering Authority”) are hereby designated as the joint Authority which will exercise the administration of the Territory’. The Agreement added in Article 4:

The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this purpose, in pursuance of an Agreement made by the Governments of Australia, New Zealand and the United Kingdom, the Government of Australia will, *on behalf of the Administering Authority* and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory.⁹² (emphasis added)

Australia always appointed the Administrator, and as a consequence was in charge of the day-to-day administration of the territory. Administrative decisions were subject to confirmation or rejection by the Governor-General of Australia, and were communicated to the other governments for information only.⁹³ In the *Nauru* case, Australia argued before the

⁸⁹ ‘Responsabilité internationale pour des dommages causés dans la zone de Tanger’, (1953) *Annuaire suisse de droit international* 10 238, 244, 247.

⁹⁰ On 30 July 1980, the New Hebrides became the independent State of Vanuatu.

⁹¹ DP O’Connell, ‘The Condominium of the New Hebrides’, (1968-69) 43 *BYBIL* 71, 82. See also *ibid.*, at 78 and 83-4. See further Bantz, n 88, at 148; and Coret, n 88, at 311-12.

⁹² See *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections) ICJ Rep 1992, 240 at 257 para 45.

⁹³ *Ibid.*, at 257, para 43, and at 258, para 46.

International Court of Justice (ICJ) that its special role in the administration of the territory did 'not detract from the fact that all acts were done on behalf of all three Governments'.⁹⁴ The ICJ, noting that the 'Administering Authority' for Nauru did not have an international legal personality distinct from the three states mentioned in the Trusteeship Agreement, seems to have accepted that the Authority constituted the 'common organ' of these states and that Australia was acting on its behalf.⁹⁵

- (iv) In July 1943, the United Kingdom and the United States jointly began to occupy Italy and established an 'Allied Military Government of Occupied Territory' (AMGOT) there. Acting in the name of the two governments, US General Dwight D Eisenhower, Supreme Commander of the Allied Forces in the Mediterranean Theatre of Operations,⁹⁶ appointed British General Harold Alexander as head of AMGOT. The latter was invested with the actual exercise of the authority that the laws of war vested in the occupying powers. AMGOT was a completely fused or integrated military government composed of British and American officers in equal proportions in every function and place.⁹⁷ It was assumed that the two governments would have joint legal responsibility for the actions of AMGOT.⁹⁸
- (v) At the end of the Second World War, the Allies established two joint occupation authorities in Germany. The area of Greater Berlin was governed by an Inter-Allied Governing Authority known by its Russian name of *Kommandatura*, which consisted of four commandants appointed by their respective commanders-in-chief who were 'to direct jointly the administration of the Greater Berlin Area'.⁹⁹ At the national level, the commanders-in-chief acted jointly as Allied Control Council in matters affecting Germany

⁹⁴ *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections of the Government of Australia) December 1990, 136, at para 340; see also 131, at para 322.

⁹⁵ See *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections) ICJ Rep 1992, 270 at 284, separate opinion of Judge Shahabuddeen, who expressly uses the term 'common organ'. See also the dissenting opinion of Judge Schwebel who held: 'In view of the essential fact that [...] Australia always acted as a member of a joint Administering Authority composed of three States, and always acted on behalf of its fellow members of that joint Administering Authority as well as its own behalf, it follows that its acts engaged or may have engaged not only its responsibility—if responsibility be engaged at all—but those of its "Partner Governments"' (*ibid.*, 329 at 342).

⁹⁶ The Supreme Commander himself may be regarded as a common organ of the two states. Military alliances or 'coalitions of the willing' are arrangements between two or more states whereby they agree to cooperate militarily. The alliance or coalition as a rule has no legal personality of its own. The organs of cooperation, such as the 'Supreme Commander of the Allied Forces', are common organs of the members of the military alliance.

⁹⁷ See HA Smith, 'The Government of Occupied Territory' (1944) 21 *BYBIL* 151, 152; Lord Rennell of Rodd, 'Allied Military Government in Occupied Territory' (1944) 20/3 *International Affairs* 307, 310. See also C Harris, *Allied Military Administration of Italy, 1943–1945* (1957).

⁹⁸ AFHQ Appreciation and Outline Plan for Military Government of Sicily, 24 March 43, reproduced in HL Coles and AK Weinberg, *Civil Affairs: Soldiers Become Governors* (Washington, Center of Military History: US Army, 1992) 162.

⁹⁹ See para 5 of the Protocol on the Zones of Occupation in Germany and the Administration of Greater Berlin unanimously adopted by the European Advisory Commission on 12 September 1944 (Cmnd 1552) 28. See also RY Jennings, 'Government in Commission' (1946) 23 *BYBIL* 112, 115.

as a whole. The Council was 'exercising its authority on behalf of the Four Allied Powers', from whom its authority was derived.¹⁰⁰ A hallmark of these common organs was the equal representation at all stages of the four Allied Powers and the requirement that decisions were to be unanimous.

- (vi) On 2 September 1945, US, British and Commonwealth forces occupied Japan. US President Truman appointed as Supreme Commander for the Allied Forces US General Douglas MacArthur, who was recognised 'as the sole executive authority for the Allied Powers in Japan'.¹⁰¹ Although he was supposed to consult and advise an Allied Council for Japan, his decisions on matters of the occupation and control of Japan were final.¹⁰² In a suit brought against the United States by a Hong Kong corporation to recover damages for the use of its vessel by the Allied Powers during the occupation, the United States Court of Federal Claims held:

The occupation of Japan was a joint venture, participated in by the United States of America, the United Kingdom, China, and Russia; and whatever benefit the occupying powers derived from the use of the plaintiff's vessel in the laying and repairing of submarine cables was derived by all of them in common and not by any one more than another. [...].

The Allied Powers, of course, was not a body politic. It was an association of sovereign states. Any action taken by the Supreme Commander for the Allied Powers was taken on behalf of the association, of course; but it was also taken on behalf of each one of the Allied Powers. Any action taken by him was taken as the agent of the United States of America, as the agent of Great Britain, and as the agent of China and of Russia. Whatever use there may have been of the plaintiff's vessel by the Allied Powers, it was a use by all of them. The Supreme Commander was acting as the agent for each of them.¹⁰³

While the Court ultimately found that the United States was not liable for the taking of the vessel,¹⁰⁴ it treated General MacArthur and the Allied occupation authorities in Japan as a common organ of the Allied Powers.

Taking into account these examples, three requirements of a 'common organ' may be identified.

¹⁰⁰ *Flick v Johnson* 174 F2d 983 at 986 (CADC 1949). See also W Friedman, *The Allied Government of Germany* (London, Stevens, 1947) at 67 and Jennings, n 99, at 140.

¹⁰¹ Communiqué on the Moscow Conference of the Foreign Ministers of the Soviet Union, the United Kingdom and the United States, held at Moscow, 16–26 December 1945, signed on 27 December 1945, Report, Part II.B.5 (20 UNTS 272 at 282).

¹⁰² *Ibid.*

¹⁰³ *Anglo Chinese Shipping Co v US*, 127 F Supp 553 at 554, 556 (CtCl 1955). See also *Standard-Vacuum Oil Co v US*, 153 FSupp 465 at 466 (CtCl 1957); *Koki Hirota v General of the Army MacArthur*, 338 US 197 at 198, 203 (1948).

¹⁰⁴ But see the dissenting opinion of Whitaker J. in *Standard-Vacuum Oil Co v US*, 153 FSupp 465 at 468 (Ct.Cl. 1957): 'The occupation of Japan was a joint enterprise of the United States, Great Britain, Russia and other Powers [...]. That each of them was engaged in a joint venture with the others affords no escape from liability.'

- (1) The body in question must not possess a separate international legal personality and must not qualify as a collective organ of an international organisation. The occupying powers have made it clear that the CPA 'is not an entity which is legally distinct from the United Kingdom and the United States for the purposes of international law'.¹⁰⁵ On the contrary, it was established 'as the executive body' of the occupying powers in Iraq.¹⁰⁶
- (2) A common organ of two or more states is a state organ of each of them. State organs, by definition, exercise elements of the governmental authority of their state. This requires that each state in question is competent to exercise the authority exercised by the common organ.¹⁰⁷ British Foreign Secretary Jack Straw explained that the CPA 'was established to exercise the specific authorities, responsibilities and obligations under international law of the occupying powers'.¹⁰⁸ In Resolution 1483 (2003), the Security Council recognised that these authorities, responsibilities and obligations lay with both the United States and the United Kingdom 'as occupying powers under unified command'.¹⁰⁹
- (3) There are various ways to create a common organ. States may jointly set up a new integrated body composed of officials from both. The number of officials from each side and their decision-making power may vary depending on the individual case. As states can always authorise another state to exercise some of their powers and to act on their behalf, states may also by agreement designate an existing state organ of one of them as their common organ,¹¹⁰ or they may entrust one of them with the establishment of a new state organ that will serve as a common organ of both. In this case, the other state may assist the entrusted state by placing some of its officials at the disposal of the existing or newly established organ.¹¹¹ Adapting Georges Scelle's theory to the present situation, one may speak of a horizontal *dedoublement fonctionnel*, ie a state organ playing a functional dual role as organ of its own and of another state.¹¹² It is not necessary for the

¹⁰⁵ Supplementary Memorandum Submitted by the Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee, 5 April 2004, above n 5, Ev 35; Brief of the United States in Response to the Court's Invitation of December 21, 2004, 1 April 2005, above n 79.

¹⁰⁶ See the Written Submission from the CPA to the UN High Commissioner for Human Rights, 28 May 2004, n 75 above.

¹⁰⁷ See A Verdross, 'Staatsgebiet, Staatengemeinschaftsgebiet und Staatengebiet' (1927) *Zeitschrift für Internationales Recht* 37, 293 at 303.

¹⁰⁸ HC Debs, vol 417, col 1304W (10 February 2004).

¹⁰⁹ UN Doc S/RES/1483 of 22 May 2003, preambular para 13.

¹¹⁰ Cp JL Kunz, *Die Staatenverbindung* (1929), 395, 400. See also the 'Second Report on State Responsibility by Mr James Crawford, Special Rapporteur', n 84, at 2 ('one State [...] acting as an organ or agent of another State').

¹¹¹ Cp Art. 6 ILC Articles on State Responsibility.

¹¹² Cp G Scelle, *Précis de droit des gens*, vol I (1932) 43, 54–6, 217. Scelle understood the concept in a vertical way, ie state organs acting both on behalf of the state and the international community.

state organ to act on the joint instructions of its own and the other state, for each state to exercise a measure of control over the common organ,¹¹³ or for the other state to have assented to a particular action by the foreign state organ. On the contrary, the state must retain (at least some) control over the actions of its organ in order for it to qualify as a common organ of both states.¹¹⁴

Employing the organ of another state as a common organ is, in some ways, like writing a blank cheque and potentially exposes the state to increased international responsibility. It may be compared with the situation in Article 11 of the ILC Articles on State Responsibility where a state generally acknowledges and adopts the conduct of a foreign state organ as its own; the only difference being that this is done *ex ante facto*. In the case of Iraq, it seems that the United Kingdom wrote the United States a blank cheque for the latter to set up a new organ, the CPA, which was to act as the common organ of both occupying powers.¹¹⁵ In this sense, one may speak of an agency relationship between the United States and the United Kingdom. In the day-to-day administration of occupied Iraq, the CPA, as a state organ of the United States, acted on behalf of its own state as well as on behalf of the United Kingdom. Consequently, the CPA's conduct may be attributed to both of them.

iii. Breach of an International Obligation of the Occupying Powers

Conduct of the CPA, which is attributable to the occupying powers, must constitute a breach of their international obligations. As the obligations of the occupying powers may not be the same, the question of breach of obligation must be determined separately for each occupying power. Unlike the United States, the United Kingdom is bound, for example, by the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Second Optional Protocol to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, all of which may apply in occupied territory.¹¹⁶ In addition, the United Kingdom is a party to Additional Protocol I to

¹¹³ Cp *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections), CR 91/20 (19 November 1991) 70–1, para 43. James Crawford appearing for Nauru submitted that ‘normally each State would exercise a measure of control over a common organ’ (emphasis added).

¹¹⁴ In case the other state exercised exclusive direction or control over the organ Art 6 ILC of the Articles on State Responsibility would apply. Cf ‘Second Report on State Responsibility by Mr James Crawford, Special Rapporteur’, n 84, at 3, fn 355.

¹¹⁵ Cp Supplemental Brief of the United States, 22 April 2005, above n 49 (‘For some purposes, the CPA may also have been an instrumentality of a coalition of both the United States and the United Kingdom’).

¹¹⁶ The application of the universal human rights instruments in occupied territory was confirmed by the ICJ in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004, 136, paras 106, 111–13. On the (very limited) application of the ECHR to British forces in occupied Iraq, see *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26, paras 56, 61–84, 91, 97, 105–32. The last word on this question has, however, not been spoken yet. The court in Strasbourg is the ultimate authority on this question.

the Geneva Conventions, while the United States is not. As under Protocol I, the United Kingdom has a broader set of obligations than the United States in relation to the definition and categorisation of prisoners of war. Accordingly, on 23 March 2003 it concluded an arrangement with the United States that contained mutual assurances on the treatment of all transferred persons and confirmed that such persons were entitled to the full protection of the third Geneva Convention and the first Additional Protocol.¹¹⁷ In the case of the same obligation binding both occupying powers, it must also be determined whether this is a joint obligation of both or an individual obligation of each.¹¹⁸

It is beyond the scope of this chapter to examine individual breaches of the occupying powers' international obligations.¹¹⁹ Instead, this section outlines some of the obligations incumbent on the United States and the United Kingdom in Iraq and their possibility for breach. As occupying powers, the two states were each individually subject to the rules of international humanitarian law, and in particular the Hague Regulations Concerning the Laws and Customs of Land Warfare¹²⁰ and the fourth Geneva Convention.¹²¹ This was confirmed by the British Foreign Secretary, who said in a statement before the House of Commons: 'The United Kingdom and the United States fully accept our responsibilities under the fourth Geneva Convention and the Hague regulations'.¹²² In *Armed Activities on the Territory of the Congo*, the ICJ held that the obligation under Article 43 of the Hague Regulations 'comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party'.¹²³ The occupying powers may thus be held responsible for any violation of their obligations by the CPA and for 'any lack of vigilance [on the part of the CPA] in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory'.¹²⁴ The CPA was well aware that the occupying powers were under an obligation to supervise the day-to-day operations of private contractors and of Iraqi government officials in order to secure compliance with international human

¹¹⁷ Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia, entered into on 23 March 2003. The Agreement is reproduced in Talmon, n 1, Doc 226.

¹¹⁸ Cp *Eurotunnel Arbitration*, Partial Award of 30 January 2007, n 86, para 177.

¹¹⁹ For a list of acts and omissions of the occupying powers giving rise to state responsibility, see D Scheffer, 'Beyond Occupation Law' (2003) 97 *AJIL* 842, 855–6.

¹²⁰ Hague Regulations Concerning the Laws and Customs of Land Warfare, Annex to the Convention Regarding the Laws and Customs of Land Warfare, signed at The Hague, 18 October 1907 (1908) 2 *AJIL Supp.* 97–117.

¹²¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, with Annexes, done at Geneva, 12 August 1949, 75 UNTS 287.

¹²² HC Debs, vol 405, col 22 (12 May 2003).

¹²³ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Rep 2005 para 178.

¹²⁴ Cp *ibid*, para 179.

rights law. In the National Policy Guidelines drawn up by the CPA Ministry of Justice it was stated:

One of the most sensitive issues that the CPA will have to address is the management of prisons. As I stated at the beginning of this memorandum, the Coalition will have ultimate responsibility for prison conditions and for the treatment of prisoners, even if correctional facilities are staffed with Iraqi officers. As the occupying powers, the US and the UK will have an obligation to maintain these facilities at a level of internationally acceptable standards. The CPA, therefore, will have little choice but to be actively involved in operations of prisons to a degree that may not be true of courts or police.¹²⁵

This was especially true as the CPA had removed almost the entire management of the Iraqi prison system on the grounds of its Baath party membership.¹²⁶ In *Armed Activities on the Territory of the Congo*, the ICJ further held that the occupant's obligation under Article 43 of the Hague Regulations 'to take appropriate measures to prevent the looting, plundering and exploitation of natural resources' extended to private persons in the occupied territory and not only to members of its own forces and officials.¹²⁷ It is argued that the same obligation exists in the case of the 'cultural resources' of the occupied territory,¹²⁸ which raises the question of the occupying powers' responsibility for the looting of the Iraqi National Museum in Baghdad and other archaeological and religious sites throughout the country. The obligation under Article 43 of the Hague Regulations to 'ensure, as far as possible, public order and safety' also includes the obligation to maintain appropriate protection over the nuclear material at Iraq's nuclear research centre at Tuwaitha.¹²⁹ As Iraq no longer had a functioning government to act on its behalf, the occupying powers found themselves in a fiduciary position. Fiduciary duties of the occupant are recognised, for example, in Article 55 of the Hague Regulations.¹³⁰ At the beginning of the occupation, Iraq or its state owned enterprises were engaged in over 70 lawsuits worldwide, mostly as defendant. The occupying powers were under an obligation to seek delays to allow a future Iraqi government to make its own legal decisions, take urgent procedural steps, conclude settlement agreements to avert execution of judgments against Iraqi state property abroad and, availability of Iraqi funds

¹²⁵ CPA, Ministry of Justice National Policy Guidance, 26 June 2003, Appendix III, reproduced in Talmon, n 1, Doc 159.

¹²⁶ See CPA Order No 1, De Baathification of Iraqi Society (CPA/ORD/16 May 2003/01), above n 9.

¹²⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Rep 2005 para 248. See also para 250.

¹²⁸ See the EU Presidency's Statement on Iraq at the Informal European Council in Athens, 16 April 2003: 'At this stage the coalition has the responsibility to ensure a secure environment, including [...] the protection of the cultural heritage and museums' <<http://www.consilium.europa.eu/>> accessed 01 Aug 2007.

¹²⁹ Following media reports of looting of nuclear and radioactive material from the Tuwaitha nuclear research centre, IAEA Director General El Baradei wrote to the US Government asking it to ensure proper protection of the material located there. See IAEA Press Release 2003/04, 11 April 2003 and 2003/03, 22 May 2003.

¹³⁰ On fiduciary duties of the occupant, see M Rheinstein, 'The Legal Status of Occupied Germany' (1948) 47 *Michigan LR* 23, 29–30.

permitting, pay for the provision of legal services. In light of its obligations, the CPA made available some US\$4.5 million for outside legal fees¹³¹ and instructed counsel to take certain actions on behalf of Iraq.¹³²

Resolutions of the Security Council may be another source of the occupying powers' obligations. On 16 May 2003, the CPA established the Development Fund for Iraq (DFI) to hold the proceeds of all Iraqi oil sales, as well as Iraqi assets frozen abroad and funds transferred from the United Nations' oil for food programme. Six days later, the Security Council, acting under chapter VII of the UN Charter, adopted Resolution 1483 in which it noted the establishment of the DFI and that the funds in the DFI were to be disbursed 'at the direction of the Authority, in consultation with the Iraqi interim administration'.¹³³ The Council underlined that the DFI was to

be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq.¹³⁴

Further, the Council decided that all export sales of Iraqi oil following the adoption of the resolution were to be made 'consistent with prevailing international market best practices'.¹³⁵ The CPA acknowledged some of these obligations in its Memorandum No 4 where it says: 'As steward for the Iraqi people, the CPA will manage and spend Iraqi funds, which belong to the Iraqi people, for their benefit. [...] they shall be managed in a transparent manner that fully comports with the CPA's obligations under international law, including Resolution 1483'.¹³⁶ That Resolution 1483 imposed additional obligations on the occupying powers was also made clear by the French representative explaining the French vote on that resolution in the Security Council who stated that 'these broad authorities [attributed to the occupying powers by the resolution] entail responsibilities vis-à-vis [...] the international community, because it has recognized the existence of the rights and obligations of the Authority and addressed specific requests to it'.¹³⁷ In Resolution 1511, the Security Council itself referred to the 'responsibilities, authorities, and

¹³¹ See United States Department of Defense, Office of General Counsel, Acquisition and Fiscal Accountability: Between Iraq and a Hard Place, Fiscal Panel, 2004 Contract Law Symposium, The Judge Advocate General's Center and School, 9 December 2004 <<https://www.jagcnet.army.mil/>> accessed 1 August 2007.

¹³² Compare *Kuwait Airways Corporation v Iraqi Airways Company*, [2003] EWCA Civ 1294 paras 3, 7 (CA).

¹³³ See n 1, paras 12, 13.

¹³⁴ *Ibid*, at para 14. See also UN Doc S/RES/1511 (2003) of 16 October 2003 para 23.

¹³⁵ *Ibid*, at para 20.

¹³⁶ CPA Memorandum No 4, Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq (CPA/MEM/19 August 2003/04) sec 1. See also CPA Regulation No 2, Development Fund for Iraq (CPA/REG/10 June 2003/02), preambular para 5 and sec 1; published in *Al-Waqai Al-Iraqiya. Official Gazette of Iraq* vol 44, no 3979 (no date) 70–82 and vol 44, no 3978 (17 August 2003) 3–7; both reproduced in Talmon, n 1.

¹³⁷ UN Doc S/PV.4761, (22 May 2003) 4. See also UN Doc S/PV.4791, 22 July 2003 25 (Pakistan).

obligations under applicable international law recognized *and set forth* in resolution 1483 (2003)¹³⁸ (emphasis added). In a brief in response to the Court's invitation in the *Custer Battles* case the US government stated: 'International law, as well as UNSCR 1483, imposed particular rights and responsibilities that the Geneva and Hague Conventions do not address. One of these was responsibility for the management of this unique creation, the DFI.¹³⁹ The occupying powers were thus under an obligation to use the DFI funds in a transparent manner, in line with international accounting standards, and only for purposes benefiting the Iraqi people. Between May 2003 and June 2004, the CPA controlled US\$23.3 billion in Iraqi funds and spent or disbursed US\$19.6 billion, including nearly US\$12 billion in cash.¹⁴⁰ Reports indicate that a large proportion of that money was wasted, stolen or frittered away. In an Audit Report of January 2005, the US Special Inspector General for Iraq Reconstruction writes:

The CPA provided less than adequate controls for approximately \$8.8 billion in DFI funds provided to Iraqi ministries through the national budget process. Specifically, the CPA did not establish or implement sufficient managerial, financial, and contractual controls to ensure DFI funds were used in a transparent manner. Consequently, there was no assurance that the funds were used for the purposes mandated by Resolution 1483. [...] we believe the CPA management of Iraq's national budget process and oversight of Iraqi funds was burdened by severe inefficiencies and poor management.¹⁴¹

Auditors found hundreds of irregularities, non-existent contracts, non-existent projects and non-existent contractors. In one case, CPA officials authorised payment for about 74,000 guards' salaries but only a fraction of these could later be validated.¹⁴² Several criminal prosecutions have been brought in the meantime against private contractors and members of the CPA for large-scale procurement fraud.¹⁴³ Some have described events in Iraq as 'a financial scandal that in terms of sheer scale must rank as one of the greatest in history'.¹⁴⁴ The CPA's mishandling of the DFI may thus, in due course, give rise to claims for compensation by Iraq against the occupying powers. The fact that British officials were not authorised signatories

¹³⁸ UNSC Res 1511 (16 Oct 2003) UN Doc S/RES/1511 para 1.

¹³⁹ Brief of the United States in Response to the Court's Invitation of December 21, 2004, 1 April 2005, above n 79.

¹⁴⁰ See US House of Representatives, *Cash Transfers to the Coalition Provisional Authority*, Memorandum to Members of the Committee on Oversight and Government Reform, 110th Congress, 6 February 2007 5, 9.

¹⁴¹ Office of the Special Inspector General for Iraq Reconstruction, *Oversight of Funds Provided to Iraqi Ministries through the National Budget Process*, Audit Report No 05-004, 30 January 2005 i, ii and 5.

¹⁴² *Ibid*, at 7.

¹⁴³ Cp Statement of Deputy Assistant Attorney General Barry M Sabin before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Concerning War Profiteering and Other Contractor Crimes Committed Overseas, 19 June 2007 4-5 <<http://judiciary.house.gov/>> accessed 1 Aug 2007.

¹⁴⁴ C Macrae and A Fadhil, G2: 'Iraq was awash in cash. We played football with bricks of \$100 bills' *The Guardian* (London 20 March 2006) Features 22. See also J Gordon, 'Iraq: Follow the Money' *Le Monde diplomatique* (April 2007).

over the DFI account and were not involved in the auditing of the CPA accounts¹⁴⁵ does not absolve the United Kingdom from its international responsibility.¹⁴⁶

B. Questions of Multiple State Responsibility

In cases of parallel attribution of a single course of conduct of a common organ to two or more states, all states will, if the conduct constitutes a breach of their international obligations, concurrently have committed separate, although identical, internationally wrongful acts.¹⁴⁷ The plurality of responsible states raises intricate questions. In the literature there is considerable confusion as these questions are discussed in terms of 'joint', 'joint and several' or 'solidary' responsibility. The substantive questions of the extent of each state's (full or partial) responsibility and whether the state held responsible has a right of recourse against the other state(s) are regularly mixed up with the procedural questions of whether responsibility can be invoked separately and, more importantly, whether claims against one state only are admissible. Each of these questions will be discussed in turn.

i. Invocation of Responsibility of Each Occupying Power

Where there is a plurality of responsible states in respect of the same internationally wrongful act, an injured state can invoke the responsibility of each one of them in relation to that act. There is ample authority for this proposition. Judge Azevedo held in the *Corfu Channel* case that the 'victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always let to the discretion of the victim'¹⁴⁸ and Judge Shahabuddeen stated in the *Nauru* case that 'where States act through a common organ, each State is separately answerable for the wrongful act of the common organ'.¹⁴⁹ Referring to Judge Shahabuddeen's statement, the WTO Panel in *Turkey-Textiles* concluded that Turkey alone could be held responsible for measures taken by the Turkey-EC customs union.¹⁵⁰ The ILC also favoured a system of separate responsibility, even

¹⁴⁵ See HC Debs, vol 430, col 1202W (4 February 2004) (Denis MacShane, Minister for Europe, FCO).

¹⁴⁶ The UK Secretary of State for International Development, Baroness Amos, said: 'Under UNSCR 1483, the occupying powers shared joint responsibility for the actions of the Coalition Provisional Authority (CPA), including management of the Development Fund for Iraq (DFI)' (HL Debs, vol 664, col WA108 (7 September 2004)).

¹⁴⁷ Cp ILC Yb 1978, II/2, 99, para 2.

¹⁴⁸ *Corfu Channel*, ICJ Rep 1949, 78 at 92 (diss op Azevedo). See also the Memorial submitted by the Government of the United States of America, 2 December 1958, ICJ Pleadings, *Aerial Incident of 27 July 1955 (USA v Bulgaria)* 167 at 229 para 3.

¹⁴⁹ Separate opinion of Judge Shahabuddeen, above n 95, 270 at 284. See also the Memorial of the Republic of Nauru, April 1990, vol 1, paras 623-30.

¹⁵⁰ *Turkey—Restrictions on Imports of Textiles and Clothing Products*, Report of the Panel, WT/DS34/R, 31 May 1999 [adopted as modified by the Appellate Body report on 19 November 1999] para 9.42.

in relation to common organs.¹⁵¹ The general principle of separate responsibility in international law is now reflected in Article 47, paragraph 1 of the ILC Articles on State Responsibility.¹⁵² An injured state such as Iraq would thus be free to hold either the United States or the United Kingdom, or both of them, to account for the way the DFI was administered on their behalf by the CPA.

ii. Extent of Responsibility of the Individual Occupying Power

That responsibility can be invoked against each occupying power separately does not say anything about the extent of that responsibility, ie whether each occupying power can be held to account for the whole or only for part of the damage. In its legal opinion on the international responsibility for injuries caused in the Tangier zone, the Swiss Federal Political Department was of the opinion that:

Chacune des puissances en question n'est cependant pas responsable entièrement pour les actes de l'organe commun qu'est le Comité de contrôle. Le représentant qu'elle y délègue n'est en effet qu'un organe partiel. Il nous semble donc juste d'admettre que chaque des puissances membres du Conseil de contrôle est responsable pour une partie seulement du dommage.¹⁵³

In the *Nauru* case, Australia also contended that 'it would not be appropriate to require Australia to bear more than a proportionate share of the supposed injury'.¹⁵⁴ Nauru, on the other hand, argued that Australia was responsible for the entirety of the damage. The ICJ did not have to decide this question; having decided that it had jurisdiction and that the case was admissible, Australia agreed to pay by instalments an amount corresponding to the full amount of Nauru's claim and the case was subsequently withdrawn.¹⁵⁵ The problem with any apportionment of responsibility between the occupying powers is that it must not necessarily be apportioned in equal parts and that, even if it is, the other occupying power may claim special circumstances.¹⁵⁶ Any agreement between the

¹⁵¹ ILC Yb 1978, II/2. 99 para 2. See also *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections), CR 91/20, (19 November 1991) 70–1 para 43 (James Crawford).

¹⁵² See also the Commentary on Art 47, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001 314, paras 1, 3; 317, para 6.

¹⁵³ 'Responsabilité internationale pour des dommages causés dans la zone de Tanger', (1953) 10 *Annuaire suisse de droit international* 238, 247–8.

¹⁵⁴ *Certain Phosphate Lands in Nauru (Nauru v Australia)*, (Counter-Memorial of the Government of Australia), 29 March 1993, 216 para 560. The Court left the question open: see ICJ Rep 1992 240, 262, para 56. But see also 326 at 328 (diss op Ago).

¹⁵⁵ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) ICJ Rep 1993, 322. See also the Settlement Agreement of 10 August 1993 (1770 UNTS 379).

¹⁵⁶ In *Ilaşcu and Others v Moldova and Russia*, Application No 48787/99, the European Court of Human Rights apportioned the compensation payable by Russia and Moldova between the two states in a ratio of 66.6 to 33.3 in respect of pecuniary and non-pecuniary damage arising from the violation of Arts 3 and 5 ECHR and in a ratio of 70 to 30 in respect of non-pecuniary damage sustained on account of a breach of Art 34 ECHR. In neither case did the Court give any reasons for arriving at these figures, although one may guess that the duration of the violations may have played a role. At the time of the judgment, Russia had violated the rights of the applicants for some 6 years, while Moldova had violated them only for some 3 years. See (2005) 40 *EHRR* 46 para 489 and paras 20, 21 of the operative provisions of the judgment.

occupying powers on that question, for example on the basis of decision-making authority or control over the CPA, would be *res inter alios actus* and thus would not be binding on the injured state. Furthermore, there is the procedural problem for an international court or tribunal to determine the share of the responsibility falling upon one of the occupying powers without the other being present before the court. As there is no power of compulsory joinder of parties in international law,¹⁵⁷ it would be impossible for the court to determine the individual share of responsibility of the occupying power.¹⁵⁸

It could be argued that each occupant is responsible for the whole damage as the occupying powers share 'joint (or solidary) responsibility' for the conduct of the CPA. If states are jointly responsible, they are each responsible for the full amount of the damage. Ian Brownlie writes that 'in principle, joint responsibility would flow from the joint occupation, at least as a presumption'.¹⁵⁹ In the *Eurotunnel Arbitration* the tribunal noted that the question of whether there is solidary responsibility depends on the circumstances and on the international obligations of each of the states concerned.¹⁶⁰ The tribunal continued to examine whether the states had intended to assume solidary responsibility.¹⁶¹ In the case of the United States and the United Kingdom, such an intention may be inferred from their joint letter to the President of the Security Council, dated 8 May 2003, in which they informed the international community that, 'acting under existing command and control arrangements through the Commander of Coalition Forces, [they] have created the Coalition Provisional Authority', and that they were 'working through the Coalition Provisional Authority'.¹⁶² That the two states assumed joint responsibility is also confirmed by British government statements which speak of 'shared joint responsibility for the actions of the Coalition Provisional Authority'.¹⁶³

The doctrine of joint responsibility, however, is not required to explain the full responsibility of each occupying power. As has been shown above, both the United States and the United Kingdom are concurrently responsible for the internationally wrongful acts of the CPA. Article 31 of the ILC Articles on State Responsibility provides that the 'responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'. In its commentary on this provision the ILC makes it clear that state practice and the

¹⁵⁷ See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, ICJ Rep 1990 92, at 135, para 99; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Jurisdiction and Admissibility) ICJ Rep 1984 392, at 431, para 88.

¹⁵⁸ See *Monetary Gold Removed from Rome in 1943 (Preliminary Question)* ICJ Rep 1954 19, at 32.

¹⁵⁹ I Brownlie, *Systems of the Law of Nations, State Responsibility: Part I* (Oxford, Clarendon Press, 1983) 192. See also R Jennings and A Watts (eds), *Oppenheim's International Law* (Harlow, Longman, 9th edn, 1992) 501.

¹⁶⁰ *Eurotunnel Arbitration*, Partial Award of 30 January 2007, n 86, para 174.

¹⁶¹ *Ibid*, para 175.

¹⁶² Joint Letter of 8 May 2003, n 3, at 1; reproduced in Talmon n 1.

¹⁶³ See, eg, HL Debs, vol 664, col WA108 (7 September 2004); vol 668, col WA131 (24 January 2005).

decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes. The responsibility of a state is not affected vis-à-vis the injured state by the consideration that another state is concurrently responsible.¹⁶⁴ This is also expressly spelled out in the commentary on Article 47, where the ILC states that in the case of a plurality of responsible states ‘responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act’.¹⁶⁵ The only limitation Article 47 imposes is that the injured state must not recover, by way of compensation, more than the damage it has suffered. Each occupant is thus responsible for all the damage caused by the CPA.

iii. Recourse against the other Occupying Power

Where two or more states commit the same internationally wrongful act and one of them is held responsible for the entire damage, the question arises whether that state has a right of recourse against the other States. Article 47, paragraph 2(b) of the ILC Articles on State Responsibility does not address the question of contribution among several states which are responsible for the same internationally wrongful act; it merely provides that the general principle of separate responsibility ‘is without prejudice to any right of recourse against the other responsible States’. This raises the question of the legal basis of such a right.

There is no treaty governing the rights of recourse between several responsible occupying powers and no evidence of the existence in customary international law of a general right of recourse against other responsible states.¹⁶⁶ It has, however, been suggested on the basis of a study of comparative tort law that ‘the principle of joint-and-several responsibility [...] can properly be regarded as a “general principle of law” within the meaning of Article 38, paragraph 1(c), of the ICJ Statute’.¹⁶⁷ This principle allows the injured claimant to pursue one of several tortfeasors and to receive from him payment in full. That tortfeasor can then pursue the other tortfeasors liable for the same damage for a contribution. The ILC sounds a word of caution with regard to such analogies. In its commentary on Article 47 it notes that ‘it is important not to assume that internal law concepts and rules in this field can be applied directly to international law’. Terms such as ‘joint’, ‘joint and several’ and ‘solidary’ responsibility derive from different

¹⁶⁴ See the Commentary on Art 31, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001 229–30 para 12.

¹⁶⁵ *Ibid*, 314, at para 1.

¹⁶⁶ See Brownlie, n 159, at 189; Besson, n 65, at 29.

¹⁶⁷ *Oil Platforms (Islamic Republic of Iran v USA)* ICJ Rep 2003 324, at 358, para 74 (separate opinion of Judge Simma). See also *Aerial Incident of 27 July 1955 (USA v Bulgaria)*, Memorial submitted by the Government of the United States of America, 2 December 1958, ICJ Pleadings 1958, 167 at 229, para 3 and 230–3 and Annex 63. On the content of municipal law rules, see further also JE Noyes and BD Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 *Yale JIL* 225, at 251–8. For a comparative tort law approach, see also Besson, n 65, 34–6.

legal traditions and analogies must be applied with care.¹⁶⁸ The ILC also states, however, that Article 47, paragraph 1 neither recognises a general rule of joint and several responsibility, nor does it exclude such a possibility.¹⁶⁹ There are no decisions of international or national courts which confirm the existence in international law of the general principle of joint and several responsibility. This silence strongly suggests that, in the absence of a special treaty regime,¹⁷⁰ that principle and the right of recourse are not part of international law. However, even if they were, there is the additional problem that there are no clear rules in international law for the apportionment of compensation and for contribution or indemnification between jointly and severally responsible states.¹⁷¹ In its Memorial submitted in the case concerning the *Aerial Incident of 27 July 1955* the United States, after claiming that an aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, continued: 'The relationship between the joint tortfeasors themselves is a separate problem. Whether a joint tortfeasor who has paid may have recourse for indemnity or contribution against the others *frequently* depends on the relative degree of culpability involved'¹⁷² (emphasis added). The degree of culpability is just one way of apportioning compensation for the damage caused; relative causation, decision-making authority in or control over a common organ or the nationality of the acting official of a common organ may be others.¹⁷³ There may also be situations where the extent of fault of each state cannot be clearly established. In this case, should the burden of compensation be apportioned equally between them? In the absence of a special treaty regime international law has no answers to these questions.¹⁷⁴

¹⁶⁸ See Commentary on Art 47, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10) 2001 314 para 3. See also the 'Third Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum', UN Doc A/CN.4/507/Add2, 10 July 2000, 26, para 275. Cf also I Brownlie, *Principles of Public International Law* (Oxford, Oxford University Press, 6th edn, 2003) 440, who points out that 'municipal analogies are unhelpful'.

¹⁶⁹ See Commentary on Art 47, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 317 para 6.

¹⁷⁰ On treaty based joint and several responsibility, see, eg, S Sucharitkul, 'Liability and Responsibility of the State of Registration or the Flag State in Respect of Sea-Going Vessels, Aircraft and Spacecraft Registered by National Registration Authorities' (2006) 54 *American Journal of Comparative Law* 409, 440–2.

¹⁷¹ Cp Commentary on Art 47, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 317 para 5. See also Besson, n 65, at 37; Noyes and Smith, n 167, at 255, fn 144, and 256, 263–4.

¹⁷² *Aerial Incident of 27 July 1955 (USA v Bulgaria)*, Memorial submitted by the Government of the United States of America, 2 December 1958, ICJ Pleadings 1958, 167 at 230, para 4. The ICJ did not have to decide the question of joint and several responsibility as the United States advised that it desired to discontinue the proceedings; see *Aerial Incident of 27 July 1955 (USA v Bulgaria)* ICJ Rep 1960 146.

¹⁷³ Cp s 6 of CPA Order No 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors (CPA/ORD/26 June 2003/17) published in *Al-Waqai Al-Iraqiya. Official Gazette of Iraq*, vol 44, No 3979 (no date) 1–4; reproduced in Talmon, n 1, at Doc 29.1.

¹⁷⁴ See Art IV(2) of the Convention on the International Liability for Damage Caused by Space Objects of 29 March 1972 (961 UNTS 187). See also Art V(2) which provides for indemnification between states which are jointly and severally liable.

However, there is no need to identify the situation of the occupying powers in Iraq with 'joint and several responsibility'. A right of indemnification may be established on the basis of the law of agency. The existence of agency relationships under international law is well recognised.¹⁷⁵ As has been shown above, the CPA was a US state organ that acted on behalf of both the United States and the United Kingdom.¹⁷⁶ Thus there existed an agency relationship between the United States and the United Kingdom: the United States was acting as an agent of the United Kingdom and, at the same time, on its own behalf. The agency relationship works both ways. Where the agent has acted without the authority of the principal or the agency relationship is limited in any other way, but the principal is nevertheless bound because the agent had apparent authority, the agent is liable to indemnify the principal for any resulting loss. In the letter of 8 May 2003 to the President of the Security Council, the United Kingdom stated that, together with others, it had created and was working through the CPA, thereby implying that it had given the (US state organ) CPA general authority to act on its behalf. However, the United Kingdom may have limited that authority in its internal relationship with the United States, for example, to acts in conformity with its obligations under international law. In the case that the internationally wrongful act is a result of the CPA acting *ultra vires*, the United States is under an obligation to indemnify the United Kingdom for any payments it made to an injured State. Where the CPA was acting *intra vires*, the United States must pay the United Kingdom half the compensation paid to an injured state as the CPA was also acting on behalf of the United States. On the other hand, if the agent has acted within the scope of the actual authority given, the principal must indemnify the agent for any payments made as a result of the agency relationship. Where the CPA acted within the broad policy guidelines agreed between the United States and the United Kingdom, the latter is under an obligation to reimburse the United States for compensation payments made to an injured state. The right to reimbursement is, however, limited to a 50 per cent share of the compensation payment as the CPA was also acting on behalf of the United States.

iv. Admissibility of Claims against One Occupying Power Only

The fact that responsibility may be invoked against each occupying power separately does not mean that each occupying power can also be sued separately.¹⁷⁷

¹⁷⁵ See D Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford, Oxford University Press, 2005) 33 and the numerous references given there. See also Brownlie, n 168, at 439, 643.

¹⁷⁶ See above section III A ii.

¹⁷⁷ This is overlooked by Besson, n 65, at 32, who fails to note that Art 47, para 1, refers to the 'invocation' of responsibility only.

The ICJ held in the *Monetary Gold* case that where ‘the vital issue to be settled [in a case] concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue’.¹⁷⁸ The *Monetary Gold* principle or ‘indispensable third party rule’ is a procedural barrier to the admissibility of a claim before an international court or tribunal. It arises because such judicial bodies cannot determine the responsibility of a state not party to the proceedings. To do so would run counter to the well-established principle of international law that jurisdiction over a state at the international level can be exercised only with its consent.¹⁷⁹ However, as the ICJ explained in the *Nauru* case, the determination of the responsibility of the third state must constitute ‘the very subject-matter of the judgment to be rendered’ or, in other words, must be ‘a prerequisite for the determination of the responsibility’ of the state before the Court. The link between any necessary finding regarding the third state’s responsibility and the decision on the responsibility of the state present before the Court must not be ‘purely temporal but also logical’. It is not sufficient that a decision regarding the existence or the content of the responsibility of the state before the Court might well have implications for the legal situation of the third state.¹⁸⁰ The situation of the two occupying powers is similar to that of the three states forming the Administering Authority in the *Nauru* case where the ICJ held: ‘The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States’.¹⁸¹ Each occupying power had obligations under international law with regard to the administration of Iraq, a breach of which can be determined without previously determining the responsibility of the other occupying power. The two occupying powers are thus not necessary parties and can be sued separately for the internationally wrongful acts of the CPA.

Another admissibility issue arose in the context of the European Convention on Human Rights (ECHR). In the case of *Saddam Hussein v Albania and Others*, the European Court of Human Rights declared an application by Saddam Hussein against the members of the Iraq Coalition that are parties to the ECHR inadmissible as the applicant had not established that he fell within the ‘jurisdiction’ of the respondent states, including the United Kingdom, as required by

¹⁷⁸ *Monetary Gold Removed from Rome in 1943* (Preliminary Question), ICJ Rep 1954 19, at 33.

¹⁷⁹ *Ibid*, at 32. See also *East Timor (Portugal v Australia)*, ICJ Rep 1995 90, at 105, para 34.

¹⁸⁰ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) ICJ Rep 1992 240 at 261, para 55. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Rep 2005 paras 203–4; *East Timor (Portugal v Australia)*, ICJ Rep 1995 90, at 105, para 35.

¹⁸¹ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) ICJ Rep 1992 240, at 258–9, para 48.

Article 1 ECHR.¹⁸² Jurisdiction could not be established on the sole basis that the respondent states ‘allegedly formed part (at varying unspecified levels) of a coalition with the US [a non-party to the ECHR], when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US’.¹⁸³ Saddam Hussein was captured and detained as a prisoner of war by US troops. The Coalition military forces which were not part of the CPA retained legal responsibility for their prisoners of war and detainees.¹⁸⁴ The case might have been decided differently, at least with regard to the United Kingdom, if Saddam Hussein had been in the custody of the CPA, the acts of which can be attributed to the United Kingdom. This situation must be distinguished from the situation in *Hess v United Kingdom*.¹⁸⁵ This case concerned the question of whether Rudolf Hess, Adolf Hitler’s deputy as leader of the Nazi party, who was imprisoned at Spandau Allied Prison, was ‘within the jurisdiction’ of the United Kingdom. The European Commission of Human Rights found that, under a 1945 agreement, the United Kingdom acted ‘only as a partner in the joint responsibility which it shares with the three other Powers’ in the administration and supervision of Spandau prison. As this joint authority could not be divided into four separate jurisdictions, the Commission declared the application inadmissible.¹⁸⁶ The Commission, however, also indicated that the United Kingdom could be held responsible for entering into such an agreement establishing joint authority if it was to enter into such an agreement after the entry into force of the ECHR.¹⁸⁷ The parties to the ECHR cannot escape their Convention responsibilities by transferring powers to international organisations or by creating joint authorities against which Convention rights or an equivalent standard of protection cannot be secured.¹⁸⁸ It would be incompatible with the object and purpose of the ECHR to absolve the United Kingdom completely from its Convention responsibility in the area of CPA activities. Otherwise, the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards.¹⁸⁹

¹⁸² *Hussein v Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine, United Kingdom*, Application No 23276/04 (Saddam Hussein; jurisdiction), 14 March 2006 (2006) 42 EHRR 16 at 223.

¹⁸³ *Ibid.*, at 225.

¹⁸⁴ See section III A i; ‘Relevant Conduct of the Coalition Provisional Authority’.

¹⁸⁵ *Hess v United Kingdom*, Application No 6231/73, Decision of 28 May 1975, 2 DR 72.

¹⁸⁶ *Ibid.*, at 74.

¹⁸⁷ *Ibid.*

¹⁸⁸ See *Matthews v United Kingdom*, Application No 24833/94, Judgment of 18 February 1999, ECHR 1999-I, paras 32–5; *Bosphorus Hava Yollari Turizm v Ireland*, Application No 45036/98, Judgment of 30 June 2005, ECHR 2005-I, paras 152–8.

¹⁸⁹ Cp *Bosphorus Hava Yollari Turizm v Ireland*, Application No 45036/98, Judgment of 30 June 2005, ECHR 2005-I, para 154.

IV. International Responsibility of Other Actors in Connection with the Acts of the Coalition Provisional Authority

A. Aid or Assistance by the Coalition Partners

In their joint letter of 8 May 2003 to the President of the Security Council, the United States and the United Kingdom wrote that they ‘and Coalition partners’ had created the CPA to exercise powers of government temporarily in Iraq.¹⁹⁰ The two states considered all members of the coalition as part of the CPA. This is also clear from a draft resolution submitted by the two states on 9 May 2003 which spoke of ‘recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states [ie the United States and the United Kingdom] and others working now or in future with them under unified command as the occupying power (“the authority”)¹⁹¹ However, the Security Council in Resolution 1483 distinguished between the United Kingdom and the United States ‘as occupying powers under unified command (“the Authority”)¹⁹² on the one hand and ‘other States that are not occupying powers [that] are working now or in the future may work under the Authority’ on the other.¹⁹² Coalition partners such as Australia were thus ‘not legally an occupying power’¹⁹³ and the CPA was not their state organ. The Coalition partners seconded government officials and military personnel to the CPA, hired private contractors and made them available to the CPA and funded the activities of, and under the auspices of, the CPA. Australia, for example, ‘provided advisers in some key sectors to assist the CPA in the performance of its duties’.¹⁹⁴ In November 2003, some 18-odd experts, paid for by the Australian government, were working on short-term missions in the CPA. The seconded government officials qualify as State organs ‘placed at the disposal’ of the occupying powers in the sense of Article 6 of the ILC Articles on State Responsibility. They were acting with the consent, under the authority of and for the purposes of the occupying powers. They were operating under the exclusive direction and control of the CPA Administrator, rather than on instructions from their own government.¹⁹⁵ In cases where the seconded officials were

¹⁹⁰ Joint Letter of 8 May 2003, n 3, at 1.

¹⁹¹ Draft Resolution of 9 May 2003 <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/middle_east/3012847.stm> accessed 1 Aug 2007.

¹⁹² UN Doc S/RES/1483, n 1, at preambular paras 12, 13. The distinction between the United States and the United Kingdom on the one hand and the Coalition partners on the other is reminiscent of the ‘Three Great Allies’ and the other Allied Powers during the Second World War.

¹⁹³ Commonwealth of Australia, Official Committee Hansard, Senate, Foreign Affairs, Defence and Trade Legislation Committee Estimates, (Budget Estimates Supplementary Hearings), 6 November 2003, 52.

¹⁹⁴ *Ibid*, at 52.

¹⁹⁵ Cp Commentary on Art 6, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 95, para 2.

exercising elements of occupation authority, their conduct is attributable to the occupying powers. The Coalition partners thus cannot be held responsible for the wrongful acts committed by their personnel as members of the CPA. They may, however, be held responsible, in accordance with Article 16 of the ILC Articles on State Responsibility, for seconding personnel to the CPA if they were thereby aiding or assisting the occupying powers in the commission of an internationally wrongful act by the latter.¹⁹⁶ The assisting state is not responsible for the wrongful conduct of the assisted state (which cannot be attributed to it) but for its own conduct in assisting the wrongful act. The ILC has made it clear that no particular kind of aid or assistance is necessary in order for this responsibility to arise. In particular, there is no requirement that the aid or assistance should have been 'essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act'.¹⁹⁷ In its commentary on an earlier draft of Article 16 the ILC stated:

It is obvious, too, that aid or assistance in an act of aggression may also take other forms, such as the provision of land, sea or air transport, or even *the placing at the disposal* of the State that is preparing to commit aggression *of military or other organs* for use for that purpose. Furthermore, it is by no means only in the event of an act of aggression by a State that the possibility of assistance by another State may arise.¹⁹⁸

Article 16, which is reflective of customary international law,¹⁹⁹ stipulates a three-fold requirement for the responsibility of the assisting state. First, the relevant state organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted state internationally wrongful; second, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and, third, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.²⁰⁰

It seems somewhat unlikely that Coalition partners specially seconded officials with the view that they commit or assist in the commission of an internationally wrongful act. It is more likely that they learnt about such acts during their officials' secondment. Seconded personnel regularly reported back home by email on the activities of the CPA. For example, seconded financial experts may have reported the squandering of DFI funds, or interpreters may have described scenes of torture in CPA-run prison facilities. Where seconded officials reported breaches of the occupying powers' (and their own state's) international obligations in which they had been involved or to which their work had contributed and where their home government did not withdraw them or instruct them to abstain from any further

¹⁹⁶ See A Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (2007) 137.

¹⁹⁷ Commentary on Art 16, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 156 para 5.

¹⁹⁸ ILC Yb 1978, II/2, 102, para 13 (commentary on draft Art 27; italics added).

¹⁹⁹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, n 77, at para 420.

²⁰⁰ Commentary on Art 16, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 156, para 3.

action, it must be assumed that the Coalition partner continued to second personnel with a view to facilitating the commission of an internationally wrongful act. The more Coalition partners knew about the internationally wrongful acts of the CPA in which their seconded officials were involved, the more likely it is that their support of the CPA can be interpreted as aiding or assisting in the commission of internationally wrongful acts by the occupying powers. This raises the question of whether, if there were clear indications of wrongdoing by the CPA, Coalition partners were under an obligation to make further enquiries with the occupying powers on the employment of their seconded officials. International law might develop, *de lege ferenda*, a due diligence standard in this context, or otherwise responsibility for aiding or assisting might remain a very narrow and exceptional basis of responsibility.²⁰¹

The ILC Articles on State Responsibility are silent on the question of the division of responsibility between the occupying powers and the aiding or assisting Coalition partners.²⁰² It has been suggested that in the situation of a principal state and an aiding state, responsibility should be joint and several.²⁰³ It should, however, be recalled that each state is responsible for its own internationally wrongful conduct. The assisting state is not responsible, as such, for the internationally wrongful act of the assisted state (which cannot be attributed to it) but only for its own act of deliberately assisting the other state in committing the wrongful act.²⁰⁴ By assisting the occupying powers to commit an internationally wrongful act, Coalition partners thus should not necessarily be held to indemnify the injured state for all the consequences of that act, but only for those that result from its own conduct. Where the assistance, ie the involvement of the seconded official, has been only an incidental factor in the commission of the primary act, and has contributed only to a minor degree, if at all, to the injury suffered, the assisting state's responsibility would be limited. Where, on the other hand, the secondment of the official was a *sine qua non* for the commission of the internationally wrongful act, the Coalition partner may share equal responsibility with the occupying powers.²⁰⁵ Responsibility should thus be divided between the occupying powers and the assisting Coalition partners according to their degree of fault or their contribution to the injury caused.²⁰⁶

Claims against the Coalition partners for aiding or assisting the occupying powers in the commission of an internationally wrongful act by the CPA face

²⁰¹ Cp V Lowe, 'Responsibility for the Conduct of Other States' (2002) *Japanese Journal of International Law*, 1, 10.

²⁰² See Art 19 and the Commentary of the International Law Commission thereto, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 168–9.

²⁰³ J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 *British Year Book of International Law*, 77, 128; Felder, n 196, at 277–8.

²⁰⁴ B Graefrath 'Complicity in the Law of International Responsibility' (1996) 29 *Revue belge de droit international*, 370, 379, speaks of aid or assistance as entailing a 'lesser degree of responsibility'.

²⁰⁵ Cp Commentary on Art 16, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 159, at para 10.

²⁰⁶ Cp Quigley, n 203, at 129.

the obstacle of the *Monetary Gold* principle.²⁰⁷ The determination of the responsibility of the Coalition partners under Article 16 of the ILC Articles on State Responsibility for aiding or assisting the occupying powers logically requires the prior determination of the commission of an internationally wrongful act by the occupying powers.

B. Delegation of Powers by the United Nations

In its commentary on an earlier draft of the Articles on State Responsibility the ILC wrote in 1978:

it would be a mistake to draw hasty conclusions from the fact that there are but few examples of international organizations being called to account at the international level for acts committed by their organs [...] it must not be forgotten that, by their very nature, international organizations normally behave in such a manner as not to commit internationally wrongful acts. Nevertheless, there have already been some specific cases in international practice in which the act of one of its organs has been attributed to an international organization as a source of international responsibility of the organization.²⁰⁸

The question may thus legitimately be asked whether the United Nations incurred any responsibility in connection with the acts of the CPA in Iraq. The fact that no judicial machinery exists to hold the United Nations responsible should not be allowed to obscure the fact that the United Nations remains responsible for its internationally wrongful acts. There is at least the theoretical possibility that the General Assembly may request an advisory opinion from the ICJ on the legality of the acts of the Security Council. There may also be room for other indirect remedial opportunities.²⁰⁹ In order for the international responsibility of the United Nations to be engaged, there must be an internationally wrongful act of the organisation, namely (a) a certain conduct which is (b) attributable to the United Nations under international law, and which (c) constitutes a breach of its international obligations.²¹⁰

i. Relevant Conduct of United Nations Organs

As has been seen above, the CPA provided less than adequate controls for some US\$8.8 billion in the Development Fund for Iraq (DFI) and there are strong

²⁰⁷ See section III B iv; 'Admissibility of Claims against One Occupying Power Only'.

²⁰⁸ ILC Yb 1978, II, 87, para 3 (commentary on draft Art 13 on 'Conduct of Organs of an International Organization').

²⁰⁹ See International Law Association, *Accountability of International Organisations*, Final Report, International Law Association, *Report of the Seventy-first Conference* (2004), at 230–2; T Ueki, *Responsibility of International Organizations and the Role of the International Court of Justice in N Ando et al* (eds), *Liber Amicorum Judge Shigeru Oda* vol I (2002), 237, 244–46.

²¹⁰ See Art 3 of the ILC Draft Articles on the Responsibility of International Organizations and the commentary thereto, Report of the International Law Commission, GAOR, 58th Session, Supplement No 10 (A/58/10), 2003, 45 and 47, para 5. See also International Law Association, n 209, at 199.

indications that a large part of that money was wasted, stolen or frittered away.²¹¹ Most of the money in the DFI had been made available—directly or indirectly—to the occupying powers by the United Nations. During the existence of the CPA, a total of US\$20.706 billion was transferred into the DFI. US\$8.1 billion alone were transferred by the United Nations from the ‘United Nations Iraq Account’, which had been established in 1996 for the administration of the UN-run Oil-for-Food Programme and which held unencumbered funds from Iraqi oil sales under the programme.²¹² A further US\$11.42 billion came from Iraqi oil proceeds, US\$120 million from UN non-Oil-for-Food funds, and US\$1.2 billion from Iraqi assets seized abroad and donations from around the world.²¹³

The conduct of the United Nations may consist of ‘an action or omission’²¹⁴ Several actions of the Security Council are of relevance here. In Resolution 1483, the Council, acting under chapter VII of the UN Charter, requested the Secretary-General to terminate the Oil-for-Food Programme and to transfer responsibility for the administration of any remaining activity under the programme to the CPA;²¹⁵ decided that the Secretary-General should transfer at the earliest possible time all surplus funds in the escrow accounts established under the Oil-for-Food Programme to the DFI;²¹⁶ decided to terminate the functions related to the observation and monitoring activities undertaken by the Secretary-General under the Oil-for-Food Programme;²¹⁷ decided that all proceeds from export sales of petroleum, petroleum products, and natural gas from Iraq should be deposited into the DFI;²¹⁸ and decided that all Member States should freeze without delay Iraqi state funds in their territory and transfer them to the DFI.²¹⁹ As the funds in the DFI were to be disbursed ‘at the direction of’ the CPA,²²⁰ the Security Council, in fact, turned over to the occupying powers some US\$20 billion of Iraqi state funds to which they would not otherwise have had access. In a brief submitted by the United States in the *Custer Battles* case, it was stated that the ‘funds in the DFI have always been Iraqi funds’.²²¹ Without the authorisation granted by the Security Council under chapter VII, the occupying powers and, consequently, the CPA would not under international law have had the competence to dispose of these Iraqi State funds. Under international humanitarian law, the occupying powers

²¹¹ See section III A iii; ‘Breach of an International Obligation of the Occupying Powers.’

²¹² On the Oil-for-Food Programme, see <<http://www.un.org/Depts/oip/background/index.html>> accessed 1 Aug 2007.

²¹³ See *US ex rel DRC, Inc v Custer Battles, LLC*, 376 FSupp2d 617 at 627, n 36 (EDVa, 2005).

²¹⁴ See Art 3, para 2, of the ILC Articles on the Responsibility of International Organizations.

²¹⁵ UN Doc S/RES/1483, n 1, at para 16.

²¹⁶ *Ibid*, at para 17.

²¹⁷ *Ibid*, at para 18.

²¹⁸ *Ibid*, at para 20.

²¹⁹ *Ibid*, at para 23. See also UN Doc S/RES/1511 (2003) of 16 October 2003, n 134, at para 24.

²²⁰ *Ibid*, at para 13.

²²¹ Brief of the United States in Response to the Court’s Invitation of December 21, 2004, 1 April 2005, above n 79.

were only allowed to take possession of cash, funds and other Iraqi state property located within the occupied territory.²²²

The Hague Regulations also imposed limitations on the occupying powers' competence to produce and export Iraqi oil and to expand the sales proceeds.²²³ Such limitations, of course, do not exist for the Security Council when exercising its chapter VII powers. By authorising the occupying powers to dispose of the Iraqi state funds in the DFI, the Security Council, in effect, delegated some of its chapter VII powers to the occupying powers.²²⁴ This was made clear by Pakistan's representative to the Security Council who said after the adoption of Resolution 1483: 'Pakistan, like several other members of the Security Council, has agreed, due to the exigencies of the circumstances, *to the delegation of certain powers by the Security Council to the occupying Powers*, represented by the Authority'²²⁵ (emphasis added).

Besides the action of turning over Iraqi state funds to the occupying powers and freeing them of the constraints of international humanitarian law, there may also be a relevant omission on the part of the Security Council in that it did not exercise proper control over the disbursement of turned-over Iraqi state funds by the CPA.

ii. Questions of Attribution

The question of attribution of the conduct of the Security Council and the Secretary-General can be disposed of quickly. Both are principal organs of the United Nations²²⁶ and as such their conduct is attributable to the United Nations as an act of its organs, both under customary international law and under the ILC Draft Articles on the Responsibility of International Organizations.²²⁷

One may ask whether the CPA's conduct in the area of delegated powers may be attributed to the United Nations. The CPA was not a subsidiary organ of the

²²² See Art 53 Hague Regulations, which is located in the section on 'Military Authority over the Territory of the Hostile State'.

²²³ See Art 55 Hague Regulations. See also the remarks of JB Bellinger, III, Legal Adviser, US Department of State, at the International Conference in San Remo, 9 September 2005, who spoke of the 'limitations contained in the Hague Regulations related to the right of an occupying power to produce and use natural resources, and to expand their sales proceeds' and the use of oil proceeds 'to fund long-term economic reconstruction projects to benefit Iraq (an activity that would at least arguably be outside the scope of authorities provided by the Hague Regulations)' <<http://www.us-mission.ch/Press2005/0909BellingerIHLSanRemo-2.htm>> accessed 1 Aug 2007.

²²⁴ Compare D Scheffer, n 119, at 845–6. See also the statement of the representative of Pakistan in the Security Council: 'The administration of Iraq's economic and natural resources is a trust that was given to the Coalition Provisional Authority under resolution 1483 (2003) as a temporary measure due to the exigencies of the situation' (UN Doc S/PV.4791, 22 July 2003, at 25).

²²⁵ UN Doc S/PV.4761, 2 May 2003 11. See also the statement of the French delegate, *ibid*, at 4.

²²⁶ See Art 7, para 1 of the UN Charter.

²²⁷ See Art 4 of the ILC Draft Articles on the Responsibility of International Organizations and the commentary thereto, Report of the International Law Commission, GAOR, 59th Session, Supplement No 10 (A/59/10), 2004, 103 and 104, 106.

International Responsibility for Acts of the CPA

Security Council in the sense of Article 29 of the UN Charter; the Council in Resolution 1483 did not establish the CPA for the performance of its functions but only took note of its creation by the occupying powers. In situations where the Security Council, acting under chapter VII of the Charter, adopts a resolution delegating some of its powers one may argue, by analogy with Article 5 of the ILC Articles on State Responsibility, that the State has been empowered by the law of the United Nations to exercise elements of the organisation's authority and, for that reason, its conduct shall be considered an act of the United Nations, provided the state is acting in its capacity as a delegatee in the particular instance. The justification given for Article 5 similarly applies in the context of international organisations. An organisation should not be able to evade its international responsibility solely because it has delegated the exercise of some elements of its authority to a person or entity separate from its own machinery proper.²²⁸ There is, however, one major difference between the two situations. While both concern a delegation of powers, in the present case the delegates are not public or private bodies but other subjects of international law. This brings the situation within the scope of Article 6 of the ILC Articles on State Responsibility, which deals with the exercise of elements of the governmental authority of a state by the organs of another state. In this case, attribution requires that the foreign state organ placed at the disposal of the state is acting under its 'exclusive direction and control'.²²⁹ The CPA, however, was not under the direction and control of the United Nations but under the control of the United States. The conduct of the CPA thus cannot be attributed to the United Nations. In addition, it has been suggested that there is no responsibility of the international organisation when the states concerned have acted *ultra vires* the delegation or authorisation or breach conditions attached to it.²³⁰ The Security Council had made it clear to the occupying powers that the DFI was to be administered in a transparent manner and that the funds were to be used only for purposes benefiting the people of Iraq.²³¹ Any squandering of DFI funds by the CPA would thus have been *ultra vires* and could not have engaged the United Nations' responsibility.

iii. Breach of an International Obligation of the United Nations

There is a breach of an international obligation by the United Nations when one of its acts is not in conformity with what is required of it by that obligation,

²²⁸ Cp ILC Yb 1974, II/1, 281–2.

²²⁹ See the Commentary on Art 6, Report of the International Law Commission, GAOR, 56th Session, Supplement No 10 (A/56/10), 2001, 95, at para 2.

²³⁰ D Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford, Oxford University Press, 1999) 165. See also International Law Association, n 209, at 205.

²³¹ See UN Doc S/RES/1483, n 1, at para 14, and UN Doc S/RES/1511 (2003) of 16 October 2003, n 134, at paras 23, 24.

regardless of its origin and character.²³² As a subject of international law, the United Nations is bound by any obligation incumbent upon it under customary international law, under the UN Charter, under international agreements to which it is a party or under a general principle of law applicable within the international legal order.²³³

It may be argued that the United Nations was under an obligation to use the Iraqi state funds at its disposal in a transparent manner and only for purposes benefiting the people of Iraq. Such an obligation may be based either on a unilateral commitment to that effect by the United Nations, an agreement between the United Nations and Iraq, or the general principle of law that a trustee is under an obligation to act in the best interest of the beneficiary.

It is generally recognised that a unilateral declaration by an international organisation may give rise to an international legal obligation toward third parties. The requirements of clear intention, publicity and authority to make a declaration must be met in order for the organisation to be bound by a declaration of its organ. Where all these elements have been fulfilled, conduct that is inconsistent with the content of the declaration may entail the responsibility of the organisation.²³⁴ On 14 April 1995, the Security Council adopted Resolution 986 establishing the Oil-for-Food Programme that provided Iraq with an opportunity to sell petroleum and petroleum products to finance the purchase of humanitarian goods. The proceeds from these sales were to be paid into an escrow account held by the United Nations from which payment for exports to Iraq was to be made after the Secretary-General had verified that the exported goods concerned had arrived in Iraq. The confirmation procedure was to make sure that the money was used only to provide for the humanitarian needs of the Iraqi people. Acting under chapter VII, the Council expressly decided that ‘the funds in the escrow account shall be used to meet the humanitarian needs of the Iraqi population’.²³⁵ The Council also requested the Secretary-General to appoint independent and certified public accountants to audit the escrow account, and to keep the government of Iraq fully informed.²³⁶ That the Iraqi money was to be used in a ‘transparent manner’ and only for ‘purposes benefiting the people of

²³² See Art 8, para 1, of the Draft Articles on the Responsibility of International Organizations, proposed by the Special Rapporteur, Mr Giorgio Gaja, Report of the International Law Commission, GAOR, 60th Session, Supplement No 10 (A/60/10), 2005, at 87.

²³³ Cp *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Rep 1980 73, at 89–90 para 37; *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep 1949 174, at 179. For the various international obligations incumbent upon the UN that may be breached, see Ueki, n 209, at 237–42.

²³⁴ See M Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (The Hague, Martinus Nijhoff, 1995) 38. See also M Virally, ‘Unilateral Acts of International Organizations’ in M Bedjaoui (ed), *International Law: Achievements and Practice* (Paris/Boston, UNESCO and Martinus Nijhoff, 1991) 241–63.

²³⁵ UN Doc S/RES/986 of 14 April 1995, para 8; see also preambular para 3.

²³⁶ *Ibid*, at para 7.

Iraq' was also 'underlined' by the Council in Resolution 1483.²³⁷ The question is whether the Security Council intended to create an obligation binding on itself when adopting Resolution 986. According to Article 25 of the UN Charter, the decisions of the Security Council are binding only on the 'members of the United Nations'. It is suggested, however, that as long as the Council does not formally revoke a resolution it is estopped from contravening its own resolutions and must be considered bound by them.

It may also be argued that the content of Resolution 986 later became part of an agreement between the United Nations and Iraq. Although established on 14 April 1995, the implementation of the Oil-for-Food Programme started only in December 1996, after the signing on 20 May 1996 of the 'Memorandum of Understanding between the Secretariat of the United Nations and the Government of Iraq on the implementation of Security Council resolution 986 (1995)'.²³⁸ The MOU provided, in addition, that the escrow account to be known as the 'United Nations Iraq Account' was to be 'administered in accordance with the relevant Financial Regulations and Rules of the United Nations'.²³⁹ The United Nations thus assumed either unilaterally in Resolution 986 or by agreement with Iraq the obligation to use the money received under the Oil-for-Food Programme in a transparent manner and for the benefit of the Iraqi people.

This obligation also results from the United Nations' position as a trustee of Iraqi state funds. The concept of trusteeship and trust funds is well known in international law.²⁴⁰ A trustee is the legal owner of all the trust's property. The beneficiary, at law, has no legal title to the trust; however, trustees are bound to suppress their own interests and to act in the best interest of the beneficiary. In this way, the beneficiary obtains the use of property without being its technical owner. In the context of the Oil-for-Food Programme, the United Nations was acting as a trustee of Iraq, as can already be seen from the name of the escrow account. The United Nations held legal title to the 'United Nations Iraq Account', which is also evidenced by the fact that it enjoyed the privileges and immunities of the United Nations.²⁴¹ The money in the 'United Nations Iraq Account' was generated by the sale of Iraqi petroleum and petroleum products and was to be

²³⁷ UN Doc S/RES/1483, n 1, at para 14. See also the statement of the French delegate upon the adoption of Resolution 1483: 'The resolution recalls that these resources, which belong to the Iraqi people, should be used exclusively for their benefit and in the greatest possible transparency' (UN Doc S/PV.4761, 22 May 2003, at 4).

²³⁸ See 'Letter dated 20 May 1996 from the Secretary-General addressed to the President of the Security Council' UN Doc S/1996/356, (20 May 1996) at 2–14.

²³⁹ *Ibid*, at 3, para 12. For the latest version of the Financial Regulations and Rules of the United Nations, see UN Doc ST/SGB/2003/7, (9 May 2003).

²⁴⁰ Cp Arts 75–85 of the UN Charter. There are numerous trust funds administered by the United Nations and its specialised agencies. See, eg, the Trans European Railway Trust Fund, the Trust Fund for the purposes of Art 76 UNCLOS.

²⁴¹ See UN Doc S/RES/986 (1995) of 14 April 1995, n 235, para 15. This is to be contrasted with the petroleum and petroleum products for which, 'while under Iraqi title', different immunity provisions had to be made: *ibid* para 14.

used 'to meet the humanitarian needs of the Iraqi population'; the Secretary-General was to select a major international bank and establish there the escrow account 'after consultations with the Government of Iraq' and was 'to keep the Government of Iraq fully informed' of the establishment of the account. The reports on the audit of the financial statements relating to the account were to be forwarded to the Iraqi government.²⁴²

The United Nations could not avoid its obligation to use these funds in a transparent manner and only for purposes benefiting the people of Iraq simply by turning over the Iraqi state funds in the United Nations Iraq Account to the occupying powers. Ian Brownlie has correctly pointed out that this 'approach of public international law is not *ad hoc* but stems directly from the normal concepts of accountability and effectiveness'.²⁴³ It seems as if the Security Council members were also aware that the United Nations could not legally absolve itself from its obligations. Following the adoption of Resolution 1483, the representative of Mexico declared that the 'Security Council [...] will have to make sure that the commitment of transparency is met'.²⁴⁴ The French delegate considered the International Advisory and Monitoring Board, established under the resolution, as a 'guarantor' that the proceeds from oil sales would be used 'exclusively for their [the Iraqi people's] benefit and in the greatest possible transparency'.²⁴⁵

The United Nations may also have violated its obligations by the Security Council delegating chapter VII powers to the occupying powers without supervising the exercise of these powers. In the *Nauru* case, Judge Oda indicated that the United Nations was responsible for supervising the behaviour of the Administering Authority to which the United Nations had delegated the administration of Nauru.²⁴⁶ Dan Sarooshi has shown in his seminal study on *The Delegation by the UN Security Council of its Chapter VII Powers* that 'the Security Council is under an obligation to ensure that it can exercise effective authority and control over the way in which its delegated powers are being exercised'.²⁴⁷ The aim of supervision by the Council is, inter alia, to ensure that the delegated powers are being exercised in an appropriate manner, that is, in line with the United Nations' obligations and for the attainment of the Council's stated objectives.²⁴⁸ This means that the Council must impose a reporting requirement on states

²⁴² See UN Doc S/RES/986 (1995) of 14 April 1995, n 235, paras 1(b), 6, 7 and 8 and para 12 of the MOU between the UN Secretariat and the Government of Iraq, UN Doc S/1996/356, (20 May 1996), at 3.

²⁴³ I Brownlie, 'State Responsibility: The Problem of Delegation' in K Ginther, G Hafner, W Lang, H Neuhold and L Sucharipa-Behrmann (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag* (1994), 299, 300.

²⁴⁴ UN Doc S/PV.4761, (22 May 2003), at 7.

²⁴⁵ *Ibid.*, at 4. The British representative stated: 'An International Advisory and Monitoring Board, coupled with independent auditing, will help guarantee that Iraq's resources are once again used exclusively to benefit its people' (*ibid.*, at 5).

²⁴⁶ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) ICJ Rep 1992 303, 305, para 6 (dissenting opinion of Judge Oda).

²⁴⁷ Cp Sarooshi, n 230, at 164 and 41. See also International Law Association, n 209, at 180.

²⁴⁸ Cp, *ibid.*, at 160.

exercising delegated chapter VII powers,²⁴⁹ conduct a continuous review and supervision of the exercise of the delegated powers,²⁵⁰ and, if need be, modify or countermand the delegation.²⁵¹

The United Nations failed on all these accounts. It did not exercise effective control over the disbursement of Iraqi state funds by the CPA.²⁵² The Security Council did not impose any specific reporting requirements on the occupying powers with regard to the use of Iraqi state funds but merely 'encouraged' the United States and the United Kingdom 'to inform the Council at regular intervals of their efforts' under Resolution 1483.²⁵³ On the contrary, the Council terminated the existing observation and monitoring activities undertaken by the Secretary-General under the Oil-for-Food Programme, including the monitoring of the export of petroleum and petroleum products from Iraq.²⁵⁴ The International Advisory and Monitoring Board (IAMB), which was established under Resolution 1483 but was not a United Nations organ, had no powers of oversight over the DFI. Its role was limited to 'approving' the independent public accountants who were to audit the DFI.²⁵⁵ The auditors themselves were 'nominated and appointed by the Administrator of the CPA'.²⁵⁶ The Security Council did not set any time limit for the setting up of the IAMB or for the appointment of the auditors or, indeed, for any audit to be carried out. It merely 'looked forward to the early meeting' of the IAMB.²⁵⁷ There was no reporting requirement from the IAMB to the Security Council. Rather, the Secretary-General was to report on the work of the IAMB.²⁵⁸ It took the CPA and the members of the IAMB until 21 October 2003 simply to agree on the terms of reference of the Board because of differences over the role of the CPA and audit powers of the IAMB.²⁵⁹ While the IAMB on several occasions raised concerns with the CPA over its control and use of Iraqi assets and requested further information especially with regard to the use of non-competitive bidding procedures, the CPA avoided auditing for a long time by stonewalling the

²⁴⁹ See *ibid.*, 239 and 155, 160–3. On the reporting requirement in cases of authorisation, see also F Berman, 'The Authorization Model: Resolution 678 and Its Effects' in DM Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, Lynne Rienner Publishers, 2004) 159.

²⁵⁰ Sarooshi, n 230, at 160.

²⁵¹ International Law Association, n 209, at 204.

²⁵² The statement of the US representative in the Security Council following the adoption of Resolution 1483 is revealing: 'The resolution establishes [...] United Nation *participation in monitoring* the sale of Iraqi oil resources and expenditures of oil proceeds' (UN Doc S/PV.4761, 22 May 2003, at 3 (emphasis added)).

²⁵³ See UN Doc S/RES/1483, n 1, at para 24.

²⁵⁴ *Ibid.*, at para 18.

²⁵⁵ *Ibid.*, at para 12.

²⁵⁶ See section 3.A. of the Terms of Reference for the International Advisory and Monitoring Board, dated 21 October 2003, reproduced in Talmon, n 1, at Doc. 241.

²⁵⁷ See UN Doc S/RES/1483, n 1, at para 12.

²⁵⁸ *Ibid.*, at para 24.

²⁵⁹ In Resolution 1511 (2003) of 16 October 2003, para 23, the Security Council emphasised that the IAMB 'should be established as a priority'.

Board.²⁶⁰ The IAMB was never able to fulfil its role as ‘guarantor’ as envisaged by the French delegate in the Security Council.²⁶¹ The CPA signed the contract with the external auditors of the DFI only on 5 April 2004, and the first audit report on the CPA’s management of the DFI from 22 May to 31 December 2003 was released on 15 July 2004, that is 17 days after the dissolution of the CPA.²⁶² Thus, by the time the first partial audit report was available to the Security Council, the CPA had already spent US\$19.6 billion of Iraqi State funds, including nearly US\$12 billion in cash, without any external oversight or control.

By effectively handing over some US\$20 billion in Iraqi state funds to the occupying powers, to which they would not otherwise have had access, without establishing an effective operative oversight mandate ensuring that the funds were disbursed by the CPA under conditions of transparency and only for the purpose of benefiting the people of Iraq, the United Nations breached its international obligations.

C. Aid or Assistance by the United Nations

The United Nations might also have incurred international responsibility if it aided or assisted the occupying powers in the commission of an internationally wrongful act by the latter, if it did so with the knowledge of the circumstances of the internationally wrongful act and the act would have been internationally wrongful if committed by the United Nations.²⁶³ If, as suggested above, the occupying powers committed an internationally wrongful act by misappropriating Iraqi state funds (if not for any other reason than because they violated the express terms of Resolution 1483),²⁶⁴ it could be argued that the United Nations assisted in the commission of this act by continuously transferring Iraqi state funds to the DFI. The last payment to the CPA from the United Nations Iraq Account was made by the Secretary-General on 19 April 2004.²⁶⁵ The IAMB first publicly intimated concerns over the control and use of Iraqi state assets by the CPA in its press release of 24 March 2003.²⁶⁶ One would thus have to prove that

²⁶⁰ See IAMB Press Releases, 15 July 2004, 22 June 2004, 25 May 2004, 23 April 2004 and 24 March 2004 <<http://www.iamb.info/pressrel.htm>> accessed 1 Aug 2007. See also Allawi, n 42, at 261–2.

²⁶¹ UN Doc S/PV.4761, 22 May 2003, at 4.

²⁶² See HC Debs, vol 664, col WA108 (7 September 2004).

²⁶³ See Art 12 of the Draft Articles on the Responsibility of International Organizations proposed by the Special Rapporteur, Mr Giorgio Gaja, Report of the International Law Commission, GAOR, 60th Session, Supplement No 10 (A/60/10), 2005, at 97.

²⁶⁴ See section III A iii; ‘Breach of an International Obligation of the Occupying Powers’.

²⁶⁵ Transfers of US\$1 billion each were made on 28 May, 31 October and 18 November 2003 from the United Nations Iraq escrow account. Another US\$2.6 billion was transferred on 31 December 2003, a further US\$2 billion on 31 March and US\$0.5 billion on 19 April 2004.

²⁶⁶ See IAMB Press Release, 24 March 2004, noting that ‘the IAMB had sought clarification on a number of issues of concern to the IAMB’, including the absence of metering for crude oil extraction and sales and the use of non-competitive bidding procedures for some contracts funded from the DFI <<http://www.iamb.info/pr/pr032404.htm>> accessed 1 Aug 2007.

the United Nations, either through the Security Council or the Secretary-General, had knowledge of the misappropriation of Iraqi state funds. There is no doubt that such conduct by organs of the United Nations itself would have constituted an internationally wrongful act of the organisation.

V. Conclusion

The international responsibility for the CPA's acts in Iraq is an example not just of a plurality of responsible states but also a plurality of responsible international actors and, indeed, a plurality of responsibility.

The CPA was a US state organ that was also acting as an organ of the United Kingdom. The United States was thus in fact acting as an agent of the United Kingdom in Iraq. As a common organ of the two occupying powers, the CPA's conduct is attributable to both of them. If that conduct constituted a breach of their international obligations, both would concurrently have committed separate, although identical, internationally wrongful acts. The case of the two occupying powers is one of separate, not joint or joint and several, responsibility. An injured state can invoke responsibility and bring claims against each occupying power independently. Each occupying power is under an obligation to make full reparation for the injury caused by the CPA. A right of indemnification may be established on the basis of the law of agency; there is no need to identify the situation of the occupying powers in Iraq with joint and several responsibility.

The Coalition partners are not responsible for the internationally wrongful acts of the CPA. They may, however, be held responsible for aiding or assisting the occupying powers in their commission of an internationally wrongful act by seconding personnel to the CPA. The extent of reparation due from the Coalition partners should be related to the level of involvement of their seconded officials in the commission of the internationally wrongful act by the occupying powers. Claims against the Coalition partners require the prior determination of the commission of an internationally wrongful act by the occupying powers and may thus be barred by the *Monetary Gold* principle.

The United Nations may have incurred responsibility in connection with the CPA's mismanagement of the Development Fund for Iraq by making available to the occupying powers Iraqi state funds not otherwise at their disposal. Turning over Iraqi state funds to the CPA, and delegating chapter VII powers to the United States and the United Kingdom without exercising effective authority and control to ensure that the funds were used in a transparent manner and only for purposes benefiting the people of Iraq, may fulfil the requirements of the United Nations committing an internationally wrongful act and, at the same time, aiding or assisting in the commission of an internationally wrongful act by the occupying powers. No rules dealing with such a situation exist in the ILC Articles on State Responsibility (or the draft articles on the Responsibility of International

Organizations).²⁶⁷ The Articles deal with a plurality of responsible and injured states,²⁶⁸ but not with a plurality of responsibility, meaning that the same conduct fulfils the requirements of committing an internationally wrongful act and, at the same time, aiding or assisting another in the commission of its internationally wrongful act. The situation is reminiscent of the ‘ideal concurrence of offences’ principle in (international) criminal law, which refers to the situation whereby a single act or factual situation violates more than one criminalisation or, probably more pertinent here, the principle of ‘concurrent liability’ in tort and contract. The injured state may choose to bring a claim for either or both internationally wrongful acts. However, the quantum of compensation is limited to the actual damage suffered and does not increase because there are two causes of action.²⁶⁹ As the assisting actor usually (but not necessarily)²⁷⁰ will play merely a supporting role and, consequently, will not be under an obligation to make full reparation, the injured state is most likely to focus on the commission of the internationally wrongful act by that actor.

The occupying powers and the United Nations may concurrently be held responsible for their own internationally wrongful acts. The United Nations may thus be responsible for making Iraqi state funds available to the occupying powers, even if these funds were mismanaged by the occupying powers on their own account. Where the internationally wrongful act of the United Nations consists of the delegation of power, and the occupying powers commit their internationally wrongful acts under that delegation, the United Nations’ responsibility is not only ‘subsidiary’ or ‘secondary’ in the sense that it is only responsible in the event that the occupying powers as primary wrongdoers fail to make full reparation.²⁷¹ On the contrary, in accordance with the principle of separate responsibility, both the United Nations and the occupying powers are under an obligation to make full reparation. The principle against double recovery, however, also applies in the case of a plurality of responsible actors consisting of states and international organisations. The United Nations may have recourse for indemnity against the occupying powers, on the basis of the agency relationship between the organization and the occupying powers, which was established by the delegation of chapter VII powers.²⁷²

²⁶⁷ Art 19 ILC Articles on State Responsibility leaves open the responsibility of the assisting state being held responsible on any other basis.

²⁶⁸ See Arts 46, 47 of ILC Articles on State Responsibility.

²⁶⁹ Cp Art 47, para 2(a) of the ILC Articles on State Responsibility.

²⁷⁰ It is suggested that where the aid or assistance given is a *sine qua non* for the commission of the internationally wrongful act by another actor, the aiding actor may share equal responsibility with acting actor.

²⁷¹ But see International Law Association, n 209, at 204 (‘secondary responsibility of the IO for any illegal act committed under the delegation or authorization’).

²⁷² Cf Brownlie, n 168, at 659.

Justiciability in the Areas of Foreign Relations and Defence¹

RABINDER SINGH

I. Introduction and Synopsis

The use of force against Iraq in March 2003 has generated an unprecedented interest in the possible uses of English law to deal with issues arising in the context of foreign relations and defence which just a few years ago would have been regarded as wholly unsuited for litigation in the courts of this country. Attempts have been made to seek an advisory declaration in advance of the invasion that it was not authorised by the UN Security Council²; to argue in criminal proceedings that peaceful protestors who engaged in non-violent direct action to prevent the invasion were entitled to act in reasonable ways to prevent the international crime of aggression³; to have established a public inquiry into the circumstances in which the UK came to take part in the invasion on behalf of families of British soldiers who have been killed in Iraq⁴; and to hold accountable under human rights law the actions of British troops alleged to have tortured or killed civilians in Iraq.⁵ I will come back to these cases in more detail.

These attempts have generated discussion of the legal concept of ‘non-justiciability’, long thought to be a doctrine of English law but one (I will suggest) in need of renewed and rigorous examination. In view of its apparently long history, examination of this concept will require a survey of the historical context in the English case law which provides the background against which recent cases about the invasion of Iraq need to be seen. For ease of exposition I will therefore

¹ Thanks to Julie Albrechtsen for research assistance. All errors are mine. It should be noted that I have appeared as counsel in a number of the cases discussed in this chapter: the views expressed are mine and not necessarily those of my clients.

² *R (Campaign for Nuclear Disarmament) v Prime Minister* [2003] 3 LRC 335.

³ *R v Jones (Margaret)* [2007] 1 AC 136.

⁴ *R (Gentle) v Prime Minister* [2007] QB 689; affirmed [2008] 2 WLR 879.

⁵ *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140; [2008] 1 AC 153.

adopt, in the main, a chronological approach to the case law. Before I do that I will outline the main arguments in this chapter.

The main thesis of this chapter will be both apparently bold and yet (I will suggest) surprisingly orthodox, or at least rooted in orthodox constitutional theory. It is that the concept of 'non-justiciability' has no place in modern public law. In particular it will be suggested that there are in principle no 'no-go areas' as has been traditionally thought in relation to foreign relations and defence. The main components of the argument can be summarised as follows:

1. A fundamental principle of our constitution is the rule of law.
2. One particular aspect of the rule of law is that the executive has no unlimited powers. In principle every power has legal limits.
3. Another aspect of the rule of law is that questions of law, such as what the limits are on the executive's powers and whether the executive has transgressed them, are ultimately ones that are entrusted for authoritative decision by independent courts.
4. However, there is a strong countervailing principle, which in fact flows from what has already been said. The courts' only function is to correct errors of law by the executive, not to question the political wisdom of its actions. If the courts are unable to detect an error of law in the executive's decision they must refrain from interfering with it, however wrong or immoral or foolish it may seem to be either to the court or to many members of the public.
5. So much is as true of the ordinary situation that comes before the Administrative Court as the politically more controversial areas which I shall be touching on in this chapter. The principles are well-recognised in areas like local authority finance, immigration, planning etc. It is *never* the function of the court to sit on appeal from a decision on the *merits* of a decision; its function is only ever to *review its legality*.
6. There is no room or need for any further concept of 'non-justiciability' in areas such as foreign relations or defence. If the true analysis is that no error of law can be shown in those areas, the argument will fail, not because the issue is non-justiciable but because there is no legal basis on which the court could interfere even if the case arose in some other, more conventional context.
7. To say otherwise is to accept that there are questions of law which ordinarily would and should be decided by the courts which are immune from judicial review. That represents the negation of the rule of law and should no longer be countenanced in the law of a modern constitutional state.
8. A second, and subsidiary thesis of this chapter will be that, whatever may be the position generally, there is no room for the concept of non-justiciability when a court is deciding a question which arises under the Human Rights Act 1998 (HRA). Comparative and international jurisprudence makes it clear that, once the court has to decide a question under a charter of fundamental rights, it must decide the question. In that sense, certain questions have necessarily become questions of law for courts to decide, whatever the

position might have been previously. Domestic jurisprudence to date also supports this subsidiary thesis.

9. When correctly understood, the case law, which will be examined in detail below, does not contradict (and often supports) the main and subsidiary theses of this chapter.⁶

II. The Different Meanings of ‘Non-justiciability’

Although the term ‘non-justiciability’ appears frequently in English jurisprudence (as in other jurisdictions), it will be helpful to distinguish between three different ways in which it has tended to be used so that it is clearer what is and what is not the primary subject of this chapter.

The case law indicates that the phrase is used, *first*, to reflect a principle of English law relating to the recognition of acts of foreign states.⁷ This use of the term has nothing to do with the subject of this chapter, which is concerned with the legality of the actions of the government of the United Kingdom, not a foreign state. However, as will be pointed out below, what is instructive is that even in relation to foreign states, the principle of non-justiciability is not absolute. It is for this reason that in modern case law the preferred phrase has been ‘judicial restraint’, which recognises that there is room for judicial supervision albeit that there is a need for caution.

Second, it has been used to reflect the traditional dualist view of English law in relation to international law, in particular treaty law.⁸ It has been suggested that the dualist approach may need ‘critical re-examination’ at least in relation to human rights issues.⁹ The position in relation to customary international law is generally that its norms are automatically part of English common law without the need for transformation by legislation but this has recently been held not to be true of the crime of aggression.¹⁰

Third, the phrase has been used to reflect the notion that certain areas of law fall within the exclusive competence of the executive and therefore cannot be adjudicated upon in a court of law. Traditionally, these areas (most typically in the

⁶ For a similar thesis by a well-known constitutional theorist, see TRS Allan, ‘Justiciability and Jurisdiction: Political Questions and the Scope of Judicial Review’: ch 6 of *Constitutional Justice* (Oxford, Oxford University Press, 2001), especially 161–2. There is also a useful discussion of the topics covered by this chapter, commenting in particular on the *Chandler* and *CND* cases, addressed below, in D Jenkins, ‘Constitutional Reform Goes to War: Some Lessons from the United States’ [2007] PL 258, especially 265–78. Many of the recent cases I discuss in this chapter are also considered in a lecture by Richards LJ, ‘The International Dimension of Judicial Review’ <www.judiciary.gov.uk/publications_media/speeches/2006/sp070606.htm>.

⁷ See, for instance, *Buttes Gas and Oil Co v Hammer* [1982] AC 888; *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.

⁸ See, for instance, *J H Rayner Ltd v Department of Trade* [1990] 2 AC 418.

⁹ See *In re McKerr* [2004] 1 WLR 807, at paras 49–50.

¹⁰ See *R v Jones (Margaret)* [2007] 1 AC 136.

sphere of foreign relations and defence) have been excluded from determination by the courts through reference to the fact that the source of these powers lies in the royal prerogative. However, in more recent times, as will be seen below, the courts have held that what is critical is not the source of the power but the nature of the issue. It is this third use of the concept of non-justiciability in English law that will be the primary focus of this chapter.

The issues discussed in this chapter have recently been thrown into sharp focus not only because of the controversy surrounding the invasion of Iraq in March 2003 but also as a result of the reception into domestic law of the European Convention on Human Rights by the HRA. As will be seen below, two main issues arise in relation to human rights law in this context. First, to what extent will the courts have to consider human rights issues when determining the question of justiciability in a particular case? Second, to what extent does the question of justiciability provide a hurdle for a human rights claim which the claimant will have to overcome before even getting to the substantive human rights issue? To examine these issues and to see how the law has developed, it will be useful to consider the case law which underpins the current legal position in relation to justiciability.

III. The Case Law

The rule of law goes deep and far into the history of this country, certainly to medieval times and the various versions of the Magna Carta from 1215 onwards. The 18th-century case of *Entick v Carrington*¹¹ will suffice to make the point that at the root of our constitutional state lies the notion that the courts have the responsibility of ensuring that the executive acts within the powers which the law confers upon it. The case concerned John Entick, who brought a claim in the tort of trespass against Nathan Carrington and three others.¹² The latter were King's Messengers. They had broken into Mr Entick's home, seized allegedly seditious papers and arrested him. On the facts, it was clear that their acts would be tortious should they be unable successfully to put forward a justification.

Justifications were put forward. Relevant for the purposes of justiciability is the argument on the part of the defendants that the claim in tort must fail, because their actions were conducted on the basis of a warrant issued by the Earl of Halifax. The Earl was a member of the Privy Council and one of the King's principal Secretaries of State. The search and subsequent seizure of materials had been conducted strictly according to the warrant, such warrants having been granted frequently by Secretaries of State since the Revolution, and it was therefore submitted that the defendants' actions were lawful.

¹¹ (1765) 19 St Tr 1029; (1799) 2 Wils KB 275

¹² For a discussion of the historic significance of *Entick v Carrington* in the area of protection of privacy against executive interference, see P Duffy and M Hunt, 'Goodbye *Entick v Carrington*: the Security Service Act 1996' (1997) 1 *EHRLR* 11.

The court did not accept this. Lord Camden CJ held that the issuing of such a warrant ('to break open doors, locks, boxes, and to seize a man and all his books')¹³ was outside the jurisdiction of the Secretary of State. That such warrants had frequently been issued in the past did not strengthen the defendants' argument. In his judgment, Lord Camden has the following to say: 'we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society'.¹⁴

In finding that a representative of the state can only act lawfully in a manner prescribed by statute or common law, the judgment effectively establishes the limits of executive power under English law. The case exemplifies the fundamental principle that the courts will scrutinise the boundaries of executive power. The Court roundly rejected the suggestion that there was a 'law of State distinct from the common law'.¹⁵

In matters of national security, an early statement about the role of the executive was made in *The Zamora*.¹⁶ The case also illustrates the tension between public international law and municipal law. This case was brought before the Privy Council on appeal from the High Court (in Prize). The *Zamora* was a Swedish steamship. Carrying a cargo of approximately 400 tons of copper, it left New York on 20 March 1915, bound for Stockholm. On 8 April, it was stopped somewhere between the Faroe Islands and the Shetland Islands by a British cruiser. A writ in prize was issued, claiming a decree of condemnation of the ship and cargo, on the ground that more than half of the cargo constituted contraband. Prior to the hearing of the case, a summons was then taken out by the Procurator-General for an interlocutory order that the copper should be delivered to the Crown under an Order in Council. The appellants objected that the relevant provisions of the order violated international law, and that, therefore, the Prize Court should not act upon them.

In its determination, the Privy Council considered whether the Order was binding upon the Prize Court. It was accepted that the jurisdiction in prize had its validity in the prerogative, but that,

[I]t cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred.¹⁷

On the question of national security, Lord Parker of Waddington delivered what has since become a famous dictum in the context of justiciability:

Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.¹⁸

¹³ See n 11, at 817.

¹⁴ *Ibid.*

¹⁵ See n 11, at 818.

¹⁶ [1916] 2 AC 77.

¹⁷ *Ibid.*, at 90.

¹⁸ *Ibid.*, at 107.

In accordance with this approach (as will be seen below) the House of Lords has more recently held that whether the concerns of national defence outweigh a duty of fairness is a question for the government, not for the courts, and that such matters are unsuitable for adjudication in a court of law.¹⁹ The court cannot substitute its own opinion for that of the Crown in matters of national security, unless it is expressly permitted or required to do so.

Returning to *The Zamora*, in spite of the famous dictum by Lord Parker, the court held that the Crown had no right to requisition. This was not because such a right (as exercised under the prerogative for reasons of national defence) did not exist, but rather because when the executive attempts to interfere with private rights for reasons of national security, it is not sufficient that it could have acted for this reason. It must adduce evidence that it has in fact acted on grounds of national security. Lord Parker said:

In their Lordships' opinion the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the Court, but because the judge had before him no satisfactory evidence that such a right was exercisable.²⁰

The question of justiciability in the context of national security and defence arose again in *Chandler v Director of Public Prosecutions*.²¹ It is important to bear in mind that this was a criminal case, not a judicial review case or even a damages claim for a tort.

The six appellants in *Chandler* were all members of the 'Committee of 100'. The Committee had been set up in 1960, with the objective of furthering the aims of the Campaign for Nuclear Disarmament through non-violent demonstrations of civil disobedience. They participated in the planning of a demonstration at Wethersfield Airfield, a location which was a 'prohibited place' under section 3 of the Official Secrets Act 1911. Their admitted objectives included to ground all aircraft, irrespective of whether these were carrying nuclear weapons or not; to immobilise the airfield; and to reclaim the airfield for civilian use.

The appellants were charged with conspiring together to commit a breach of section 1 of the Official Secrets Act 1911. In their defence, the appellants pleaded that their acts did not amount to a section 1 offence; that the appellants' purpose was to benefit the state, that purpose being founded on a reasonable belief in certain facts and that they did not have the requisite *mens rea*; and, that the appellants' purpose was not in fact prejudicial to the safety or interests of the state.

During the trial at the Central Criminal Court, the Director of Air Operations at the Air Ministry, as it was then called, gave evidence to the effect that the airfield was essential to the defence of the United Kingdom and that interference with the

¹⁹ See, for example, Lord Fraser of Tullybelton in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 402.

²⁰ See n 16, at 108.

²¹ [1964] AC 763.

ability of aircraft to take off from this airfield (as had been one of the purposes of the civil disobedience) would hamper their effectiveness. As a consequence of objections on behalf of the prosecution, counsel for the defence was refused the opportunity to cross-examine this witness and to call evidence as to the defendants' belief that their actions were beneficial to the state or to demonstrate that their purpose was not, in fact, prejudicial to the interests and safety of the state.

Among the grounds on which the appellants appealed were that the judge had erred in law in excluding cross-examination and evidence on the appellants' purpose and whether that purpose was prejudicial to the safety or interests of the state.

The Court of Appeal (Criminal Division) referred the case to the House of Lords with a certification of a point of law of general public importance. This point of law concerned the proper construction of the words 'purpose prejudicial to the safety or interests of the State' as used in the Official Secrets Act.

Essential to this discussion is the question of who is to determine what is and what is not prejudicial to the safety and interests of the state. In the case before the Central Criminal Court, the overall effect of refusing the defence cross-examination of the Director of Air Operations was that it was the Air Ministry, and it alone, which made this determination. This in effect rendered the question non-justiciable. Lord Reid reformulated the question so that it related to 'what is or is not in the public interest'.²² His Lordship then added: 'I do not subscribe to the view that the government or a Minister must always or even as a general rule have the last word about that'. He continued, however,

It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised. ... Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no one is entitled to challenge it in court.²³

Pausing there, no public lawyer could quarrel with that statement: 'policy' matters are always a matter for the executive and not for the courts. No court can impugn an exercise of discretion on the ground that it was 'wrong'—only that it was 'unlawful.' Lord Reid sought to give a further, practical justification why such policy cannot be challenged in a court:

The 1911 Act was passed at a time of grave misgiving about the German menace, and it would be surprising and hardly credible that the Parliament of that date intended that a person who deliberately interfered with vital dispositions of the armed forces should be entitled to submit to a jury that Government policy was wrong and that what he did was really in the best interests of the country, and then perhaps to escape conviction because a unanimous verdict on that question could not be obtained.²⁴

²² *Ibid*, at 790.

²³ *Ibid*, at 791.

²⁴ *Ibid*.

Lord Reid acknowledged that within the sphere of criminal law, all the elements of the crime must be proved by evidence. However, he pointed out that in the present case ‘the question whether it is beneficial to use the armed forces in a particular way or prejudicial to interfere with that use would be a political question ... Our criminal system is not devised to deal with issues of that kind’.²⁵

Again, no public lawyer would suggest that it is a matter for the courts to decide ‘political questions’. As will be seen in the light of more recent authority, what the House of Lords has since emphatically re-affirmed is that it *is* for the courts to decide legal questions even if they arise in a politically controversial context.

Returning to *Chandler*, on the question of what may be prejudicial to the interests of the state, Viscount Radcliffe had the following to add:

I do not think that a court of law can try that issue or, accordingly, can admit evidence upon it. It is not debarred from doing so merely because the issue is what is ordinarily known as ‘political’. Such issues may present themselves in courts of law if they take a triable form.²⁶

Although he did open the door for such an issue being triable in principle, he then went on to say:

The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country’s best interest.

I may add that I can think of few issues which present themselves in less triable form.²⁷

Again, there is nothing surprising here. It is never for the courts to find that decisions of policy, even in a less controversial context than national defence, are or are not in the country’s best interest.

In many ways the most interesting speech in *Chandler* today is that by Lord Devlin. He went outside the strict confines of the criminal law and considered what the position would be if an issue arose by way of judicial review.²⁸ He said that although ‘the courts will not review the proper exercise of discretionary power ... they will intervene to correct excess or abuse’.²⁹ In *Chandler*, no question of abuse of power was at issue, so this was not pursued. In other words, Lord Devlin articulated the point which is at the heart of this chapter. There is a crucial distinction between questioning the political wisdom of a policy (whether in relation to defence or for that matter anything else) and challenging the legality of the government’s actions. The reason why the former is not amenable to judicial review is not that it is non-justiciable but because it does not raise any question of legal error at all. If, however, a question of law does arise, Lord Devlin

²⁵ *Ibid.*

²⁶ *Ibid.*, at 798.

²⁷ *Ibid.*

²⁸ However, note that in *CCSU* (below) Lord Diplock said of Lord Devlin’s speech in *Chandler* that he ‘gained no help from it’: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 307, 408.

²⁹ See n 21, at 809.

confirmed that it would be for the courts to decide it, even though the context is that of military deployment. In other words, it is not the context that matters but the nature of the issue.

On the question of submission of evidence that Britain's nuclear policy was contrary to the interests of the state, Lord Devlin said:

It is no justification of the ruling [the judge's ruling to exclude evidence] to say that in the end the validity of the argument for unilateral disarmament is a matter of opinion. Opinion must be based on fact and opinion on such matters, as the likelihood of accidental explosions and mistakes on radar is expert opinion, which the law treats as a species of fact. Hard facts where they can be ascertained and expert opinion where they cannot would be the proper basis for the verdict of a jury on such an issue.³⁰

Lord Devlin continued:

I cannot accept that the judge is entitled to direct the jury how to answer a question of fact, however obvious he may believe the answer to be and although he may be satisfied that any other answer would be perverse. The Attorney-General submitted that, while it is a question of fact for the jury whether the entry was for a purpose prejudicial, once it was proved that the purpose was to interfere with a prohibited place and to prevent it operating, then a judge should be entitled to direct a jury to return a verdict of guilty. With great respect I think that to be an unconstitutional doctrine. It is the conscience of the jury and not the power of the judge that provides the constitutional safeguard against perverse acquittal.³¹

Lord Devlin was not even particularly impressed by the fact that the source of the power to deploy military forces lies in the prerogative, saying:

It is by virtue of the prerogative that the Crown is the head of the armed forces and responsible for their operation. Otherwise the nature of the prerogative and the position of the Crown are, in my opinion, irrelevant to the decision in this case.³²

The question of the availability of criminal defences in areas of non-justiciability was to arise in another, more recent case (*R v Jones (Margaret)*, discussed below). By the time the latter case came before the House of Lords in 2006, the legal landscape had altered following the entry into force of the HRA.

The case of *Council of Civil Service Unions v Minister for the Civil Service* (more commonly referred to as the 'GCHQ case') also concerned the issue of justiciability in the area of national security and defence.³³ Government Communications Headquarters (primarily based at Cheltenham) provided the government with intelligence and was tasked with ensuring the security of military and official communications and the handling of classified information vital to national security. At the relevant time (1982) the government was experiencing significant problems with organised industrial action. As part of this, GCHQ had been

³⁰ *Ibid*, at 802.

³¹ *Ibid*, at 803.

³² *Ibid*, at 807.

³³ [1985] 1 AC 374.

targeted by trade unions in a campaign of industrial action designed to disrupt government agencies. Since the establishment of GCHQ in 1947, all of its staff had been permitted membership of trade unions, and most employees were in fact members of such unions.

The Minister for the Civil Service (the Prime Minister, Margaret Thatcher) responded to the industrial action by giving an instruction, purportedly under the Civil Service Order, effectively prohibiting staff at GCHQ from being members of trade unions. Prior to issuing the instruction, there had been no consultation, either with staff at GCHQ or with the trade unions.

The applicants, six individuals and the Council of Civil Service Unions, sought judicial review of that instruction. For present purposes, the essence of the grounds of appeal before the House of Lords was that they sought to have the order banning trade union membership quashed because the Minister had been in breach of her duty to act fairly by consulting them prior to issuing the instruction. The grounds had in common that their success would rest upon how the House of Lords responded to the following question: to what extent, if any, is the exercise of the prerogative in the context of defence and national security reviewable?

Lord Fraser of Tullybelton summarised the preliminary question as follows:

the question [is] whether the courts, and your Lordships' House in its judicial capacity, have power to review the instruction on the ground of a procedural irregularity, having regard particularly to the facts (a) that it was made in the exercise of a power conferred under the royal prerogative and not by statute, and (b) that it concerned national security.³⁴

With reference to *Attorney-General v De Keyser's Royal Hotel Ltd*,³⁵ Lord Fraser said:

the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise.³⁶

Lord Fraser went on to state that where, as in the present case, the prerogative power in question was that of the power to regulate the Home Civil Service, there was, he recognised, 'no obvious reason why the mode of exercise of that power should be immune from review by the courts.' Nevertheless, he found that to allow such a review would run counter to the authority to which he had referred. He stated: 'I therefore assume, without deciding, ... that all powers exercised directly under the prerogative are immune from challenge in the courts.'³⁷

³⁴ *Ibid.*, at 394.

³⁵ [1920] AC 508.

³⁶ See n 33, at 398.

³⁷ *Ibid.* Lord Brightman agreed with Lord Fraser. The other members of the House of Lords, Lord Scarman, Lord Diplock and Lord Roskill would have been prepared to countenance the availability of judicial review in principle of the direct exercise of a prerogative power. In subsequent cases, the courts have entertained applications for judicial review of the direct exercise of the prerogative: eg *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 111; *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349.

On the issue of whether the Minister was under an implied obligation to act fairly, this was essentially a question of whether the trade unions and their members at GCHQ had a legitimate expectation that their views be sought, if not followed. It was clear that there was no legal right as such in existence. However, there was a long-standing practice that staff and trade unions were consulted on terms essential to their employment/conditions of service.

The Order could have been made under authority of statute. Had it been, the power delegated to the Minister would have been construed as being subject to an obligation to act fairly. Lord Fraser points out that 'I am unable to see why the words conferring the same power should be construed differently merely because their source was an Order in Council made under the prerogative'.³⁸

Their Lordships could therefore go on to consider whether there existed a legitimate expectation to be consulted. In Lord Fraser's opinion, 'if there had been no question of national security involved, the appellants would have had a legitimate expectation' that they be consulted.³⁹

Lord Fraser said that 'the issue here is not whether the minister's instruction was proper or fair or justifiable on its merits. These matters are not for the courts to determine', but of course such questions as to the merits are never for the courts to determine.⁴⁰ Mrs Thatcher had deliberately made the decision without prior consultation because prior consultation 'would involve a real risk ... which was a threat to national security and which it was intended to avoid'.

On this, Lord Fraser states:

The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security.⁴¹

On the question of national security, Lord Scarman interestingly recognised that even in this area there was a role for judicial review, saying that,

though there are limits dictated by law and common sense which the court must observe in dealing with the question, the court does not abdicate its judicial function. If the question arises as a matter of fact, the court requires evidence to be given. If it arises as a factor to be considered in reviewing the exercise of a discretionary power, evidence is also needed so that the court may determine whether it should intervene to correct excess or abuse of the power.⁴²

³⁸ See n 33, at 399.

³⁹ *Ibid*, at 401.

⁴⁰ See D Nicol, 'Law and Politics after the Human Rights Act' (2006) *PL* 733.

⁴¹ See n 33, at 402. It is arguable that today the court would wish, even in a case where national security or similar public policy interests are raised, to decide for itself whether the duty to act fairly is outweighed in all the circumstances by those other interests. After all the courts are well-used now to deciding where the balance of public interests lies when public interest immunity is claimed for documents. In so far as the concern may be that the court's procedures are not apt to deal with sensitive material in open session, there is now available the possibility of going into closed session with the interests of the claimant represented by a 'special advocate': see, eg, *R (Murungaru) v Secretary of State for the Home Department* [2006] EWHC 2416 (Admin).

⁴² *Ibid*, at 404.

In his speech, Lord Diplock could 'see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review'.⁴³

Lord Diplock proceeded to set out his now famous dictum on the three grounds of judicial review: illegality, procedural impropriety and irrationality. Whereas his Lordship did not rule out irrationality as a ground of judicial review of a ministerial decision taken under the prerogative, he said:

Such decisions will generally involve the application of Government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the Executive discretion is to be wisely exercised, need to be weighed against one another—a balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise.⁴⁴

Lord Roskill considered that the current decision did not, by reason of its subject-matter, fall within what he considered the 'excluded categories', ie prerogative powers that 'because their nature and subject matter are such as not to be amenable to the judicial process'.⁴⁵ He suggested obiter that there were certain prerogative powers which would not by reason of their subject-matter be amenable to judicial review but he was careful not to be too categorical even about those:

I do not think the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces deployed in a particular manner or Parliament dissolved on one date rather than another.⁴⁶

There are two observations which can be made about that passage. First, some of the prerogative powers mentioned there as being unreviewable have, in fact, subsequently been the subject of judicial review. In *Bentley*⁴⁷ the Divisional Court corrected an error of law by the Home Secretary in relation to the prerogative of mercy.⁴⁸ In *R v Secretary of State for Foreign and Commonwealth Affairs*,

⁴³ *Ibid*, at 410.

⁴⁴ *Ibid*, at 411.

⁴⁵ *Ibid*, at 418.

⁴⁶ *Ibid*.

⁴⁷ See above n 37.

⁴⁸ See P Craig, *Administrative Law* (London, Thomson/Sweet & Maxwell, 5th edn, 2003) 555.

ex p Rees-Mogg the Divisional Court entertained an application for judicial review in relation to the United Kingdom's agreeing to the Maastricht Treaty, although the challenge failed.⁴⁹ Second, it is by no means clear that in principle the others should not be amenable to judicial review provided a proper basis for such review can be invoked. It is true, as Lord Roskill said, that the courts are not the places to decide whether a treaty should be concluded or the armed forces deployed in a particular manner. But then they are never the place to decide what 'should' happen as a matter of policy. In such contexts as the grant of honours it is now perfectly conceivable that there may be a role for the courts to play, provided an error of law can be identified. The position may be different in relation to matters to do with Parliament, such as the date of dissolution, but that would reflect the unique constitutional position of Parliament and not because of the immunity of the executive from judicial review. In any event, foreign relations and defence are matters for the executive: judicial review in those contexts should not unduly interfere with the internal workings of Parliament.

The question of national security and defence came up in a slightly different way in *Secretary of State for the Home Department v Rehman*.⁵⁰ The appellant in this case was a Pakistani national. He was given entry clearance to allow him to work as a religious minister in the UK in January 1993. He was granted leave to remain until February 1997, something which was subsequently extended. He then applied for indefinite leave to remain, but this was refused by the Secretary of State in December 1998. In his letter of refusal, the Secretary of State gave as a reason Mr Rehman's involvement with an Islamist terrorist organisation.

Mr Rehman appealed to the Special Immigration Appeals Commission (SIAC). In an open statement, the Secretary of State accepted that Mr Rehman and his followers were unlikely to carry out acts of violence in the United Kingdom, but said that Mr Rehman was directly supporting terrorism on the Indian subcontinent, support which was likely to continue unless he was deported.

Against this background, two main points were at issue before the Court of Appeal and, subsequently, the House of Lords. The first related to the meaning of the term 'national security', the second to the standard of proof to be applied to the evidence of the Secretary of State. The Secretary of State had considered national security to be at issue even where the targets of the terrorist activities were in another country and where UK citizens or territory were not at risk. SIAC had substituted this understanding of the term with their own, narrower understanding, namely where the activity targeted the UK, its system of government or its people, or where a foreign government was likely to take reprisal action against the UK following activities aimed at overthrowing or destabilising that government. Under this understanding, Mr Rehman's continued presence in the UK was held not to be contrary to interests of national security.

⁴⁹ [1994] QB 552.

⁵⁰ [2003] 1 AC 153.

In its judgment, with reference to the relevant provisions of the Immigration Act 1971, Special Immigration Appeals Commission Act 1997, as well as SI 1998/1881, the Court of Appeal considered that the view taken by SIAC was too narrow. On appeal to the House of Lords, in a judgment handed down only a month after the events of 9/11, the House of Lords concurred with the Court of Appeal and dismissed the appeals. It is important to note that what the courts were doing in addressing the meaning of 'national security' was deciding a question of law, which arose from the need to interpret a statute. They did not simply abdicate their function of deciding a question of statutory interpretation to the executive.⁵¹

Central to the question of national security was the provision in section 3(5)(b) of the 1971 Act that a non-British citizen could be deported 'if the Secretary of State deems his deportation to be conducive to the public good'. There being no limitation or definition as to what was conducive to the public good, 'the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State'.⁵²

Had this case come before the courts a decade or so earlier, it is likely that the argument would have ended there. The case of *Rehman* was, however, a post-*Chahal* decision.⁵³ When SIAC was set up by the 1997 Act, the purpose of the legislation was to ensure an 'effective remedy' within the meaning of article 13 of the European Convention on Human Rights following the finding of a breach by the UK in *Chahal*.

Considering this background, and with reference to section 4(1) of the 1997 Act, Lord Slynn observed that,

it seems to me that on this language and in accordance with the purpose of the legislation to ensure an 'effective remedy', within the meaning of article 13 of the European Convention, that the Commission was empowered to review the Secretary of State's decision on the law and also to review his findings of fact. It was also given the power to review the question of whether the discretion should have been exercised differently. Whether the discretion should have been exercised differently will normally depend on whether on the facts found the steps taken by the Secretary of State were disproportionate to the need to protect national security.⁵⁴

In agreeing with the Court of Appeal's understanding of 'national security', Lord Slynn added that 'national security and defence of the realm may cover the same ground but I tend to think the latter is capable of a wider meaning. But if they are the same then I would accept that defence of the realm may justify action to prevent indirect and subsequent threats to the safety of the realm'.⁵⁵

⁵¹ See, however, C Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press, 2004) in which it is argued at 213 that 'the House of Lords took a very deferential approach to the question of when it is appropriate to deport a person on the ground that it was for the public good in the interests of national security'.

⁵² See above n 50 (Lord Slynn of Hadley at [8]).

⁵³ *Chahal v United Kingdom* (1996) 23 EHRR 413.

⁵⁴ See n 50, at [11].

⁵⁵ *Ibid*, at [18].

On SIAC's powers of review in relation to the decision taken by the executive, Lord Slynn stated:

In conclusion even though the Commission has powers of review both of fact and of the exercise of the discretion, the Commission must give *due weight* to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. (emphasis added)⁵⁶

Note the careful use of the phrase 'due weight'. This is similar to the concepts used under the Human Rights Act such as 'due deference' or 'the discretionary area of judgment' by which the courts have recognised that the judgment of the executive will, depending on the context, be entitled to weight but none of that means that the issue is non-justiciable. The court ultimately has to decide the questions properly before it.

This was made clear by Lord Steyn, who considered the impact of the Human Rights Act and Convention rights upon the issue of the Secretary of State's determination of national security. In his speech he pointed out:

While a national court must accord appropriate deference to the executive, it may have to address the questions: Does the interference serve a legitimate objective? Is it necessary in a democratic society?⁵⁷

As regards the difference between decisions made under the prerogative and decisions taken under statute, he distinguished *Chandler*: 'not all the observations in *Chandler v Director of Public Prosecutions* can be regarded as authoritative in respect of the new statutory system'.⁵⁸

Lord Hoffmann, while at first pointing out that 'it is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive',⁵⁹ used the boundaries set out by Lord Scarman in the *GCHQ* case to identify the functions of SIAC as shown necessary by *Chahal* (ie for the UK to comply with its Convention obligations). These are that

the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. ... the Commission may reject the Home Secretary's opinion on the ground that it was 'one which no reasonable minister advising the Crown could in the circumstances reasonably have held'. ... an appeal to the Commission may turn upon issues which at no point lie within the exclusive province of the executive.⁶⁰

Lord Hoffmann used *Chahal* itself as an example of the latter. Whether deportation is in the interest of national security is irrelevant where article 3 rights are engaged (the provision being absolute). His Lordship said:

⁵⁶ *Ibid*, at [26].

⁵⁷ *Ibid*, at [31].

⁵⁸ *Ibid*.

⁵⁹ *Ibid*, at [54].

⁶⁰ *Ibid*.

If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.⁶¹

The next case of importance was that of *R (Marchiori) v Environment Agency*. This concerned the manufacture of Trident and the discharge of nuclear waste.⁶² The appellant, Emanuela Marchiori, sought judicial review in respect of some authorisations granted by the Environment Agency permitting the discharge of radioactive waste from two nuclear sites at Aldermaston and Burghfield, sites at which the design, manufacture and servicing of Trident nuclear warheads take place. It was submitted by the appellant that the manufacture and maintenance of Trident was contrary to international law.

Although the case concerned an authorisation permitting the discharge of waste at the sites, the issue for the appellant was wider, in that she had a firmly held belief that the manufacture and maintenance of Trident nuclear warheads was contrary to international law.

In terms of the question of justiciability, it can for purposes of this case be formulated thus: was the Environment Agency required to make a judgement for itself regarding the merits or demerits of Trident or did they simply have to accept the government's nuclear weapons policy as it was? If the question was answered in the affirmative, then they would not have acted according to proper procedure since they had merely substituted the Secretary of State's views for their own. Necessary to answer this question is whether the Secretary of State had within his exclusive ambit to decide upon the merits or demerits of having and maintaining a nuclear deterrent. It had been made clear in a statement by the respondent that they regarded themselves effectively bound to regard Trident, considering the clear government policy, as a benefit for the purposes of the justification principle to be applied pursuant to the relevant legislation.

Laws LJ found it 'to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy'.⁶³ But he might have added that the courts *never* engage in 'merits review' of any policy of the executive: they can only ever review the legality of government actions, not their merits. He said:

The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome. The defence of the realm, which is the Crown's first duty, is the paradigm of so grave a matter. Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions. Of course they may or may not be satisfied, and their satisfaction or otherwise

⁶¹ *Ibid.*

⁶² [2002] EWCA Civ 03 [2002] Eu LR 225. For a case comment, see I Freer, *R (Marchiori) v Environment Agency* in [2002] JPL 1295.

⁶³ *Ibid.*, at [38].

will sound in the ballot-box. There is not, and cannot be, any expectation that the unelected judiciary play any role in such questions, remotely comparable to that of government.

However, he added an important proviso:

this primacy which the common law accords to elected government in matters of defence is by no means the whole story. Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds. There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness. Judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy. In the British state I assume that is overwhelmingly unlikely in practice. Closer to reality, perhaps, is that a statute might itself require the courts to review high policy decisions ... That I think was the position in *Operation Dismantle*. In this jurisdiction such a state of affairs may most obviously arise in the execution of the judges' duty under the Human Rights Act 1998.⁶⁴

It had been submitted that the Advisory Opinion of the International Court of Justice on the legality of the use of nuclear force supported the contention that the UK policy on Trident was repugnant to humanitarian principles of international law. With reference to the ICJ's opinion which makes clear that the ICJ were not pronouncing upon the legality of deterrence policies, the Court of Appeal did not find that this was supported by that Advisory Opinion.⁶⁵

The case of *Marchiori* can be contrasted with the earlier case before the Supreme Court of Canada of *Operation Dismantle v R*, cited by Laws LJ in *Marchiori* as being potentially relevant in this jurisdiction once the Human Rights Act entered into full force (as it had not done at that time). In this case, the appellants alleged that a decision made by the Canadian government, allowing the USA to test cruise missiles in Canada, was in violation of section 7 of the Canadian Charter of Fundamental Rights and Freedoms 1982.

It was argued that the development of cruise missiles increased the risk of nuclear war and that the US military presence and interest in Canada resulting from the testing made Canada a more likely target for nuclear attack. The decision, so it was alleged, therefore violated the right to life, liberty and security of the person, as guaranteed by section 7 of the Charter.

The decision, although taken under the Royal Prerogative, was reviewable under section 32(1)(a) of the Charter. Nor was the court exempt from reviewing it because it was a political decision; the court had a constitutional obligation under section 24 to decide whether rights under the Charter were violated.

Although the Supreme Court dismissed the appeal, it was held that compatibility of the decision with section 7 of the Charter was in principle reviewable, in

⁶⁴ *Ibid.*, at [40].

⁶⁵ *Ibid.*, at [67].

spite of the decision being one of national defence. Dickson J agreed ‘in substance’ with Wilson J on the question of justiciability, who gave the main judgment on the issue. With reference to Lord Devlin’s speech in *Chandler*, she said, and it is worth quoting at length:

It seems to me that the point being made by Lord Devlin, as well as by Tigar and Henkin in their writings, is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court’s opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.⁶⁶

She continued,

if the Court were simply being asked to express its opinion on the wisdom of the executive’s exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the *effect* of the appellants’ action is to challenge the wisdom of the government’s defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government’s defence policy is sound but whether or not it violates the appellants’ rights under s. 7 of the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts.⁶⁷

And then she declared,

While the court is entitled to grant such remedy as it ‘considers appropriate and just in the circumstances,’ I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called ‘political question.’⁶⁸

Finally, she concluded,

that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to ‘second guess’ the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so.⁶⁹

Those words by Wilson J encapsulate the essential thesis of this chapter.

In light of the apparent conflict between *Operation Dismantle* and *Marchiori*, Laws LJ addressed the earlier decision in the latter:

it seems to me that the result flowed ... from the terms of constitutional provisions in the law of Canada, namely ss.24 and 32(1)(a) of the Charter. Our law contains no analogous

⁶⁶ *Ibid*, at [62].

⁶⁷ *Ibid*.

⁶⁸ *Ibid*, at [63].

⁶⁹ *Ibid*, at [64].

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provisions, and in my judgment—quite aside from any issue of stare decisis—*Operation Dismantle* cannot serve to undermine the effects of the decision of the House of Lords in *Chandler*.⁷⁰

Interestingly, Laws LJ recognised that the position might well be different if and when the Human Rights Act came into force in the UK, since that would be comparable with the Canadian Charter.⁷¹

As mentioned above, *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*⁷² brought up the question of whether the legitimacy of executive action taken by a foreign state was justiciable. It is not directly relevant to the subject of this chapter, which concerns the legality of the UK government's actions. Nevertheless, it is instructive in the present context because the House of Lords recognised that even then there is no absolute concept of non-justiciability; and in particular affirmed that breaches of fundamental principles of international law would lead to the English courts declining to give effect to certain acts of foreign states.

The case concerned action taken by Iraq's government during the occupation of Kuwait in 1990. Immediately following the invasion, the Revolutionary Command Council of Iraq had adopted resolutions proclaiming the sovereignty of Iraq over Kuwait and designating Kuwait as a 'governate' within Iraq. The Iraqi armed forces, upon taking control of the airport at Kuwait, seized 10 commercial aircraft belonging to Kuwait Airways, subsequently transferring all property belonging to the Airways to the state-owned Iraqi Airways. The latter was done through a resolution issued by the Revolutionary Command Council.

Taking as a starting point that the law to be used for determining issues brought under a tortious claim would be the law of the country in which the actions constituting the tort took place, Lord Nicholls of Birkenhead said that:

[e]xceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances.⁷³

An example of this was referred to by Lord Nicholls when he went on to say that:

Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws. The leading example in this country, always cited in this context, is the 1941 decree of the National

⁷⁰ *Marchiori* at [35].

⁷¹ In the more recent case of *R (Gentle) v Prime Minister* (cited below), the Court of Appeal at [38] accepted the reasoning in *Operation Dismantle* in the area of human rights, albeit pointing out that the case concerns a foreign charter of rights and not the ECHR or HRA.

⁷² [2002] 2 AC 883. For a discussion on this case, see J Carruthers and E Crawford (2003) 52 *ICLQ* 761; and also in a casenote by E Peel (2003) 119 *LQR* 1.

⁷³ *Ibid*, at [16].

Socialist Government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: *Oppenheimer v Cattermole* [1976] AC 249, 277–278. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations.⁷⁴

What the House of Lords had to decide was whether the resolution of the Revolutionary Command Council of Iraq was of this character. Their Lordships accepted that ‘this seizure and assimilation were flagrant violations of rules of international law of fundamental importance’.⁷⁵

In finding that the Iraqi resolution was of this character, and therefore should not be applied, Lord Nicholls made some general observations on UN law, customary international law and the question of justiciability:

Article 2(4) of the United Nations Charter provides that in their international relations all members shall refrain from the use of force against the territorial integrity of any state. This is also a principle of customary international law binding on states independently of the provisions of the Charter: see the International Court of Justice in *Nicaragua v United States of America* [1986] ICJ Reports 14, 98–100, paras 187–188. Further, article 25 of the United Nations Charter provides that the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter. ... Decisions of the Security Council taken under these chapter VII powers are legally binding upon all members of the United Nations.⁷⁶

It had been argued for the respondent that the public policy exception was limited to infringements of human rights, and that breach of international law should not be a ground for refusing to recognise a decree of a foreign state. Lord Nicholls rejected this at [25 ff]:

My Lords, this submission seeks to press the non-justiciability principle too far. Undoubtedly there may be cases, of which the *Buttes* case is an illustration, where the issues are such that the court has, in the words of Lord Wilberforce, at p 938, ‘no judicial or manageable standards by which to judge [the] issues’ ... This is not to say an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances

⁷⁴ *Ibid.*, at [18].

⁷⁵ *Ibid.*, at [20].

⁷⁶ *Ibid.*, at [22]–[23].

it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law ... Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the *Buttes* litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome not in doubt. That is the present case.

The question of justiciability arose in the context of Guantánamo Bay in the case of *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*.⁷⁷ Feroz Abbasi is a British national. He was captured by US forces in Afghanistan, from where he was transported to Guantánamo Bay, which is in Cuba on lease to the USA. By the time the case was heard by the Court of Appeal in September 2002, Mr Abbasi had been held captive for eight months without access to a court or tribunal, or to a lawyer. In the case before the Court of Appeal, the claimants sought, through the means of judicial review, to compel the Foreign and Commonwealth Office to make representations on Mr Abbasi's behalf to the United States government, to take other appropriate action or at least to give reasons why this had not been done.

The issues of justiciability with which the court had to deal were twofold: first, in relation to the actions of a foreign state; and secondly, in relation to the UK government's decisions in the area of foreign relations. Lord Phillips MR set out these issues as follows:

To what extent, if at all, can the English court examine whether a foreign state is in breach of treaty obligations or public international law where human rights are engaged? To what extent, if at all, is a decision of the executive in the field of foreign relations justiciable in the English court? More particularly, are there any circumstances in which the court can properly seek to influence the conduct of the executive in a situation where this may impact on foreign relations?⁷⁸

In relation to justiciability of actions taken by foreign states, the claimants sought to argue, with reference to a number of international instruments, that the prohibition on arbitrary detention had reached the status of a norm of customary international law. For the Secretary of State, it was argued that the court could not rule on an assertion that the foreign state was acting unlawfully. To do so would be contrary to comity and the principle of state immunity. Against this, the claimant argued that the relief sought in the present case was against the Secretary of State. The rights and obligations of the USA were not at issue.

The human rights element was summed up as follows:

The essence of [the] submissions was that Mr Abbasi was subject to a violation by the USA of one of his fundamental rights and that, in these circumstances, the Foreign

⁷⁷ [2002] EWCA Civ 1598, [2003] UKHRR 76. This case is discussed in C Warbrick, 'International Law in English Courts—Recent Cases' (2003) 52 *ICLQ* 815, 820–1.

⁷⁸ *Ibid.*, at [2].

Secretary owed him a duty under English public law to take positive steps to redress the position, or at least give a reasoned response to his request for assistance.⁷⁹

Lord Phillips MR, with reference to *Adan*⁸⁰ and *Cattermole* suggested:

Although the statutory context in which *Adan* was decided was highly material, the passage from Lord Cross' speech in *Cattermole* supports the view that, albeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.⁸¹

However, this part of the claim failed because the Court concluded that 'we do not consider that the European Convention on Human Rights and the Human Rights Act afford any support to the contention that the Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf'.⁸²

In relation to the question of whether the actions of the Secretary of State were non-justiciable, their Lordships summarised their views as to what the authorities established as follows:

- i. It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.
- ii. ... there is nothing which supports the imposition of an enforceable duty to protect the citizen. The European Convention on Human Rights does not impose any such duty. Its incorporation into the municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this court.
- iii. However the Foreign Office has discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were *irrational* or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy.
- iv. It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden areas.
- v. The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case. (emphasis added)⁸³

⁷⁹ *Ibid*, at [25].

⁸⁰ *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477.

⁸¹ See above n 77, at [57].

⁸² *Ibid*, at [79].

⁸³ *Ibid*, at [106].

As is apparent from the first of these contentions, a reference to a prerogative power is not sufficient to oust the jurisdiction of the court. It is the subject-matter of the claim for judicial review that is essential.⁸⁴ However, it is submitted that what is meant by ‘subject-matter’ in this context is not the *general* context in which a case arises (eg foreign relations) but rather the nature of the particular issue which is brought before the court. It is only if that issue is a legal one (ie one which can be decided by reference to legal standards) that the court can interfere. If the nature of the issue *is* a legal one, then the court not only can but must go on to decide it even if the context in which it arises is a sensitive or controversial one. That is required by the rule of law. Read in this way, it is suggested that the use of the phrase ‘forbidden areas’ in *Abbasi* should not cause any problems. All that is meant by ‘forbidden’ is that the court cannot question the merits of the executive’s decisions in foreign relations. In principle the Court of Appeal was prepared to countenance that all the usual grounds for judicial review would be available, including irrationality (cf *Marchiori* above, where Laws LJ was doubtful); but no doubt the jurisdiction would in practice be exercised with caution precisely so as to avoid intruding on the merits. That is a far cry from saying that legal issues are non-justiciable. The Court of Appeal was saying precisely the opposite.

All this brings us to *R (Campaign for Nuclear Disarmament) v The Prime Minister and Ors*.⁸⁵ This case came before the courts at a time of heightened concern about a possible US-led invasion of Iraq. The UN Security Council had passed Resolution 1441 on 8 November 2002, just over a month before the case was heard. The international controversy had turned to the question of whether another Resolution, expressly authorising the use of force, would be needed for states such as the UK to invade Iraq.

The Campaign for Nuclear Disarmament sought, by way of judicial review, an advisory declaration as to the meaning of Resolution 1441 from the court. In particular, they wanted to know whether non-compliance on the part of Iraq could authorise states to take military action. As Simon Brown LJ (as he then was) put it in the judgment, ‘the court is being invited to declare that the UK government would be acting in breach of international law were it to take military action against Iraq without a further Resolution.’⁸⁶ It was clear that the court had, in principle, jurisdiction to grant relief in the form of an advisory declaration. The question, however, was whether such jurisdiction should be exercised in this case, given that ‘[o]rordinarily speaking, English courts will not rule upon the true meaning and effect of international instruments.’⁸⁷

⁸⁴ See D Oliver, *Constitutional Reform in the UK* (Oxford, Oxford University Press, 2003) at 122; and C Lewis, *Judicial remedies in Public Law* (London, Thomson/Sweet & Maxwell, 2004) at para. 2–025.

⁸⁵ [2002] EWHC 2777 (Admin), [2003] LRC 335. For a discussion, see C Warbrick, ‘International Law in English Courts—Recent Cases’ (2003) 52 *ICLQ* 815, 821–4.

⁸⁶ *Ibid*, at [2]. See also C Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press, 2004) at 119–20.

⁸⁷ *Ibid*, at [23].

Simon Brown LJ made clear that the court was unwilling to pronounce on the true meaning of Security Council Resolution 1441 in the case before it by commenting that:

Should the court declare the meaning of an international instrument operating purely on the plane of international law? In my judgment the answer is plainly no. All of the cases relied upon by the applicants in which the court has pronounced upon some issue of international law are cases where it has been necessary to do so in order to determine right and obligations under domestic law.⁸⁸

In the same paragraph, he continued:

There is in the present case no point of reference in domestic law to which the international law issue can be said to go; there is nothing here susceptible of challenge in the way of determination of rights, interests or duties under domestic law to draw the court into the field of international law.

Maurice Kay J (as he then was) agreed with Simon Brown LJ 'that the 'international law ground' is more appropriately categorised as going to jurisdiction rather than justiciability'.⁸⁹ Simon Brown LJ continued:

What is sought here is a ruling on the interpretation of an international instrument, no more and no less. It is one thing, as in cases like *Kebilene* and *Launder*, for our courts to consider the application of an international treaty by reference to the facts of an individual case. (That, indeed, would have been the position in *Lyons* itself had the courts been prepared to undertake the exercise.) It is quite another thing to pronounce generally upon a treaty's true interpretation and effect. There is no distinction between the position of the United Kingdom and that of all other States to whom Resolution 1441 applies. Why should the English courts presume to give an authoritative ruling on its meaning? Plainly such a ruling would not bind other States. How could our assumption of jurisdiction here be regarded around the world as anything other than an exorbitant arrogation of adjudicative power?

On the issue of whether it would be damaging to the national interest for the government to commit itself publicly to a definitive view on the interpretation of the Resolution, the court, with reference to *Abbasi*, looked at the practical implications of doing so. Simon Brown LJ said,

The Court would in any event decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence. That too is the position here. Whether as a matter of judicial theory such judicial abstinence is properly to be regarded as a matter of discretion or a matter of jurisdiction seems to me for present purposes immaterial. Either way I regard the substantive question raised by this application to be non-justiciable.⁹⁰

Richards J (as he then was) took the view that

even if this court were otherwise free to do so, it would be undesirable for it to rule on the interpretation of Resolution 1441 as an abstract legal question in advance of any

⁸⁸ *Ibid*, at [36].

⁸⁹ *Ibid*, at [50].

⁹⁰ *Ibid*, at [47](ii).

decision and in circumstances where any difference of view over the correct interpretation of that instrument might not be of any relevance at the end of the day. In practice the point may not arise at all. If it does arise, it will arise against a particular factual background and in circumstances where the position adopted by other states may also be relevant and other rules of international law may also be in play. I recognise the force of *CND*'s point that if one waits for a decision it will be too late to raise the issue in the national court; but even leaving aside the inappropriateness of entertaining such a claim when any ultimate decision would be unreviewable (see below), I consider there to be real objections to examining a question of this kind in isolation and on a contingent basis.⁹¹

Before leaving the *CND* case it is worth noting the following passage from a lecture by Richards LJ, speaking extra-judicially:

In another passage in my judgment I said it was 'unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country'. That view still represents established orthodoxy, but I must confess to a strange sense of unease to find it being relied on by the Attorney General in a recent speech on 'Government and the rule of law in the modern age'.⁹²

In *R v Jones (Margaret) and others*⁹³ a different question arose, one that centred on the dualist view of international law in relation to English law. The 20 appellants had all committed acts in February and March 2003, immediately preceding the US-led invasion of Iraq, which would have been criminal acts, unless a valid defence could be put forward. For present purposes the defence sought to be relied upon was, in very simplified terms, that the UK, in preparing for, declaring and waging war in Iraq, was engaged in unlawful acts which the appellants were justified in attempting to prevent through the use of reasonable force, under section 3 of the Criminal Law Act 1967.

This assertion raised interesting points about the relationship between international law and English law, in particularly the extent to which the crime of aggression was capable of being an offence in domestic law and one that is justiciable. The following point of law was certified as being of general public importance: 'Is the crime against peace and/or the crime of aggression capable of being a 'crime' within the meaning of section 3 of the Criminal Law Act 1967, and if so is the issue justiciable in a criminal trial?'

It had been contended by the appellants that customary international law was in its full extent part of the law of England and Wales. The general truth of this was not challenged by the Crown, and Lord Bingham of Cornhill was for purposes of the cases prepared to accept that this was generally so. However, His Lordship

⁹¹ *Ibid*, at [57].

⁹² Richards LJ, lecture cited above n 6, at 2.

⁹³ [2007] 1 AC 136. The case is discussed in P Capps, 'The Court as Gatekeeper: Customary International Law in English Courts' (2007) 70 *MLR* 458, in which there is also discussion of *CND* and *Kuwait Airways*; and in R O'Keefe, 'Crimes, the Courts and Customary International Law' (2006) *CLJ* 473.

made clear that he would be hesitant, without more comprehensive argument, to accept the proposition in quite such unqualified terms, preferring instead the notion that ‘international law is not a part, but is one of the sources, of English law’.⁹⁴ Because the case before the House did not require this point to be argued fully, their Lordships did not adjudicate upon this point.

The appellants also had to show that customary international law recognised a crime of aggression at the times relevant to the appeals. Unlike the Court of Appeal (Criminal Division), the House of Lords had, with reference to international instruments, no difficulties accepting this proposition. To adjudicate upon the certified point of law, it also had to be found that crimes recognised in customary international law were recognised and enforced by the domestic law of England, without the need for domestic statute or judicial decision. Lord Bingham accepted that a crime recognised in customary international law may be ‘accepted into the domestic criminal law of this country’.⁹⁵ However, he did not find support in the authorities for the appellants’ contention that that result would follow automatically.

Related to this issue, their Lordships did not accept the alternative propositions advanced by the appellants concerning the meaning of ‘crime’ in section 3 of the 1967 Act as covering crimes established in customary international law, eg the crime of aggression. With reference to *Kneller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions*,⁹⁶ it was pointed out by Lord Bingham that ‘while old common law offences survive until abolished or superseded by statute, new ones are not created’. Further, he stated that ‘when it is sought to give domestic effect to crimes established in customary international law, the practice is to legislate’.⁹⁷

Most significantly, was the following reasoning:

A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty’s Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be *very slow to review* the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law’. (Emphasis added. Note the words ‘very slow to review’ not that the courts can never review the exercise of such powers.)⁹⁸

⁹⁴ [2007] 1 AC 136 at [11].

⁹⁵ *Ibid*, at [23].

⁹⁶ [1973] AC 435.

⁹⁷ See above n 94, at [28].

⁹⁸ *Ibid*, (Lord Bingham at [30]).

And in the same paragraph:

In considering whether the customary international law crime of aggression has been, or should be, tacitly assimilated into our domestic law, it is none the less very relevant not only that Parliament has, so far, refrained from taking this step but also that it would draw the courts into an area which, in the past, they have entered, if at all, with *reluctance and the utmost circumspection*. (Emphasis added. Again, the language is striking: ‘reluctance’ and ‘circumspection’ do not suggest that the matters are inherently non-justiciable.)

The situation faced by the defendants in *R v Jones (Margaret)* was in many respects similar to that faced by the defendants in *Chandler v Director of Public Prosecutions*. Because the argument required to consider the defence brought up non-justiciable issues, such a defence could not, in reality, be relied upon. *Chandler*, however, was a pre-Human Rights Act case; *Jones* was not. It was submitted on behalf of some of the appellants that it would be contrary to Article 6 fair trial rights if a defendant was unable to rely upon a defence otherwise open to him because this particular defence raised non-justiciable issues. It was acknowledged on behalf of the appellants that as a matter of substantive criminal law, Article 6 did not require that any particular defence should be available to the defendant. Lord Hoffmann said in his speech ‘there seemed to me to be much force in this submission’,⁹⁹ ie the submission that a defence recognised in domestic law could not then be non-justiciable because that would lead to an unfair trial. In the result, the appeals were dismissed.

*R (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and Anor*¹⁰⁰ can in some respects be regarded as the natural successor to *Abbasi*. Both were claims for judicial review of UK governmental decisions not to petition the US government on behalf of detainees at Guantánamo Bay. The two cases differ, however, in that the detainees in *Abbasi* were British nationals; those in *Al Rawi* were not although they had been resident in the UK and two of them had been recognised as refugees here.

The facts of the case were as follows: Mr Al Rawi is an Iraqi national. His immediate family members are all British citizens, whereas he had indefinite leave to remain in the United Kingdom. The other detainees were in a similar situation as regards the status of themselves and their family members, save that they were Jordanian and Libyan nationals, respectively. All three were detained by US forces and taken to Guantánamo Bay.

The case was firstly argued with reference to the Race Relations Act 1976. The appellants sought to show that in declining to make formal representations on behalf of the detainees of the same kind as those made on behalf of British citizens, the Secretary of State was guilty of direct discrimination on racial grounds (which includes nationality: see section 3(1) of the 1976 Act). The Court of Appeal (Laws

⁹⁹ *Ibid*, at [67].

¹⁰⁰ [2006] EWCA Civ 1279; [2007] 2 WLR 1219.

LJ giving judgment) dealt with this not through reference to justiciability, but rather by finding that ‘the national and the non-national are in truth in materially different cases one from the other for purposes of the exercise of the right of diplomatic protection by means of State to State claims’, so that there was no violation of the relevant provisions of the RRA.¹⁰¹

The family claimants argued that their enforced separation from the detainee claimants engaged Articles 3 and 8 of the ECHR. The Divisional Court had accepted that the families’ suffering was sufficient to engage Article 3, and the Court of Appeal acknowledged that for the purposes of Article 14, the families’ complaints fell within the ambit of Article 8. With respect to this part of the case, Laws LJ identified the following as an obstacle to the families’ claim:

It is that the source of their grave misfortunes is the action of a foreign sovereign State. Does, or should, our human rights jurisprudence require the United Kingdom to intervene with the United States out of a duty owed in domestic law to the family claimants?¹⁰²

The Court of Appeal applied *Bertrand Russell Peace Foundation v UK*¹⁰³ in holding that Art 1 of the Convention (the jurisdiction clause) could not be interpreted as giving rise to an obligation on the Convention party to ensure that non-contracting states acted compatibly with the Convention, even where failure to do so would have a detrimental effect on persons within the jurisdiction of the contracting state. The court thus declined to distinguish *Bertrand Russell*, although such a distinction had been advanced by the claimants on the basis that a potential Articles 3 and 8 violation was of a different scale entirely to interference with post, the latter being the issue in *Bertrand Russell*. It was found that ‘the ECHR contains no requirement that a signatory State should take up the complaints of any individual within its territory touching the acts of another foreign state’.¹⁰⁴

In considering the argument that the UK had an *erga omnes* obligation rooted in *ius cogens* to forestall torture, the court said the following with reference to *A v Secretary of State for the Home Department (No 2)*.¹⁰⁵

This learning shows that, as a matter of international law, (1) the status of *ius cogens erga omnes* empowers but does not oblige a State to intervene with another sovereign State to insist on respect for the prohibition of torture (paragraph 151 of *Prosecutor v Furundzija*); (2) special standing is accorded to international bodies charged with impartially monitoring compliance (paragraph 152); (3) there can be no derogation from the prohibition (paragraph 153); (4) the prohibition is to be treated as an absolute value (paragraph 154); (5) any measure authorizing torture is illegitimate and proceedings may be taken to declare it so (paragraph 155); (6) perpetrators of torture may be held criminally responsible in the courts of any State (paragraph 155). These features are a powerful constellation, demonstrating, as Lord Bingham said (paragraph 33), that

¹⁰¹ *Ibid*, at [78].

¹⁰² *Ibid*, at [93].

¹⁰³ (1978) 14 D&R 117.

¹⁰⁴ See above n 101, at [98].

¹⁰⁵ [2006] 2 AC 221.

‘[t]here can be few issues on which international legal opinion is more clear than on the condemnation of torture.’

But none of this imposes a duty on States, sounding in international law, of the kind for which the appellants must here contend. As a matter of the law of the ECHR, there is nothing to qualify the principle in the *Bertrand Russell* case.¹⁰⁶

Laws LJ found that the ‘fundamental objection’ to the appellants’ case was that ‘their suffering is the consequence of the actions of a foreign State for which the United Kingdom bears no responsibility under the ECHR or the HRA’.¹⁰⁷

With reference to the case law, the court considered that the State enjoyed a wide discretionary area of judgment in relation to positive obligations. As regards foreign relations, ‘if in that context Article 8 has a place, the margin of appreciation must be all the greater’. What is of interest about this and similar passages in the case law is that there is a crucial distinction between recognising a ‘discretionary area of judgment’, or giving ‘due weight’ to the views of the executive, and holding that certain areas of decision-making are non-justiciable.

The case of *R (Gentle & Clarke) v The Prime Minister*¹⁰⁸ provides yet another contemporary consideration of issues relevant to this chapter. This was an application for judicial review of the UK government’s refusal to conduct an independent inquiry into the circumstances leading up to the invasion of Iraq, in particular the circumstances in which the Attorney-General came to make an unequivocal statement on 17 March 2003 that the invasion would be lawful.

The application, as it stood before the Court of Appeal in November 2006, was being brought by two mothers whose sons had lost their lives while on active duty in Iraq. Rose Gentle’s son David was killed in ‘friendly fire’ on 25 March 2003, five days after the invasion of Iraq began. Beverley Clarke’s son Gordon lost his life to a roadside bomb on 28 June 2004. The applicants did not seek an inquiry into the circumstances surrounding their children’s deaths. An inquest into the death of Fusilier Gentle was due to be held. No inquest was possible into the death of Trooper Clarke, because no mortal remains were recovered. However, his family would be treated as an interested party during the forthcoming inquest into the death of a non-commissioned officer who died alongside Trooper Clarke. It was not suggested that these inquests would fail to satisfy Article 2 ECHR as far as the physical circumstances surrounding the deaths were concerned. The invasion question, though, would not be heard at the inquests.

The independent inquiry was sought, pursuant to Article 2 ECHR on the right to life, into the question of whether the UK government had taken reasonable steps to satisfy themselves that the invasion of Iraq was lawful under principles of public international law. The applicants contended that there was a procedural obligation to inquire into whether such reasonable steps had been taken.

¹⁰⁶ See above n 101, at [103].

¹⁰⁷ *Ibid*, at [110].

¹⁰⁸ [2007] QB 689; affirmed [2008] 2 WLR 879.

Sir Anthony Clarke MR cited Lord Bingham's well-known speech in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at [2] and [3] for a summary of a contracting state's substantive and procedural obligations under Article 2 on the right to life. It was argued that the substantive obligation in relation to the present facts included taking reasonable steps to ensure that members of the armed forces were not deployed to participate in unlawful military activities. On the face of it, the UK government was at least capable of being in breach of their substantive obligations under Article 2. If the deaths of Fusilier Gentle and Trooper Clarke occurred in circumstances in which the UK may have been in breach of this substantive obligation, it was argued that the UK had a procedural obligation to initiate an effective public investigation by an independent official body.

Sir Anthony Clarke MR considered that the court was not in fact being asked to pronounce upon 'the lawfulness of war or upon the reasonableness or otherwise of the steps taken in this regard by the government as a whole or the Attorney-General in particular. For this reason it would not be appropriate for us to express a view and we do not do so'.¹⁰⁹ He then set out the court's stance on justiciability:

As we see it, apart from the possible effect of the HRA and the Convention, the position may be summarised as follows. The question whether the United Kingdom acted unlawfully in sending its armed forces to Iraq is not justiciable for one or both of two reasons, namely that it would involve a consideration of at least two international instruments, viz Security Council resolutions 678 and 1441, and that it would involve a detailed consideration of decisions of policy made in the areas of foreign affairs and defence which are the exclusive responsibility of the executive government, in the exercise of what Lord Hoffmann called in *Jones* at [67] 'the discretionary nature or non-justiciability of the power to make war', and thus one of the forbidden areas. It is important to note that the court in *CND* rejected the submission that it would be possible to consider legal questions of international law while respecting the principle of the non-justiciability of non-legal issues of policy. It was in our opinion correct to do so because we can see no basis upon which it would be possible sensibly to consider one without the other. They are closely bound up together.¹¹⁰

However, the court found that there was 'undoubted force' in the appellants' submission that there were no forbidden areas under the Convention and 'it is correctly accepted by [counsel for the respondents] that, as Lord Bingham and Lord Hoffmann put it in *Jones*, the principle of non-justiciability cannot prevent the courts from giving effect to a Convention right once such a right is shown to exist'.¹¹¹

The court drew a parallel to the decision in *Operation Dismantle* which, although it was brought under the Canadian Charter, concerned human rights of a similar nature to Article 2. However, the Court considered that:

¹⁰⁹ *Ibid*, at [23].

¹¹⁰ *Ibid*, at [33].

¹¹¹ *Ibid*, at [38]. See also Baroness Hale when the case reached the House of Lords: [2008] 2 WLR 879, at [60], approving the Court of Appeal.

if [counsel for the appellants'] submissions are correct, although the Convention does not expressly say so, the changes made to it radically alter the relationship between the role of the executive and the role of the courts in whole areas which were traditionally regarded as within the exclusive domain of the executive. We accept [counsel for the respondents'] submission that the fact that the right relied upon by the applicants, if it exists, would involve the courts in examining matters traditionally regarded as non-justiciable, is a factor militating against its existence.¹¹²

In holding that the UK government was not under an obligation to set up an independent inquiry under Article 2 of the Convention, the Court concluded that:

while the principles of international law do play a part in the construction of the Convention, they are not imported wholesale into the Convention, which is concerned only with domestic rights. As we see it, the Convention respects the general principle of the separation of powers between the executive and the courts, including the principle that there remain some areas which are essentially matters for the executive and not the courts. We are not persuaded that the United Kingdom is arguably in breach of article 2 of the Convention.¹¹³

Thus, the Court of Appeal recognised that the concept of non-justiciability has no relevance once there is a human right in play under the HRA, following analogous reasoning in *Operation Dismantle*. However, the Court concluded that there was no right under the HRA in play at all, and in reaching that conclusion the Court did have regard to the fact that traditionally the issues raised by the case would, in its view, have been regarded as non-justiciable. The House of Lords agreed.

It should also be noted that in *R (Al-Skeini) v Secretary of State for Defence*¹¹⁴ it was never suggested on behalf of the executive that the rights in that case (Articles 2 and 3 ECHR) were in any way non-justiciable. The main issues of law were whether the civilians concerned who had died in South East Iraq during its occupation by British forces were within the 'jurisdiction' of the United Kingdom within the meaning of Article 1 ECHR and, even if they were, whether the HRA has any application to British authorities outside the territory of the UK. It was decided by the Divisional Court that one of the cases (Baha Mousa) did fall within the jurisdiction of the UK and that the HRA did apply to his case. Before the Court of Appeal the Secretary of State conceded that Mr Mousa's case fell within the jurisdiction of the UK but disputed that the HRA was applicable even to his case. The Court of Appeal held that it was. What is of interest in the present context is that, even on the Secretary of State's concession, the case could have been brought in the European Court of Human Rights, where the issue as to the territorial scope of the HRA would be irrelevant. In that Court, the issues under Articles 2 and 3 would be justiciable even though they arose in the context of military operations. This is consistent with the approach which the Strasbourg institutions have taken in other cases arising out of military conflicts, eg the cases concerning Turkey's invasion of northern Cyprus such as *Cyprus v Turkey*.¹¹⁵

¹¹² *Ibid*, at [38].

¹¹³ *Ibid*, at [75].

¹¹⁴ [2007] QB 140. This case has since been the subject of a judgment in the House of Lords: see [2007] UKHL 26.

¹¹⁵ (1976) 4 EHRR 482.

The final case which will be examined here is *A v Secretary of State for the Home Department* (sometimes referred to as the ‘Belmarsh’ case to distinguish it from *A (No 2)*, which is sometimes referred to as the ‘torture evidence’ case).¹¹⁶ This concerned perhaps the most important issue which has arisen to date under the HRA. The House of Lords had to decide whether the United Kingdom’s derogation from Article 5 ECHR purportedly made under Article 15 was valid. By a majority of 8 to 1, the House of Lords held that it was not. The reasoning of seven of the judges, led by Lord Bingham, was both that the derogation was tainted by discrimination against foreign nationals and that it was not a proportionate measure and therefore could not be said to be ‘strictly required’ to meet the exigencies of the situation, as required by Article 15. As a consequence, the House of Lords quashed the derogation order made under the HRA (since it was secondary legislation) and made a declaration of incompatibility in relation to Part 4 of the Anti-terrorism, Crime and Security Act 2001 (it could not be struck down since it was primary legislation).

Of direct relevance in the present context are two passages by Lord Bingham at paras 29 and 42:

The more purely political (in a broad or narrow sense) the question is, the more appropriate it would be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller therefore would be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.

[T]he function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself ... The 1998 [Human Rights] Act gives the Court a very specific, wholly democratic, mandate. As Professor Jowell has put it ‘The courts are charged by Parliament with delineating the boundaries of a rights-based democracy’.

It will be seen that both the theses advanced in this chapter derive support from what is said in *A*. First, the distinction between ‘political wisdom’ and legality is very clearly re-affirmed. The legality of the derogation order (and the compatibility—though not strictly legality—of the primary legislation) were questions of law for the court to decide, no matter that the context was that of national security. Second, the fact that the case was brought under the HRA meant that, whatever the position might have been otherwise, the court had a clear and democratic mandate from Parliament to decide the questions raised by the case.¹¹⁷

A third point which can also be derived from *A* deserves emphasis at this stage, however. It relates to the conceptual distinction between non-justiciability and

¹¹⁶ [2005] 2 AC 68.

¹¹⁷ See M Cohn, *Judicial Activism in the House of Lords* (2007) PL 110.

‘due deference’ or the ‘discretionary area of judgment’. To recognise that an issue is justiciable is not necessarily to say that the courts will not give due *weight* to the judgment of the executive. In *A* itself, the majority of the judges were prepared to give a large degree of deference to the judgment of the government and Parliament that there was a public emergency within the meaning of Article 15 of the ECHR and that the measures under challenge were strictly required to meet the exigencies of that emergency. But the question for decision was still ultimately one for the court, whereas a true concept of non-justiciability would hold that there are certain questions of law which are for the executive to decide without the possibility of judicial supervision. That is what is unacceptable in a modern constitutional state.

Before leaving the survey of the case law it is worth noting the comments of Richards LJ, a judge who has been involved in a number of the above cases, when speaking extra-judicially about some of the cases I have discussed:

A cynic might say in the light of these cases that things have not changed greatly since the days when the prerogative powers in relation to the conduct of foreign affairs were not susceptible to judicial review at all. The courts have asserted a jurisdiction to intervene but all the claims to which I have referred have failed. In truth, however, I believe that there has been a very important shift of position. There is a close scrutiny of those aspects of the decision-making process which the courts are equipped to deal with. When a legal challenge is made, the executive has to justify its position with detailed evidence and arguments; it cannot simply stick up a ‘keep out’ notice. In *Al Rawi*, the question whether there had been an error of law was assessed not just by reference to domestic law, but also by reference to the principles of international law and the content of international treaties—perhaps representing a move forward even since the *CND* case concerning the lawfulness of the military invasion of Iraq. Both in *Al Rawi* and *Abbasi* there was a careful assessment of the evidence to ensure that proper consideration had been given to the issues and relevant material. It is only at the stage of judgments as to substantive policy that the courts draw back, recognising that it is not for them to determine the foreign policy of this country and that they are not well placed to make a proper evaluation of judgments made by the executive in this field. Even with that limitation, however, the availability of judicial review serves to impose a valuable discipline on the executive decision-making process.¹¹⁸

IV. Conclusion

It has been suggested in this chapter that there should in principle be no doctrine of non-justiciability in modern public law. The rule of law should not countenance such a doctrine. A subsidiary thesis of this chapter has been that, whatever

¹¹⁸ Richards LJ, lecture cited above n 6, at 4. Note that at the time of his writing (June 2006) Richards LJ had available the judgment of the Divisional Court (not the Court of Appeal) in *Al Rawi*.

the position may have been before the HRA, there can be no room for a concept of non-justiciability when an issue arises under the HRA. That subsidiary thesis is well supported by the authorities to date both in this jurisdiction and in Canada and Strasbourg. It has also been suggested that the main thesis of this chapter, though apparently inconsistent with some of the authorities, can be reconciled with the authorities. If there is room for doubt this is an issue which is ripe for the House of Lords, in effect the supreme court of the United Kingdom, to resolve authoritatively.

What matters in the end is not the general context in which a decision by the executive takes place or even the subject-matter. What is important is the nature of the issue raised before the court. If the issue concerns the merits or wisdom of a decision it is not properly an issue for the courts to decide at all. But that would be so even if the challenge arose in an uncontroversial context and has nothing to do with any additional doctrine of non-justiciability. If, however, the issue is one of law, in principle the courts can and should decide it. They should not flinch from upholding the rule of law even if the issue arises in a politically controversial context. In our constitution the executive enjoys no sovereignty. It is accountable to Parliament for the wisdom of its actions but it is accountable to the courts for the legality of its actions. As Lord Bridge of Harwich put it in another context: 'The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law'.¹¹⁹

¹¹⁹ *X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1, 48. See also S Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 LQR 270.

Responsibility for Troops Abroad: UN-Mandated Forces and Issues of Human Rights Accountability

KEIR STARMER

I. Introduction

A key issue for international law since the events of 9/11 has been the development of the UN Security Council as a legislative body.¹ One cannot read key speeches by US and UK politicians and lawyers without surmising that such a development has involved a deliberate effort by the USA and the UK to change international law for their own ends.² This chapter discusses some key questions that highlight what is, or should be, the role of international law in this regard. In particular, focusing on two recent cases, one in the European Court of Human Rights, the other in the House of Lords, it asks how legal concerns of accountability and responsibility have been approached judicially where issues of human rights violation have arisen under a purported Security Council mandated operation. Consequently, the chapter first examines some of the background concerning the nature and scope of relevant UN Security Council resolutions. It then moves on to discuss in detail the joined cases of *Behrami* and *Saramati*³ heard by the European Court of Human Rights. The decision that emerged was then highly relevant in the House of Lords decision in *Al-Jedda*⁴ which is addressed in the final section of this chapter.

II. UN Security Council

The United Nations Charter created a system for collective security, which provides for a forceful reaction by the international community to a breach of

¹ P Szasz, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 901–5.

² J Bellinger, 'United Nations Security Council Resolutions and the Application of International Humanitarian Law, Human Rights and Refugee Law', International Conference, San Remo, Italy, 9 September 2005.

³ *Behrami v France* (App No 71412/01) and *Saramati v France and others* (App No 78166/01), 2 May 2007.

⁴ *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

international peace.⁵ Primary responsibility for the maintenance of international peace and security has been given to the Security Council to act on behalf of UN Member States.⁶ More specifically, under chapter VII of the Charter, the Security Council has power to determine the existence of any 'threat to the peace, breach of the peace or act of aggression' and to take enforcement action in accordance with Articles 41 or 42 of the Charter. Article 41 provides for measures not involving the use of armed force. Article 42 provides for 'such action by air, sea or land forces as may be necessary' to maintain or restore international peace.

Under the scheme of the Charter it was always intended that any military enforcement measures designed to maintain or restore international peace would depend on forces supplied by UN Member States.⁷ Article 43 of the Charter provides for the conclusion of agreements between Member States and the Security Council for making available the land and air forces necessary for the purpose of maintaining international peace and security. However, for political reasons, no such agreements have been concluded. There is, consequently, no basis in the Charter for the UN to oblige Member States to contribute resources to chapter VII missions.

That does not mean that there have been no military elements to UN efforts to maintain peace. As early as 1946, military observers attached to a field mission established by the Security Council were sent to investigate Greek allegations of border incursions from the northern neighbouring states.⁸ Between that date and the year 2000, Professor Bothe has identified over 40 missions of one sort or another that were established by the Security Council, including peace-keeping missions.⁹ Since then there have been many more. On each occasion, Member States voluntarily committed their troops to the mission in question.

However, as Professor Sarooshi points out,¹⁰ the question of who is to carry out military enforcement action is very different from the question of who is to exercise command and control over such action. It was not envisaged under the Charter that the Security Council itself would exercise military command over forces carrying out military enforcement action.¹¹ It was the Military Staff Committee that was to be responsible for the strategic direction and control of the states' forces carrying out such action.¹² The intention was that national contingents would continue to remain subject to their own regulations and obey their national commander who

⁵ J Delbruck, 'Collective Security', Bernhardt (ed), *Encyclopedia of Public International Law, Instalment 3* (1982) 646.

⁶ Charter of the United Nations, Art 24(1).

⁷ D Sarooshi, *The United Nations and the Development of Collective Security* (Oxford, Clarendon, 1999) 142; Y Dinstein, *War, Aggression and Self-Defence* (Cambridge, Cambridge University Press, 1994) 296–7; and G Kirk, 'The Enforcement of Security' (1946) 55 *Yale LJ* 1081.

⁸ B Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford, Clarendon, 1995) 665.

⁹ Simma (ed), n 8, at 665–80.

¹⁰ Sarooshi, n 7, at 142.

¹¹ Simma (ed), n 8.

¹² Sarooshi, n 7, at 142.

would take commands from a UN Force Commander who was to be under the control of the Military Staff Committee.¹³ However, the Military Staff Committee never functioned effectively and in practice different command and control mechanisms were put in place. For example, after the Israeli attack on Egypt and the British/French intervention in the Suez Canal area in November 1956, the UN General Assembly created a United Nations Emergency Force (UNEF I) to secure withdrawal of foreign troops from Egyptian territory and then to serve as a buffer between Egypt and Israel. The General Assembly appointed the commander-in-chief of the force directly and authorised the Secretary-General to issue all regulations and instructions essential to the effective functioning of the force.¹⁴ To take a different, and more typical, model in the case of the Operations des Nations Unies au Congo (ONUC), the enabling resolutions were formulated as a mandate to the Secretary-General to create a force and he appointed the commander-in-chief.

Whatever command and control mechanisms were put in place, an essential characteristic of these missions was that they were all under the command and control of the UN. That has important implications because, as a general rule, where the UN exercises effective control over troops contributed by Member States, international responsibility for the conduct of those troops rests with the UN and not the troop-contributing nations. The general position is that set out in Article 5 of the Draft Articles on the Responsibility of International Organisations adopted by the International Law Commission in 2004 during its 56th session:

The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.

Applying that approach to peace-keeping forces, the UN has always taken the following position:

A United Nations peacekeeping force established by the Security Council of the General Assembly is a subsidiary organ of the United Nations. Members of the military personnel placed by Member States under United Nations command although remaining in their national service are, for the duration of their assignment to the force, considered international personnel under the authority of the United Nations and subject to the instructions of the force commander. The functions of the force are exclusively international and members of the force are bound to discharge their functions with the interests of the United Nations only in view. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Security Council or the General Assembly as the case may be.

As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organisation, and if committed in violation of an international

¹³ See the 'Report of the Military Staff Committee to the Security Council', S/336, SCOR, Special Supplement (1947), No 1, Arts 36–40.

¹⁴ UNGA Res 1001, [7]; Simma, n 8, at 687.

organisation entails the international responsibility of the Organisation and its liability in compensation.¹⁵

UN peace-keeping troops are thus under UN command and control, and discharge their functions for UN purposes only. Consequently the UN bears international responsibility for their conduct.

So far, so good. But in the last 10–15 years the Security Council has begun to adopt a different technique for collective enforcement action under chapter VII of the Charter. Instead of creating a UN peace-keeping force, the Security Council has adopted resolutions ‘mandating’ multinational forces, usually made up from willing Member States, to use force if necessary to achieve certain goals under the authority of a Security Council resolution. The distinguishing feature of these resolutions is that they typically authorise the establishment of the multinational force under unified command, specify the tasks assigned to it, authorise the force to use ‘all necessary means’ to accomplish those tasks and require the leadership of the force to report to the Security Council on a periodic basis. The following examples are given by Professor Bothe: the various mandates taken over by NATO states supporting UNPROFOR in (former) Yugoslavia 1992–95; UNITAF in Somalia; Operation turquoise in Rwanda; Haiti; IFOR/SFOR under the Dayton Agreement; KFOR in Kosovo; and INTERFET in East Timor.¹⁶ As Professor Bothe notes:

All these forces, although acting under a mandate of the SC, are not organs of the UN, but of the participating States. This means, in particular, no command authority is vested in the [Secretary-General] or the [Security Council].¹⁷

According to Professor Gowlland-Debbas, these resolutions essentially perform two functions: first, in the context of UN Charter law, they constitute delegations of the council’s enforcement powers under chapter VII; second, in the context of international law, and in particular that of state responsibility, they act as a ‘circumstance precluding wrongfulness’, authorising action which would otherwise be unlawful under international law.¹⁸

The power of the Security Council to mandate Member States to take collective enforcement action is not uncontroversial. The UN Charter does not in express terms give the Security Council the competence to delegate its chapter VII powers to Member States. Neither is there such a reference in the *travaux préparatoires* of the Charter. The dangers are obvious. As Professor Sarooshi tellingly observed:

The main danger is that those Member States [who are mandated to take action] will exercise the delegated powers to achieve their own self-interest and not that of the UN. As Abi-Saab has noted, in the case of an authorization given to a group of States to

¹⁵ UN Secretariat; UN Doc A/CN.4/545 (25 June 2004).

¹⁶ Simma (ed), n 8, at 699.

¹⁷ *Ibid.*

¹⁸ V Gowlland-Debbas, ‘The limits of unilateral enforcement of community objectives in the framework of UN peace maintenance’ (2000) 11 *EJIL* 361, 368.

Responsibility for Troops Abroad

undertake enforcement action, the risk is great that it will be abused as a vehicle for the realization of the national interest of the States concerned rather than for the realization of the purposes of the Organisation.¹⁹ This is contrary to the very reason for centring in the UN the responsibility for maintaining and restoring international peace and security: to regulate the use of force by States to attain their national ends.²⁰

Those dangers notwithstanding, and despite initial reservations, there now seems to be consensus that the Security Council does indeed have the power to 'mandate' Member States to take collective enforcement action. This is an area where state practice can crystallise into 'law'. Thus, argues Professor Sarooshi, 'The course of the Council's competence to delegate chapter VII powers to Member states is subsequent practice'.²¹

Delegation may explain the process by which the Security Council mandates Member States to take collective enforcement action, but the consequences of delegation raise a number of delicate issues, not least the question of command and control and, with it, the question of responsibility. If the Security Council delegates its chapter VII powers to Member States, who is responsible under international law for the conduct of the troops taking action? Now that it is recognised that international humanitarian law and international human rights law co-exist,²² that has become a critical issue. To date it has received scant academic attention. No doubt that will change in light of two recent and important decisions which bear centrally on the matter: first, the decision of the Grand Chamber of the European Court of Human Rights in *Behrami v France; Saramati v France and others*;²³ second, the decision of the House of Lords in *R (Al-Jedda) v Secretary of State for Defence*.²⁴

Before examining these decisions, it is instructive to consider how the UN itself approaches the matter. In its 2003 report,²⁵ the International Law Commission requested views on the following question:

The extent to which the conduct of peacekeeping forces is attributable to the contributing States and the extent to which it is attributable to the United Nations.

The UN Secretariat responded to this request in a communication dated 3 February 2004.²⁶ Having dealt with UN peace-keeping forces and their status

¹⁹ G Abi Saab, *United Nations Forces in Congo* (Oxford, Oxford University Press, 1978) 20; Sarooshi, n 7, at 154.

²⁰ Sarooshi, n 7, at 154.

²¹ *Ibid*, at 149.

²² See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] 43 ILM 1009 ('ICJ Wall Case'); and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ <<http://www.icj-cij.org>> at 178 and 215–20 ('ICJ Congo v Uganda').

²³ *Behrami v France* (App No 71412/01); and *Saramati v France and others* (App No 78166/01) 2 May 2007.

²⁴ *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

²⁵ International Law Commission, 'Report on the work of its fifty-fifth session' (2003) UN Doc A/58/10 [27].

²⁶ See UN Doc A/CN.4/545 (25 June 2004) Introduction, para 3.

as subsidiary organs of the UN in the passage set out above, the UN Secretariat continued as follows:

The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ. In authorized Chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where effective command and control is vested and practically exercised.

Thus, in the UN's view, it is responsible only for the conduct of forces that are under its effective command and control and it is not responsible for the conduct of forces that are under national command and control.

That clear and simple principle was reaffirmed in a communication from the UN Secretariat to the UN's International Law Commission dated 9 March 2005:²⁷

We are not aware of any situation where the Organization was held jointly or residually responsible for an unlawful act by a State in the conduct of an activity or operation carried out at the request of the Organization or under its authorization. In the practice of the Organization, however, a measure of accountability was nonetheless introduced in the relationship between the Security Council and Member States conducting an operation under Security Council authorization, in the form of periodic reports to the Council on the conduct of the operation. While the submission of these reports provides the Council with an important 'oversight tool', the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the State conducting the operation, for the ultimate test of responsibility remains 'effective command and control'.²⁸

On that view, if the Security Council delegates its chapter VII powers to Member States to take collective enforcement action, those states remain responsible under international law for the conduct of their troops. Their responsibilities include complying with applicable international humanitarian law and international human rights law and they should be held accountable where breaches are established. However, that clear and simple principle has been put in serious doubt by the decision in *Behrami/Saramati*.

III. The Cases of *Behrami* and *Saramati*

The facts of the two joined cases are straightforward. The Behrami family fled Kosovo²⁹ during the recent conflict, returning only after the UN had established a civil administration and security presence there. On 11 March 2000, their two young sons stumbled on an unexploded cluster bomb in the hills above Mitrovica,

²⁷ See UN Doc A/CN.4/556 (12 May 2005) Introduction, para 3.

²⁸ UN Doc A/CN.4/556 (12 May 2005) 46.

²⁹ Setting up home in Switzerland.

which had been dropped during the NATO air strikes a year earlier. Not appreciating the dangers, they threw the cluster bomb in the air. It exploded, killing one of the Behrami boys and seriously injuring the other.

Mr Saramati's case was different, but raised the same issue. On 13 July 2001, Mr Saramati was arrested in Kosovo on the orders of the Norwegian Commander of the multinational force in Kosovo (KFOR). He was detained for six months without trial because he was considered a threat to national security.

In proceedings in the European Court of Human Rights, the Behrami family claimed a breach of Article 2 of the European Convention on Human Rights (ECHR); Mr Saramati claimed a breach of Article 5. France and Norway challenged the admissibility of the cases, arguing that, as part of a multinational force mandated by the UN to take action in Kosovo, the acts or omissions of their troops were attributable to the UN, not them.

The conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 is well known. After NATO carried out air strikes on the territory of the then Federal Republic of Yugoslavia (FRY) between March and June 1999, a conditional agreement was reached under which the FRY agreed to withdraw from Kosovo and all parties agreed to the deployment in Kosovo of international civil and security presences. That agreement anticipated a UN Security Council resolution, UNSCR 1244, which was passed a few days later.³⁰ UNSCR 1244 authorised the establishment of a civil administration (UNMIK), which was a subsidiary organ of the UN. It also authorised the establishment of a security presence (KFOR) by 'Member States and relevant international institutions',³¹ 'under UN auspices',³² with 'substantial NATO participation', but 'under unified command and control'.³³ KFOR was not a UN peace-keeping force, nor was it a subsidiary organ of the UN. It was a NATO-led force authorised to use 'all necessary means'³⁴ to achieve tasks such as deterring renewed hostilities and maintaining a cease-fire.³⁵ UNSCR 1244 required the Secretary-General to report to the Security Council at regular intervals on the implementation of the resolution, including reports from the leadership of KFOR.³⁶ KFOR contingents were grouped into four multinational brigades (MNBs), each of which was responsible for a specific sector of operations with a lead country. They included MNB Northeast (Mitrovica), led by France.

In many respects, therefore, UNSCR 1244 was typical of the technique of mandating multinational forces under chapter VII of the Charter to take collective enforcement action described above and analysed by Professor Bothe and Professor Sarooshi, among others. It was also typical of the sort of arrangement under which the UN considered that responsibility under international law lay with the troop contributing forces, not the UN.

³⁰ On 10 June 1999; UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

³¹ *Ibid* at para 7.

³² *Ibid* at para 5.

³³ *Ibid* annex 2 [4]

³⁴ *Ibid* at para 7.

³⁵ *Ibid* at para 9.

³⁶ *Ibid* at para 20.

The Grand Chamber of the European Court of Human Rights approached the case on the basis that it had to ascertain whether there was a chapter VII framework for KFOR and UNMIK and, if so, whether the impugned action of KFOR (detention, in *Saramati*) and inaction of UNMIK (failure to de-mine, in *Behrami*) could be attributed to the UN. The Court then examined whether it was competent *ratione personae* to review any such action or omission found to be attributable to the UN.

On the question of whether there was a chapter VII framework for KFOR and UNMIK, the Court noted that UNSCR 1244 referred expressly to chapter VII and made the necessary identification of a 'threat to international peace and security' within the meaning of Article 39 of the UN Charter. The Resolution also recalled the Security Council's 'primary responsibility' for the 'maintenance of international peace and security'. Being 'determined to resolve the grave humanitarian situation in Kosovo' and to 'provide for the safe and free return of all refugees and displaced persons to their homes', the Security Council had determined that the 'situation in the region continues to constitute a threat to international peace and security' and, having expressly noted that it was acting under chapter VII, it went on to set out its solution to the identified threat to peace and security, namely the deployment of an international security force (KFOR) and the establishment of a civil administration (UNMIK).

On that basis, the Court in *Behrami/Saramati* reasoned that in establishing KFOR and UNMIK, and in vesting KFOR with all necessary means to fulfil its responsibilities, the Security Council was:

thereby delegating to willing organisations and member states ... the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command.³⁷

Although the Resolution did not identify the precise Articles of the UN chapter under which the Security Council was acting in delegating its chapter VII powers, the Court considered that 'Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK'.³⁸ The fact that KFOR had, in fact, been created (and a Military Technical Agreement (MTA) signed) the day before UNSCR

³⁷ *Behrami v France*, n 23, at para 130.

³⁸ See generally and *inter alia*, ND White and O Ulgen, 'The Security Council and the Decentralised Military Option: Constitutionality and Function' (1997) 44 *Netherlands Law Review* 386; Sarooshi, n 7; Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford, Oxford University Press, 2002) 167–9 and 172; A Zimmermann and C Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo' (2001) 70 *Nordic Journal of Intl Law* 423; E De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford, Hart Publishing, 2004) 260–5; R Wolfrum 'International Administration in Post-Conflict Situations by the United Nations and other International Actors' (2005) 9 *Max Planck UNYB* 667–72; J Friedrich, 'UNMIK in Kosovo: Struggling with Uncertainty' (2005) 9 *Max Planck UNYB* and the references cited therein; and *Prosecutor v Duško Tadić*, Decision of 2 October 1995, Appeals Chamber of ICTY, §§ 35–6.

1244 was passed) might have been thought to be wholly inconsistent with the notion of delegation, but the Court disagreed on the basis that ‘the MTA was completed on the express basis of a security presence “under UN auspices” and with UN approval’, the Resolution was adopted the following day, and no international forces were deployed before it was adopted.³⁹

Thus the Court accepted that the Security Council *could* delegate its chapter VII powers to ‘willing organisations and member states’ and that it did delegate those powers to KFOR. The Court also accepted that the Security Council could and did also delegate its command of the multinational force created to the organisations or Member States in question. That is certainly an endorsement of the delegation thesis, and is a milestone on the road towards the privatisation, or at least outsourcing, of the Security Council’s responsibilities for collective security and military enforcement action.

The fact that the Security Council delegated its chapter VII powers, including command of KFOR, to NATO and the troop-contributing nations might suggest that responsibility in international law was also delegated such that the troop-contributing nations under unified command would be accountable under international humanitarian law and international human rights law for the conduct of their troops. The situation, after all, was far from that described in Article 5 of the Draft Articles on the Responsibility of International Organisations where a state places its troops ‘at the disposal’ of an international organisation and the latter ‘exercises effective control’ over their conduct. However, the Grand Chamber of the European Court of Human Rights decided otherwise.

The Court approached the question of responsibility on the basis that while chapter VII constituted the foundation for the delegation of Security Council powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of Security Council collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegated entity to be attributable to the UN. For the Court, those limits strike a balance between the central security role of the Security Council and two realities of its implementation. In the first place, the absence of Article 43 agreements which means that the Security Council relies on Member States (notably its permanent members) and groups of Member States to provide the necessary military means to fulfil its collective security role. Second, the multilateral and complex nature of such security missions renders necessary some delegation of command. For the Court the key question, therefore, was whether the Security Council retained ultimate authority and control so that operational command only was delegated.

The Court concluded that notwithstanding the delegation of its powers under chapter VII, the Security Council did retain ultimate authority and control. It relied on the following factors. In the first place, chapter VII allowed the Security

³⁹ *Behrami v France*, n 23, at para 131.

Council to delegate powers to ‘Member States and relevant international organisations’. Second, the relevant power was a delegable power. Third, delegation was neither presumed nor implicit, but rather prior and explicit in the resolution itself. Fourth, the resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. Fifth, the leadership of the military presence was required by the resolution to report to the Security Council so as to allow the Security Council to exercise its overall authority and control. That delegation model demonstrates that direct operational command from the Security Council is not a requirement of chapter VII collective security missions. And the Court accordingly concluded that KFOR was exercising lawfully delegated chapter VII powers such that the conduct alleged to have been in breach of the ECHR was, in principle, ‘attributable’ to the UN and not France or Norway. The Court went on to find that it had no competence to review such conduct.⁴⁰ That left the Behrami family and Mr Saramati without any effective remedy for the breaches of the ECHR that they alleged.

As noted above, the factors relied on by the Grand Chamber of the European Court of Human Rights in *Behrami/Saramati* as establishing delegation (the identification by the Security Council of an international threat to the peace, the adoption of a solution under chapter VII that involved the establishment of civil and security presences) and as demonstrating that the Security Council retained ultimate authority and control (a power to delegate, delegable powers, prior and explicit delegation, a defined role and tasks for KFOR and a reporting requirement) are common characteristics of most of the arrangements whereby the Security Council has in recent years ‘mandated’ multinational forces to use force if necessary to achieve certain goals under the authority of a Security Council resolution. Arguably, therefore, in all those cases, even those where both the UN and Member States have hitherto assumed that responsibility rested with the troop contributing nations, any acts or omissions of the multinational forces created by the Security Council are attributable to the UN and not Member States.

That throws up very serious issues of accountability. It is now clearly recognised⁴¹ that international humanitarian law and international human rights law co-exist. In the 2004 case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* before the International Court of Justice (ICJ),⁴² Israel argued that the applicability of international humanitarian law displaced its international human rights obligations such as those arising under the International Covenant of Civil and Political Rights (ICCPR).⁴³ That argument failed. As the ICJ explained: the protection of a human rights convention such as the ICCPR does not cease in

⁴⁰ *Behrami v France*, n 23, at paras 144–52.

⁴¹ Previous indication was provided in the 1995 ICJ case of *Legality of the Threat of Nuclear Weapons* ICJ Rep 1995 (1), 239.

⁴² ICJ *Wall Case*, n 22.

⁴³ *Ibid*, at para 102.

time of armed conflict, except through derogation of the kind found in Article 4 ICCPR⁴⁴ and thus obligations under the ICCPR and Convention on the Rights of the Child (CRC) applied to the occupied territories.⁴⁵

The ICJ took the same approach in the 2005 case of *Case Concerning Armed Activities on the Territory of the Congo*.⁴⁶ Uganda's actions in the Congo gave it the status of an occupying power; Uganda therefore owed obligations under both international humanitarian law and international human rights law⁴⁷:

The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.⁴⁸

The ICJ went on to find Uganda internationally responsible for various breaches of the ICCPR and the CRC.⁴⁹

The reason for the recognition that international humanitarian law and international human rights law co-exist being so important was spelt out by Brooke LJ in the Court of Appeal in the case of *R (Al-Skeini and others) v Secretary of State for Defence*,⁵⁰ which concerned accountability for deaths at the hands of British troops operating in Iraq⁵¹:

what is known as international humanitarian law imposes a number of unexceptional moral precepts on occupying forces ('Thou shalt not commit murder'; 'Thou shalt not be guilty of torture or other inhuman treatment', etc) but it imposes none of the positive human rights obligations that are inherent in the ECHR. It is a far cry from the complacency of 'You must not kill but need not strive Officialously to keep alive' to the obligations imposed on a member state of the Council of Europe by the case law on Articles 1 and 2 of the ECHR ('the High Contracting Parties shall secure to everyone within their jurisdiction [their] right to life').⁵²

Moreover, the enforcement mechanisms under international human rights law, in particular the ECHR and the ICCPR, are much better developed and far more effective than the enforcement mechanisms under international humanitarian law.

These things matter. Under most of the arrangements whereby the Security Council has 'mandated' multinational forces to use force if necessary to achieve

⁴⁴ *Ibid*, at para 106.

⁴⁵ *Ibid*, at paras 111 and 113.

⁴⁶ ICJ *Congo v Uganda*, n 22.

⁴⁷ *Ibid*, at paras 215–20.

⁴⁸ *Ibid*, at para 178.

⁴⁹ *Ibid*, at para 220.

⁵⁰ *R (Al-Skeini and others) v Secretary of State for Defence* [2005] EWCA Civ 1609.

⁵¹ The case went on to the House of Lords: *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

⁵² *Ibid*, at para 8.

certain goals under the authority of a Security Council resolution, the force created is usually immune from legal process in the country where it is operating. That was the position in Kosovo. Regulation No 2000/47 provided that KFOR personnel were to be immune from jurisdiction before the courts in Kosovo in respect of any administrative, civil or criminal act committed by them in Kosovo.⁵³ The same was true in Iraq. Coalition Provisional Order 17 provided that the multinational force operating in Iraq 'shall be immune from Iraqi legal process'.⁵⁴ Thus, to take an example from the case of *Al-Skeini*, it is only because the House of Lords affirmed that the ECHR applied to the acts of British soldiers operating in Iraq that the family of Baha Mousa, who was kicked and beaten to death in custody while hooded, will now have an investigation into his death of the type required under Article 2 of the ECHR.

The obvious concern about the decision of the Grand Chamber of the European Court of Human Rights in *Behrami/Saramati* is that it might undermine the accountability of troops operating abroad that can be established through international human rights law. Such political accountability as there may be for the UN through the Security Council is no substitute for legal accountability under international human rights law. Either the approach taken in *Behrami/Saramati*, and perhaps the whole delegation thesis, has to be re-examined, or the accountability mechanisms of the UN have to be radically, and speedily, overhauled.

The danger identified by Professor Sarooshi under the delegation model, namely that Member States which are mandated to take military enforcement action may exercise their delegated powers to achieve their own self-interest and not that of the UN, injects an urgency to the debate. Relying on some similarities of the delegation model in Kosovo and those of the model ultimately put in place in Iraq, the British government recently argued that the UN, not the UK, was responsible for the acts and omissions of British troops operating in Iraq after 16 October 2003, the date when the Security Council established a multinational force under Resolution 1511. That issue was heard and determined in the second of the two cases identified above: the House of Lords' decision in *Al-Jedda*.

IV. The Case of *Al-Jedda*

Mr Al-Jedda, a dual British and Iraqi national, had been held in preventative detention by British forces in Iraq since 10 October 2004 because they suspected him of terrorist-related activity. The British authorities did not charge him with any offence nor did they bring him before a court in Iraq. The question before the

⁵³ Regulation No 2000/47, 'On the Status, Privileges, and Immunities of KFOR and UNMIK and their Personnel in Kosovo' (18 August 2000) UNMIK/REG/2000/47, Sec 2.

⁵⁴ Coalition Provisional Authority Order No 17, 'Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq', Sec 2(1).

House of Lords was whether such detention was contrary to Article 5(1) ECHR.⁵⁵ The Secretary of State argued not, on the basis that the actions of the British forces in detaining Mr Al-Jedda were attributable to the UN and not the UK. Unpicking that argument requires a close examination of the situation as it developed in Iraq between the spring of 2003, when the invasion took place, and Mr Al-Jedda's detention, some 18 months later.

When the Coalition forces took action in Iraq in May 2003 they did not do so as part of a UN mission. On the contrary, as the Court of Appeal in *Al-Jedda* recorded:

It is well known that the Coalition Forces invaded Iraq in the spring of 2003 after the abandonment of the efforts to obtain a further Security Council resolution which would give immediate backing to what the Coalition states wished to do if Saddam Hussein did not comply with the Council's demands.⁵⁶

Unlike the position in Kosovo, the invasion of Iraq was not the Security Council's solution to a threat to international peace and security. It was a solution decided upon by the Coalition forces and took place under their command.

The basis upon which the Coalition forces acted, and the status and role they claimed for themselves, is clear from a letter dated 8 May 2003 from the Permanent Representatives of the UK and the USA to the President of the Security Council:

The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions.⁵⁷

Thus it was clear that the military presence in Iraq was created and controlled by the USA, the UK and their Coalition partners, not the Security Council. Command and control vested at all times in the Coalition (in reality in the US and, to a lesser extent, the UK). A civil administration, the Coalition Provisional Authority, was also created and controlled by the Coalition, not the Security Council.

The first Security Council Resolution after the invasion, UNSCR 1483, adopted on 22 May 2003, recognised all this. In particular, it recognised:

the specific authorities, responsibilities, and obligations under applicable international law of those states [ie the USA and the UK] as occupying powers under unified command (the 'Authority').⁵⁸

The Coalition exercised powers of occupation and, applying the reasoning of the ICJ in the *Case of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the *Case Concerning Armed Activities on the*

⁵⁵ And thus the Human Rights Act 1998.

⁵⁶ *Al-Jedda v Secretary of State for Defence* [2006] EWCA Civ 327 para 15.

⁵⁷ 'Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council' (8 May 2003) UN Doc S/2003/538.

⁵⁸ UNSC Res 1483 (22 May 2003) UN Doc SC/RES/1483, Preamble.

Territory of the Congo,⁵⁹ the USA and the UK were responsible for the conduct of their troops under international humanitarian law and international human rights law.

A subsequent Security Council resolution, however, appeared to change things. UNSCR 1511, adopted on 16 October 2003, emphasised the temporary nature of the Coalition, and authorised:

a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure.⁶⁰

Thus the Coalition forces became a 'multinational force' in Iraq authorised by the Security Council to take all necessary measures to achieve the tasks assigned to it under UNSCR 1511. Moreover the 'mandate' required review by the UN on a yearly basis and the US was required to report periodically to the Security Council.

Although nothing changed in the command structure,⁶¹ or in the actual day-to-day tasks of the troops in Iraq, the Secretary of State argued that the establishment of the multinational force under UNSCR 1511 mirrored that of KFOR under UNSCR 1244 and, following the logic of the Grand Chamber of the European Court of Human Rights in *Behrami/Saramati*, the acts and omissions of British troops in Iraq after 16 October 2003 were attributable to the UN, not the UK. This, the Secretary of State argued, was confirmed by UNSCR 1546, adopted on 8 June 2004, which extended the mandate of the multinational force to the post-occupation phase in Iraq.⁶² The Security Council was exercising chapter VII powers, the authority given to the multinational force was a chapter VII power, the mandate amounted to delegation and this was demonstrated in Iraq, as in Kosovo, by the requirement imposed on the leadership of the multinational force to report periodically to the Security Council. As had been established in *Behrami/Saramati*, the fact that command remained with the USA and the UK throughout was not inconsistent with this delegation model.

⁵⁹ See n 22.

⁶⁰ UNSC Res 1511 (16 October 2003) UN Doc SC/RES/1511 para 13.

⁶¹ The CPA originally comprised two wings: 'security and support' and 'non-security'. The 'security and support' wing was identical to the Coalition armed forces in Iraq under unified command. First there was the Coalition Forces Land Component Command (CFLCC), then the Coalition Joint Task Force 7 (CJTF-7) and finally the Multinational Corps and Multinational Force in Iraq (MNF-I). The CJTF-7 was created on 14 June 2003 (replacing the CFLCC). The MNF-I was created on 15 May 2004 (replacing the CJTF-7). The CFLCC was commanded by Lt Gen David McKiernan, US Army; CJTF-7 and MNF-I were commanded until the end of June 2004 by Lt Gen Ricardo Sanchez, US Army. Thus MNF-I did not even come into existence until seven months after UNSC Resolution 1511 had been adopted. It was created by the Coalition forces and throughout the command structure remained the same.

⁶² The occupation formally ended on 28 June 2004.

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The implications of this argument are far-reaching. Baha Mousa, one of the six claimants in the *Al-Skeini* case,⁶³ was arrested by British troops in Basra on 14 September 2003 as part of Operation Salerno (an operation that included searching for and arresting individuals with a view to internment). He was a fit and healthy 26 year old. He died 36 hours later, having received 93 separate injuries at the hands of the British soldiers holding him, many inflicted while he was hooded. No one denies those basic facts: the only issue has ever been successfully identifying the individual soldiers who inflicted the blows.⁶⁴ Adopting the delegation thesis, had those events happened five weeks later (ie after UNSCR 1511 had been passed), although the same or similar operations were being conducted by the same soldiers under the same command, responsibility for the death of Mr Mousa would have been attributable to the UN under international law, not the UK. Or, to take a different example, the ill-treatment of detainees by US soldiers at Abu Ghraib prison in Baghdad, notoriously published to the world in April 2004 via the photos taken by the soldiers themselves, would also have been attributable to the UN, not the USA.

In the event, the majority in the House of Lords⁶⁵ in *Al-Jedda* distinguished *Behrami/Saramati*. For Lord Bingham:

The UN did not dispatch the coalition forces to Iraq. The CPA was established by the coalition states, notably the US, not the UN. When the coalition states became occupying powers in Iraq they had no UN mandate ... It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US. Following UNSCR 1483 in May 2003 the role of the UN was a limited one focused on humanitarian relief and reconstruction, a role strengthened but not fundamentally altered by UNSCR 1511 in October 2003. By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multinational force express authority to take steps to promote security and stability in Iraq, but ... the Security Council was not delegating its power by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the UN accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.⁶⁶

Baroness Hale⁶⁷ and Lord Carswell⁶⁸ agreed with Lord Bingham that the Security Council had not delegated its chapter VII powers to the multinational force in Iraq and that any analogy with the situation in Kosovo breaks down at almost every point. Lord Brown, although agreeing with the result, took a different

⁶³ *Al-Skeini v Secretary of State for Defence*, nn 50 and 51.

⁶⁴ Information and articles relating to the court martial are available at <<http://www.publicinterestlawyers.co.uk/cases/cases.php?id=34>> accessed 4 December 2007.

⁶⁵ Lord Rodger dissenting.

⁶⁶ *R (Al-Jedda) v Secretary of State for Defence*, n 4, at para 23.

⁶⁷ *Ibid*, at para 124.

⁶⁸ Para 131.

approach.⁶⁹ He considered that the Security Council had delegated its chapter VII powers to the multinational force in Iraq, but nonetheless did not exercise ultimate authority and control over that force.⁷⁰

The question whether the Security Council had, in fact, delegated its powers to the multinational force in Iraq is a critical question upon which the House of Lords split 3:2.⁷¹ It is undoubtedly true that if there is an intense focus on the practical realities on the ground, the analogy between the situation in Kosovo and that in Iraq does break down at every point. However, if the focus is shifted to the mandate itself, UNSCR 1244 authorising KFOR in Kosovo and UNSCR 1511 and 1546 authorising the multinational force in Iraq, the distinction is not so obvious. Lord Rodger observed in his dissenting judgment:

If one compares the terms of Resolution 1244 and Resolution 1511, for present purposes there appears to be no relevant legal difference between the two forces.⁷²

For Lord Rodger, each of the factors relied on by the Grand Chamber of the European Court of Human Rights in *Behrami/Saramati* as establishing delegation (the identification by the Security Council of an international threat to the peace, the adoption of a solution under chapter VII that involved the establishment of a security presence) and as demonstrating that the Security Council retained ultimate authority and control (a power to delegate, delegable powers, prior and explicit delegation, a defined role and tasks for KFOR and a reporting requirement) could just as easily be identified in UNSCR 1511 and UNSCR 1546. On that basis the multinational force in Iraq was exercising delegated powers under the authority and control of the UN.⁷³

Lord Brown was also clearly influenced by the similarities between the mandate in Kosovo and the mandate in Iraq:

Lord Bingham ... concludes that the analogy with Kosovo breaks down at almost every point. I wish I found it so easy. My difficulty is not least with my Lord's view that 'there was no delegation of UN power in Iraq.' By that I understand him to mean ... that, in contrast to the position in Kosovo, the UN in Iraq was merely authorising the USA and the UK to carry out functions which it could not perform itself as opposed to empowering them to exercise its own functions. It seems to me, however, that in this respect the situation in Kosovo and Iraq was the same: in neither country could the UN as a matter of fact carry out its central security role so that in both it was necessary to authorise states to perform the role. As the court in *Behrami* explained ... that necessarily follows from the absence of article 43 agreements. When the court posed 'the key question whether the UNSC retained ultimate authority and control so that operational command only was delegated', it noted ... 'This delegation model is now an established

⁶⁹ Para 143. See below

⁷⁰ Paras 148–9.

⁷¹ Lord Rodger in his dissenting judgment and Lord Brown in his concurring judgment both thought that the Security Council had delegated its Chapter VII powers in adopting UNSCR 1511 and UNSCR 1546; Lord Bingham, Lord Carswell and Baroness Hale thought that it had not done so.

⁷² Para 87.

⁷³ Para 113.

substitute for the article 43 agreements never concluded'. And this seems to me entirely consistent with para 43 of the court's judgment: the mention there of 'functions which it could not itself perform' I understand to refer to functions which the Security Council cannot itself perform as a matter of law and which accordingly can only be done by a different body properly authorised under the UN Charter—see Sarooshi, 'The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers' (1999).⁷⁴

Ultimately, he concluded that, notwithstanding the fact that the Security Council had delegated its chapter VII powers to the multinational force in Iraq, ultimate authority and control never passed from the USA and the UK to the UN. The act of detaining Mr Al-Jedda was therefore attributable to the UK.⁷⁵

The difficulty identified by Lord Brown in *Al-Jedda*, and the solution adopted by Lord Bingham, have important ramifications for the delegation thesis. If the Security Council was not delegating its chapter VII powers in adopting UNSCR 1511 and UNSCR 1546, as Lord Bingham and the majority in *Al-Jedda* decided, two important questions arise. First, what are the distinguishing characteristics of a Security Council resolution that signal delegation? As noted above, all of the Security Council resolutions by which collective enforcement action by Member States has been 'mandated' in the last 10–15 years typically authorise the establishment of the multinational force under unified command, specify the tasks assigned to it, authorise the force to use 'all necessary means' to accomplish those tasks and require the leadership of the force to report to the Security Council on a periodic basis. But those characteristics were held not to be enough to establish the delegation by the Security Council of its chapter VII powers in *Al-Jedda*.

The second question that Lord Bingham's analysis in *Al-Jedda* raises is perhaps even more profound. If the Security Council was not delegating its chapter VII powers in authorising the multinational force to take all necessary measures to contribute to the maintenance of security and stability in Iraq in UNSCR 1511 and UNSCR 1546, what was it doing? If, as Lord Brown suggests, Lord Bingham's analysis leads to the conclusion that the UN in Iraq was 'merely authorising' the USA and the UK to carry out functions which it could not perform itself, as opposed to empowering them to exercise its own functions, what competence did the Security Council have to do so, and what are the consequences?

The competence question revives an issue that appeared to have been settled by Professor Sarooshi's influential book *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers*.⁷⁶ Professor Sarooshi persuasively argued that the Security Council did have the competence to delegate its chapter VII powers to Member States. He identified as the two main sources of that competence, first, the subsequent practice of the Security Council and other UN organs and, second, an interpretation of Articles

⁷⁴ Para 143.

⁷⁵ Para 149.

⁷⁶ Sarooshi, n 3, at 142–66.

42 and 53 of the Charter.⁷⁷ But if, on Lord Bingham's analysis, the authorisation model identified by Professor Sarooshi, does not always result in delegation, the competence question is re-opened. What competence does the Security Council have to 'authorise' Member States to use force for their own ends and not under Articles 41 or 42 of the UN Charter?

The consequences question is equally intriguing. The second issue that the House of Lords had to grapple with in *Al-Jedda* was the legality of Mr Al-Jedda's internment. The earlier case of *Al-Skeini* had established that those in the custody of British troops in Iraq were within the UK 'jurisdiction' for ECHR purposes⁷⁸ and thus, it seemed, internment was prohibited under Article 5 ECHR in the absence of a valid derogation under Article 15 ECHR. The House of Lords found otherwise. Relying on Article 103 of the UN Charter, the House of Lords held that Article 5 ECHR was qualified or displaced by UNSCR 1511 and 1546 such that Mr Al-Jedda could no longer rely on it. Article 103 provides as follows:

In 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.

The 'obligation' identified by the House of Lords was an obligation to exercise a power of internment set out in UNSCR 1511 and (more specifically) UNSCR 1546 when the threshold was met, ie where necessary for imperative reasons of security. That 'obligation', it was held, being an obligation under the UN Charter, qualified or displaced any obligation under Article 5 ECHR not to intern without derogation.

Bridging the gap between an authorisation to use all necessary measures, including a power of internment, and an obligation to intern sufficiently robust to trigger Article 103 of the UN Charter was no mean feat. For Lord Bingham there were three stepping stones. First, he reasoned that, under international humanitarian law, the power to intern under Article 43 of the Hague Regulations and Articles 41, 42 and 78 of the Fourth Geneva Convention crystallised into an obligation to intern where the threshold conditions for the exercise of the power were met.⁷⁹ Second, he relied on a persuasive body of academic opinion that would treat Article 103 as applicable where conduct is authorised by the Security Council.⁸⁰ And, third, Lord Bingham eschewed a narrow, contract-based, meaning of the term 'obligations' in Article 103, given the importance of the Security Council's task in maintaining peace and security in the world.⁸¹

The other judges all agreed. Lord Carswell indicated that:

In particular, I am persuaded by State practice and the clear statements of authoritative academic opinion—recognised sources of international law—that expressions in

⁷⁷ *Ibid*, at 146.

⁷⁸ See *R (Al-Skeini and others) v Secretary of State for Defence*, nn 50 and 51.

⁷⁹ *R (Al-Jedda) v Secretary of State for Defence*, n 4, at para 32.

⁸⁰ Para 33.

⁸¹ Para 34.

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Security Council Resolutions which appear on their face to confer no more than authority or power to carry out measures may take effect as imposing obligations, because of the fact that the United Nations have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which would entitle them to call on member states to provide them.⁸²

That was Lord Bingham's second stepping stone in a passage where he observed that the Security Council can adopt resolutions couched in mandatory terms but that mandatory language cannot be used in relation to military or security operations overseas, 'since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which entitle them to call on member states to provide them.' Thus, in practice, the Security Council can do little more than give its authorisation to Member States who are willing to conduct such tasks and Article 103 is applicable where such conduct is authorised by the Security Council.⁸³

The problem with that analysis, however, is that it is based on academic opinion which treats Security Council authorisations under chapter VII of the Charter as the delegation by the Security Council of its functions to willing Member States.⁸⁴ It may well be that such delegation can only take the form of an authorisation, for all the reasons identified by Lord Bingham in *Al-Jedda*. And it may well be that as a result, such authorisations can, in certain circumstances, create obligations sufficiently robust to trigger Article 103 of the UN Charter. But it is not obvious that the same result follows where, as the House of Lords found in *Al-Jedda*, the authorisation in question did not amount to the delegation of chapter VII powers because UNSCR 1511 and UNSCR 1546 'merely authorised' the USA and the UK to carry out functions which the Security Council could not perform itself, as opposed to empowering them to exercise its own functions.

⁸² Para 135.

⁸³ Para 33.

⁸⁴ See, in particular, Sarooshi, n 7, at 150–1, expressly relied on by Lord Bingham.

How will the European Court of Human Rights deal with the UK in Iraq? Lessons from Turkey and Russia

BILL BOWRING

I. Introduction

The invasion and occupation of Iraq have placed international law as a whole and human rights law in particular under extraordinary stress. In the face of brute and lawless force all normativity may appear to have evaporated from the international scene. Nevertheless, it is highly likely that in due course the European Court of Human Rights (ECtHR) will be called upon to adjudicate on complaints arising from the conduct of the United Kingdom, and possible other European states of the 'Coalition of the Willing'. My argument in this chapter is that significant normative and legal resources already exist in the jurisprudence of the ECtHR, and that through the cases decided over the years, especially the Chechen cases, a wholly positive clarification of the relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHR) is already taking place. However, this process, on my account, can only be understood in the context of colonial and post-colonial armed struggles.

In order to show this, I engage with two points of, apparently, positive legal doctrine; and a more general problem of human rights confronted by gross, widespread and systematic violations.

The first point of doctrine is the question of the extra-territorial reach of human rights law. This question is far from technical in the current context. It is the question whether the UK can be condemned in the European Court of Human Rights (ECtHR) for some of its actions in Iraq, specifically, for those actions that violate the European Convention on Human Rights (ECHR). It is significant but not surprising that legal doctrine on this question has been developed in relation to Turkey and Russia.

My second point of doctrine joins Vladimir Putin and Tony Blair in an unholy coupling. The technical issue is that the war in Iraq, like Russia's own wars in Chechnya, throws into sharp relief a hitherto latent tension between the international law of human rights (IHR) and international humanitarian law (IHL), the

international law of armed conflict. Is IHL a *lex specialis* that displaces IHR in the context of international or internal armed conflict?

The general problem in question is the following. The ECHR and ECtHR were elaborated as an ideological instrument in the context of the onset of the Cold War.¹ The UK was very reluctant to accept the creation of a Court capable of interfering in internal affairs and rendering obligatory judgments, but finally agreed in a spirit of solidarity against the threat of Communism.² For the first three decades of the work of ECHR mechanisms the Court was for the most part called upon to deal with lapses, more or less inadvertent, by Western European states in which the rule of law and adherence to generally understood principles of democracy were not seriously in doubt. Even the many Northern Irish cases against the UK did not present as the result of serious armed conflict. Only in the 1990s, with the tidal wave of Turkish Kurdish cases, especially those concerning village destruction, followed by the many Chechen cases against Russia, has the Court been obliged to confront the human rights consequences of armed conflict. The question is whether the concepts and systems developed in a quite different context half a century ago are remotely effective or indeed legitimate in the context of the UK's invasion and occupation of Iraq.

It will be recalled that United Kingdom has been in Iraq before. As Joel Rayburn points out, the UK seized the provinces of Basra, Baghdad, and Mosul from the Ottoman Empire at the end of World War I and formally took control of the new country in 1920, under a mandate from the League of Nations. In 1920, a large-scale Shiite insurgency cost the British more than 2000 casualties, and domestic pressure to withdraw from Iraq began to build. The UK's premature pullout in 1932 led to more violence in Iraq, the rise of a dictatorship, and a catastrophic unravelling of everything the British had tried to build there.³ It may be that history repeats itself as farce; but this time there is an international mechanism which may see the UK called to account for its actions.

II. Extra-territorial Effect

The question of extra-territorial applicability of IHR has recently been the subject of intense scholarly engagement⁴. The key cases have arisen in the context

¹ I Brownlie and G Goodwin-Gill, *Basic Documents on Human Rights* (Oxford, Oxford University Press, 5th edn, 2006) 609.

² See Council of Europe, *Collected edition of the 'Travaux préparatoires' of the European Convention on Human Rights* in eight volumes (Dordrecht, Martinus Nijhoff, 1975–85).

³ J Rayburn, 'The Last Exit from Iraq' (2006) 8 *Foreign Affairs* 2, 29–40.

⁴ See F Hampson and I Salama, 'Working paper on the relationship between human rights law and humanitarian law' Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd session, Doc E/CN.4/Sub.2/2005/14, 21 June 2005 at 19–22; N Lubell, 'Challenges in applying human rights law to armed conflict' (2005) 87:860 *International Review of the Red Cross* 737, 739–41; P Leach, 'The British military in Iraq—the applicability of the *espace juridique* doctrine under the European Convention on Human Rights' (2005) *Public Law* 448.

of the application of the European Convention on Human Rights (ECHR). This is because the consequences of the post-colonial if not imperial behaviour of Turkey, of the Russian Federation, and of the UK, have been adjudicated upon by judicial instances at the international level, and now in domestic courts as well. These are the cases where the armed forces of a state are alleged to have violated human rights outside the national territory.

In this area, at least, international law demonstrates its resilience. Since the early 1990s, states have not, on balance, done well in the ECtHR. Thus, Turkey lost in respect of its occupation of North Cyprus in the *Loizidou* case⁵, the UK together with other NATO members in the ECHR system had a close shave regarding the bombing of Serbia in the *Bankovic* case⁶, Russia has been condemned for its alleged occupation of part of Moldova⁷ in *Ilascu v Moldova and Russia*, and Turkey was once more found to be responsible for violations in neighbouring territory in *Issa v Turkey*.⁸ The *Bankovic* case has been described, by a leading judge of the Strasbourg Court, Loukis Loucaides, as 'a set-back in the effort to achieve the effective promotion of and respect for human rights ... in relation to the exercise of any State activity within or outside their country'.⁹ The UK's occupation of Iraq has been scrutinised in the domestic courts in *Al-Skeini*¹⁰ and *Al-Jedda*.¹¹ Writing in 2003, Vaughan Lowe suggested that in view of the principles set out in the *Loizidou* and *Bankovic* cases 'the UK may in principle incur liability under the ECHR in respect of its conduct in areas where it is in military occupation and exercising governmental powers'.¹² The crucial principle at stake is whether a state party to the ECHR can be in 'effective control' outside its own territory or indeed outside the overall territory of the Council of Europe states so that the actions of its state agents can engage Convention rights.

It should also be noted that the UN Human Rights Committee has interpreted this aspect of the International Covenant on Civil and Political Rights (ICCPR). In its *General Comment No 31*, 'The Nature of the General Legal Obligation Imposed

⁵ *Loizidou v Turkey* (App no 15318/89) Preliminary Objections, 40/1993/435/514, paras 62–4.

⁶ *Bankovic and others v Belgium and 16 other states* (App no 52207/99) 11 BHRC 435, Judgement, 12 December 2001.

⁷ *Ilascu and others v Moldova and the Russian Federation, Romania intervening* (App no 48787/99) ECtHR, Judgement, 8 July 2004.

⁸ *Issa and others v Turkey* (App no 31821/96) Admissibility Decision of 30 May 2000; decision of the second Chamber, 16 November 2004.

⁹ L Loucaides, 'Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case' (2006) 4 *European Human Rights Law Review* 391–407. At 392, fn 2, Loucaides cites the large number of scholarly articles strongly criticising the decision.

¹⁰ *R (Al-Skeini and others) v Secretary of State for Defence*, High Court 14 December 2004, Court of Appeal 21 December 2005, [2005] EWCA Civ 1609, [2006] HRLR 7. The House of Lords decided on the matter in 2007: [2007] UKHL 26.

¹¹ *R (Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence*, Court of Appeal 20 March 2006, C1/2005/2251, [2006] EWCA CIV 327. The House of Lords decision was delivered at the end of 2007: see [2007] UKHL 58.

¹² V Lowe, 'The Iraq Crisis: What Now?' (2003) 52:4 *ICLQ* 859, 869.

on States Parties to the Covenant', which it adopted on 29 March 2004, it restated the relevant part of Article 2(1) of the ICCPR and continued, at para 10:

This means that a state party must respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that state party, even if not situated within the territory of that state party ... This principle 'of applicability to all individuals who may find themselves subject to the jurisdiction of the state party' also applies to those within the power or effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a state party assigned to an international peace-keeping or peace-enforcement operation.¹³

The question why there is a problem of the application of the ECHR at all is to be answered by reference to the history of the institution which gave birth to it, the Council of Europe.

A. The Cold War Origins and Post-colonial Destiny of the Council of Europe

The Council of Europe (CoE), which now comprises 47 states (since Montenegro voted to separate from Serbia), with a total population of some 850 million people, exemplifies one of the most poignant ironies of history. It was founded in 1949 in London, by the 10 Western European states which signed its Statute, as, quite self-consciously, 'a sort of social and ideological counterpart to the military aspects of European co-operation represented by the North Atlantic Treaty Organisation'.¹⁴ The three 'pillars' of the CoE, which are exemplified in its more than 200 binding treaties, are pluralist democracy; the rule of law; and protection of individual human rights. By promulgating the ECHR, and creating the ECtHR, the first international court with powers to interfere in the internal affairs of states and to render obligatory judgments against them, the CoE showed it was truly serious about the 'first generation' of civil and political rights, especially personal liberty, freedom of expression, the right to compensation for deprivation of property and the right to free elections. It is notable that the list of rights contained in the ECHR does not depart significantly from the list in the French Revolution's *Declaration of the Rights of Man and of the Citizen* of 1789. It contained no social, economic or cultural rights, largely at the insistence of the UK. The content of the ECHR contrasted strongly with the human rights guaranteed in the constitutions of the USSR and its subject states, all of which gave pride of place to the right to work, followed by rights to social security, healthcare, education and housing. These states could show that they were serious about the social and economic

¹³ UN Doc CCPR/C/21/Rev.1/Add.13, of 26 May 2004. See also the International Court of Justice in the recent Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ Rep, 9 July 2004) at paras 108 and 109.

¹⁴ These are the words of Professor Ian Brownlie, in I Brownlie and G Goodwin-Gill, *Basic Documents on Human Rights* (Oxford, Oxford University Press, 5th edn, 2006) 609.

rights enshrined in their constitutions and, by and large, delivered them in practice. Indeed, not only did every person of working age have work, but it was a crime, the crime of ‘parasitism’, not to work.

It should be no surprise that the UK was strongly resistant to the principle of obligatory judicial decisions at the international level. It remained determined that even if there was to be a Convention, there would be no court, at least for the UK. Thus, when, on 7 August 1950, the Committee of Ministers adopted a draft convention, weakened as a result of UK pressure, it made the right of individual petition conditional on a declaration of acceptance by the State Party, and the jurisdiction of the ECtHR optional.¹⁵ The UK’s Attorney-General, Shawcross, stated on 4 October 1950 that ‘we should refuse to accept the Court or the Commission as a Court of Appeal and should firmly set our faces against the right of individual petition which seems to me to be wholly opposed to the theory of responsible government’.¹⁶ On 18 October 1950 there was a Ministerial Meeting of the Ministers most directly concerned, and Shawcross advised that the ECHR was in essence a statement of the general principles of human rights in a democratic community, in contrast with their suppression under totalitarian government. There had been strong political pressure on the UK government to agree to the Council of Europe Convention, and he felt that the wisest course was to accept it.¹⁷

Why was the UK so reluctant to submit to such interference? Part of the answer, still relevant for my purposes, lies in the concerns that the ECHR might bring colonial matters under international scrutiny. This was borne out in two of the first cases decided against the UK, which directly concerned its colonial past¹⁸.

One of the first such cases, decided in 1973, involved events taking place outside the UK, and indeed far from Europe.¹⁹ The UK’s East African colony Uganda had an Asian population of many thousands, the descendants of Asians who had been brought by the British Empire from India, and who served as civil servants and ran shops and businesses. Uganda was granted independence in 1962. However, in January 1971 the elected President, Apolo Milton Obote, was overthrown by his army commander, Idi Amin Dada. The following year, as part of a policy of ‘Africanisation’, Amin gave all Asians in Uganda 90 days to leave the country, claiming that God had ordered him to do so in a dream.²⁰ The UK refused them entry. As the government advisers had feared, a number of the Asians complained

¹⁵ Trav Prep (ibid) vol V, at 56

¹⁶ LCO 2/5570 [3363/22].

¹⁷ CAB 130/64 [GEN 337/1st Meeting].

¹⁸ See also the earlier case *Kingdom of Greece v United Kingdom* (App no 176/56) Commission decision of 26 September 1958, rejecting the complaints by Greece arising out of the conflict in Cyprus. It will be noted that the complaint by Greece was made, and the Commission decided, before the UK recognised—in 1966—the right of individual petition.

¹⁹ *East African Asians v United Kingdom* (App No 4403/70–4429/70) and others, Commission Report adopted on 14 December 1973.

²⁰ W Wakabi, ‘Idi Amin just won’t go away’ *Black World Today* (30 April 1999) <www.blackworldtoday.com/views/feat/feat1142.asp> accessed 15 November 2007.

to Strasbourg. They could not do so under Protocol 4, but, advised by Anthony Lester, argued that deprivation of their right of entry to the UK had caused them humiliation and distress amounting to ‘inhuman and degrading treatment’ in violation of Article 3. On 14 December 1973 the (former) European Commission on Human Rights found that the enactment of the Commonwealth Immigrants Act 1968 had breached Article 3 of the Convention. The case did not have to go to the Court, since the UK conceded.

The second case was extraordinarily embarrassing for the UK: an interstate complaint brought by the Republic of Ireland, alleging that suspected terrorists held in administrative detention in Northern Ireland had been subjected to torture. The then Commission agreed; the Court held that the use by the UK of the methods of psychological pressure known as the ‘five techniques’ amounted to inhuman and degrading treatment, again a violation of Article 3.²¹

Both these cases therefore concerned the imperial—or at any rate colonial—past of the UK, in a way which threw into sharp relief the real reasons why the UK was so reluctant to make application to the ECtHR a reality (and in fact failed to incorporate the ECHR in domestic law until the Human Rights Act 1998 came into force in 2000).

B. UK Occupation of Southern Iraq

The issue of extra-territorial jurisdiction resurfaced in relation to the invasion and occupation of Iraq. On 7 April 2004 the Armed Forces Minister, Adam Ingram, stated that:

the ECHR is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not signatory to the Convention. The ECHR can have no application to the activities of the UK in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces.²²

Regina (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and another intervening) considered this assertion.²³ These were applications for judicial review brought by relatives of Iraqi citizens who had been killed in incidents in Iraq involving British troops. Five of the deceased had been shot by British troops, and a sixth, Baha Mousa, had died while being held in a British detention facility. The claimants sought judicial review of a failure by the Secretary of State for Defence to conduct independent inquiries into or to accept liability for the deaths and the torture. On the hearing of preliminary issues the Divisional Court declared that the ECHR and the Human Rights Act 1998 did not apply in the cases of the first five claimants, but that in the case of the sixth claimant the 1998 Act did apply and

²¹ *Republic of Ireland v United Kingdom* (App no 5310/71) Judgment, 18 January 1978.

²² Rt Hon Adam Ingram MP, Ministry of Defence, Letter to Adam Price MP, 7 April 2004.

²³ *R (Al-Skeini and others) v Secretary of State for Defence*, n 10.

the United Kingdom's procedural duties under Articles 2 and 3 of the Convention had been breached. The Court held that a state can be held to have 'effective control' of an area only where that area is within the territory or 'legal space'—*espace juridique*—of the Convention, and therefore only where the area occupied was that of another state party to the ECHR. Accordingly, since Iraq was not within the regional space of the ECHR, the claimants' cases were not within the jurisdiction of the UK.

The Court of Appeal dismissed the applicants' appeals, and held that the jurisdiction of a state party to the ECHR was essentially territorial; that if a contracting state had effective control of the territory of another state, it had jurisdiction within that territory under Article 1 of the ECHR and an obligation to ensure Convention rights and freedoms; but that since none of the victims in the first five cases were under the actual control and authority of British troops at the time when they were killed, and since it was impossible to hold that the United Kingdom was in effective control of that part of Iraq which its forces occupied or that it possessed any executive, legislative or judicial authority outside the limited authority given to its military forces there, neither the Convention nor the 1998 Act applied. The government's appeal with respect to Mr Mousa was also dismissed.

The Court of Appeal disagreed with the Divisional Court as to *espace juridique*. Lord Justice Brooke answered the question whether the ECHR could have extra-territorial effect as follows:

It was common ground that the jurisdiction of a contracting state is essentially territorial, as one would expect. It was also common ground that: (i) if a contracting state has effective control of part of the territory of another contracting state, it has jurisdiction within that territory within the meaning of article 1 of the ECHR, which provides that 'the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention'; (ii) if an agent of a contracting state exercises authority through the activities of its diplomatic or consular agents abroad or on board craft and vessels registered in or flying the flag of the state, that state is similarly obliged to secure those rights and freedoms to persons affected by that exercise of authority.²⁴

The first of these he referred to as 'ECA' (effective control of an area) and the second 'SAA' (state agent authority). For the purposes of SAA he held that none of the first five claimants were under the control and authority of British troops at the time when they were killed.²⁵ For the purposes of ECA he asked '[w]as the United Kingdom in effective control of Basra City in August-November 2003?'. He held that it was 'quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basra City for the purposes of ECHR jurisprudence at the material time'.²⁶

²⁴ *Ibid*, para 48

²⁵ *Ibid*, para 101

²⁶ *Ibid*, para 124

Philip Leach²⁷ has argued (and Brooke LJ appears not to disagree) that until 28 June 2004 when the Iraqi Interim government assumed full responsibility and control for governing Iraq²⁸ the UK was an occupying power as defined by the Hague Regulations of 1907 and the Fourth Geneva convention of 1949. Thus, in his view: ‘it is very clear that the exercise of authority or control by the United Kingdom over parts of southern Iraq in 2003–4 was extensive. For the purpose of the Strasbourg “effective control” test, it cannot be sensibly or convincingly distinguished from the control that Turkey has been found to exercise over northern Cyprus.’²⁹ Ralph Wilde has made similar arguments.³⁰ Loucaides cites with approval the words of Sedley LJ in *Al-Skeini*:

I do not accept Mr Greenwood’s submission that Bankovic is a watershed in the Court’s Jurisprudence. Bankovic is more accurately characterised, in my view, as a break in the substantial line of decisions, nearly all of them relating to the Turkish occupation of northern Cyprus, which hold a member state answerable for what it does in alien territory following a de facto assumption of authority.³¹

That, in my view, is the correct approach.

However, both the Court of Appeal and the House of Lords reached a conservative decision by holding that the HRA and the ECHR applied only in the case of those detained in British military prisons, such as the sixth claimant Baha Mousa, and illustrated their judgment with an analogy to the extraterritorial exception made for embassies.

III. Tensions Between International Humanitarian Law and the Law of International Human Rights

My starting point in this section is a history of struggle and of disputed doctrine. The anti-colonial struggles were largely aimed at securing independence within defined, overseas, territories—that is, the ‘salt-water self-determination’, in respect of territories separated from the colonial metropolis by seas and oceans to which the UN declaration of 1960 was directed.³² The non-state protagonists were the ‘national liberation movements’. The legal issues arising from the use of force by these movements, and the right or otherwise of other states to render support, including intervention, usually by the USSR, were explored in detail, almost at the end of the Cold War, by Julio Faundez, writing in the first issue of

²⁷ Leach, n 4, at 457.

²⁸ United Nations Security Council (UNSC) Res 1546 (8 June 2004) UN Doc S/RES/1546.

²⁹ *Cyprus v Turkey* (App no 25781/94) (2002) 35 EHRR 30.

³⁰ R Wilde, ‘The “Legal Space” or “Espace Juridique” of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?’ part 2 (2005) *European Human Rights Law Review* 115.

³¹ Loucaides, n 9, at 401; *Al-Skeini*, n 10, para 193.

³² UN General Assembly Res 1514(XV) (14 December 1960).

the first international law journal published in French and English and aimed at Africa,³³ and Heather Wilson, with a background in the US armed forces.³⁴ That was the period, up to the collapse of the USSR, when the use of force by self-determination movements—National Liberation Movements—was not, as is so often the case today, characterised as ‘terrorism’.

International humanitarian law had been substantially updated and codified following WWII, in the four Geneva Conventions, dealing with wounded and sick, shipwrecked, prisoners of war, and civilians in the power of an opposing belligerent and civilians in occupied territory. These conventions were adopted in 1949 at the initiative of a private organisation, the International Committee of the Red Cross.³⁵

As Hampson and Salama point out, there was no successful attempt to update the rules of conduct of hostilities until 1977, when two Additional Protocols were promulgated. They suggest that ‘this may have been partly attributable to the reluctance, after both the first and second world wars, to regulate a phenomenon which the League of Nations and later the United Nations were intended to eliminate or control’.³⁶ However, these distinguished authors appear to miss the significance of the two Additional Protocols to the Geneva Conventions, adopted in 1977. It is of course the case, as they note, that Protocol I dealt with international armed conflicts, updating provisions on the wounded and sick, and formulating rules on the conduct of hostilities, while Protocol II dealt, for the first time, with high-intensity non-international armed conflicts. In this, they follow Doswald-Beck and Vité, in whose view the most important contribution of Protocol I ‘is the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible’.³⁷

However, of a number of scholars recently publishing on the tension (or clash) between IHR and IHL, only William Abresch notes correctly that the Additional Protocols aimed to extend the reach of the existing treaties governing international conflicts to internal conflicts: ‘thus, Protocol I deemed struggles for national liberation to be international conflicts’.³⁸ In other words, if an armed conflict is a struggle for national liberation against ‘alien occupation’ or ‘colonial domination’ it is considered an ‘international armed conflict’ falling within Additional Protocol I.³⁹

³³ J Faundez, ‘International Law and Wars of National Liberation: Use of Force and Intervention’ (1989) 1 *African Journal of International and Comparative Law* 85.

³⁴ HA Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford, Clarendon Press, 1990).

³⁵ For a useful brief summary of the history of IHL see fn 16 in Hampson and Salama, above n 4, at 25–6.

³⁶ Hampson and Salama, n 4, fn 16, at 26.

³⁷ L Doswald-Beck, and S Vité, ‘International Humanitarian Law and Human Rights Law’ n 293 (1993) *International Review of the Red Cross* 94, at 9.

³⁸ W Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 *EJIL* 741, 742.

³⁹ Additional Protocol I, Art 1(4), and see Abresch, n 38, at 753.

This, I suggest, is the key to understanding the significance of both Additional Protocols. They were the response of the ICRC, and then the overwhelming majority of states which have ratified the Protocols, to the new world of 'internationalised' internal conflicts, in the context of armed struggle for self-determination by National Liberation Movements.

A. International Humanitarian Law and Internal Armed Conflicts

Additional Protocol II (APII) provides for non-international armed conflicts in which a well-organised armed group that controls part of its territory confronts the state party.⁴⁰ It therefore requires the existence of a high intensity civil war in which the armed groups are 'under responsible command' and 'exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations'.⁴¹

For this reason it could not apply to the conflict in Northern Ireland, but most certainly applied to the First Chechen War from 1994 to 1997. In the cases of the United Kingdom (Northern Ireland), Turkey (South-Eastern Turkey), and the Russian Federation (Chechnya), the state concerned has been at pains to deny the existence of an 'armed conflict', but has instead characterised the events as 'terrorism', 'banditry' or simply organised crime. However, it is also clear that for the purposes of Protocol I, the international community has given no shred of recognition to the situation of the Irish Republicans, the Turkish Kurds or the Chechens as involving 'alien domination' or 'colonial occupation', whatever the claims to self-determination of the Irish, Kurds and Chechens. The Irish and Kurds never exercised sufficient control over territory to justify the application of APII. The Irish Republicans for years demanded the ratification by the UK of the Additional Protocols, and UK ratification was delayed, despite the fact that, as pointed out, the protocols could have had no application. However, it should be noted that the Good Friday Agreement, which brought the Northern Irish conflict to an end, at least to the present day, recognised the 'right to self-determination of the people of the Island of Ireland', a long-standing demand of Sinn Fein. But this does not affect the general point made.

i. The Chechen Exception

The conflict in Chechnya provides the essential context to the question of the tension between IHL and IHR. This was highlighted in a judgment of the Bow Street Magistrates Court in London.⁴² In his judgment of 15 November 2003 in the

⁴⁰ See K Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003' (2004) 11 *University of California, Davis Journal of International Law and Policy* 171, at 177, fn 18.

⁴¹ Additional Protocol II, Art 1(1), and see Abresch, n 38, at 753.

⁴² The author provided written expert evidence for this case, but not on the point of internal armed conflict.

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extradition case *Government of the Russian Federation v Zakayev*,⁴³ Senior District Judge Timothy Workman held as follows:

The Government maintain that the fighting which was taking place in Chechnya amounted to a riot and rebellion, 'banditry' and terrorism. The Defence submit that it is clear beyond peradventure that this was at the very least an internal armed conflict and could probably be described as a war ... I am quite satisfied that the events in Chechnya in 1995 and 1996 amounted in law to an internal armed conflict ... In support of that decision I have taken into account the scale of fighting—the intense carpet bombing of Grozny within excess of 100,000 casualties, the recognition of the conflict in the terms of a cease fire and a peace treaty. I was unable to accept the view expressed by one witness that the actions of the Russian Government in bombing Grozny were counter-terrorist operations ... this amounted to an internal armed conflict which would fall within the Geneva Convention.⁴⁴

Another relevant feature of the First Chechen War was highlighted in 1996 by Professor Paola Gaeta.⁴⁵ On 31 July 1995 the Constitutional Court of the Russian Federation delivered its decision on the constitutionality of President Yeltsin's decrees sending Federal forces into Chechnya.⁴⁶ The Court was obliged in particular to consider the consequences of Russia's participation in APII to the 1949 Geneva Conventions.⁴⁷ As Gaeta pointed out:

The Court determined that at the international level the provisions of Protocol II were binding on both parties to the armed conflict and that the actions of the Russian armed forces in the conduct of the Chechen conflict violated Russia's international obligations under Additional Protocol II to the 1949 Geneva Conventions. Nonetheless, the Court sought to excuse this non-compliance because Protocol II had not been incorporated into the Russian legal system.

The Court clearly spelled out that the provisions of APII were binding upon *both* parties to the armed conflict, ie that it confers rights and imposes duties also on insurgents. This statement was, in Gaeta's view, all the more important in the light of the fact that, at the Geneva Conference, some States expressed the opposite view, since they were eager to keep rebels at the level of criminals without granting them any international status.⁴⁸ This view had also found support in the legal literature.⁴⁹

⁴³ Full text of *The Government of the Russian Federation v Akhmed Zakaev* available at <<http://www.hrcv.net/west/15-11-03.html>> accessed 15 November 2007.

⁴⁴ Transcript of the judgment on file with the author.

⁴⁵ P Gaeta, 'The Armed Conflict in Chechnya before the Russian Constitutional Court' (1996) 7 *EJIL* 563.

⁴⁶ An unofficial English translation of this judgement was published by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe: CDL-INF (96) 1.

⁴⁷ The RF is a party to the 1949 Geneva Conventions. The Soviet Union ratified both the 1977 Additional Protocols on 29 September 1989 to become effective on 29 March 1990. The Russian Federation deposited a notification of continuation on 13 January 1992.

⁴⁸ See A Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict' (1981) 30 *ICLQ* 415.

⁴⁹ On Protocol II see, among others, RJ Dupuy and T Leonetti, 'La notion de conflit armé à caractère non international' in A Cassese (ed), *The New Humanitarian Law of Armed Conflict* vol I (1979) 272.

Gaeta rightly emphasised the importance of the determination by the Court that the Russian Parliament had failed to pass legislation to implement AP II, and that this failure was one of the grounds—probably even the primary ground—for non-compliance by Russian military authorities with the rules embodied in the Protocol. In its determination of the case, the Court expressly directed the Russian Parliament to implement AP II in Russian domestic legislation, thus showing how much importance it attached to actual compliance with that treaty. Second, the Court underscored that according to the Russian Constitution and the UN's ICCPR victims of any violations, crimes and abuses of power shall be granted effective remedies in law and compensation for damages caused.

ii. The Second Chechen War and the Council of Europe

Russia's failure to obey the clear instructions of the Constitutional Court as to the implementation of APII has not been remedied to date, and the start of the Second Chechen War was accompanied by an equally egregious manifestation of non-concern by the Russian authorities in relation to compliance with the ECHR.

On 26 June 2000 the Council of Europe published the 'Consolidated report containing an analysis of the correspondence between the Secretary General of the Council of Europe and the Russian Federation under Article 52 of the ECHR'.⁵⁰ This report was prepared, at the request of the Secretary-General, by three experts—Tamas Bán, Frédéric Sudre and Pieter Van Dijk—who were asked to analyse the exchange of correspondence between himself and the Russian Federation 'in the light of the obligations incumbent on a High Contracting Party which is the recipient of a request under Article 52 of the European Convention on Human Rights'. The first request was dated 13 December 1999. The experts were asked to focus in particular on the explanations that the Secretary-General was entitled to expect in this case by virtue of Article 52 and to compare that with the content of the replies received. They concluded that the reply given by the Russian Federation did not even meet the minimum of the standard which must be considered to be implied in Article 52 in order to make the procedure effective, and remarked:

For example, it would have been legitimate to expect, as a minimum, that the replies would provide information, in a concrete and detailed manner, about issues such as the instructions on the use of force under which the Federal forces operated in Chechnya, reports about any cases under investigation concerning any human rights violations allegedly committed by members of the Federal forces, the detention conditions of persons deprived of their liberty by the Russian authorities and their possibilities for effectively enjoying the rights guaranteed by Article 5 of the Convention, the precise

⁵⁰ Document SG/Inf(2000)24 <<http://www.coe.int/T/E/Human%5Frights/cddh/2.%5Ftheme%5Ffiles/03.%5FArticle%5F52/01.%5FDocuments/01.%5FChechnya/SG%20Inf%282000%2924%20E%20-%20SG%20report.asp#TopOfPage>> accessed 15 November 2007.

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restrictions which have been put in place on freedom of movement in the area, et cetera. However, even after clarification by the Secretary General of what was expected, the replies lacked any such details ... We conclude that replies given were not adequate and that the Russian Federation has failed in its legal obligations as a Contracting State under Article 52 of the Convention.⁵¹

iii. The Dubious Role of the UK

The United Kingdom has played a questionable role in apparently assisting President Putin to deflect international condemnation of his actions in Chechnya, especially after 11 September 2001. Tony Blair visited Moscow on 4 October 2001, and Putin was especially grateful to him—for the fact that Blair was one of the few European leaders who had taken the initiative to assist Russia in April 2000, when Russia was coming under especially fierce criticism for its conduct of the war in Chechnya.

On 6 April 2000 the Parliamentary Assembly of the Council of Europe (PACE) received a report by its Rapporteur on Chechnya, Lord Frank Judd, condemning Russian actions.⁵² PACE considered that ‘the European Convention on Human Rights is being violated by the Russian authorities in the Chechen Republic both gravely and in a systematic manner’, and voted to recommend to the CoE’s Committee of Ministers that ‘should substantial, accelerating and demonstrable progress not be made immediately in respect of the requirements set out in paragraph 19,⁵³ [it should] initiate without delay, in accordance with Article 8 of the Statute, the procedure for the suspension of the Russian Federation from its rights of representation in the Council of Europe.’⁵⁴ Most painfully for Russia, it appealed for an inter-state complaint of human rights violations to the European Court of Human Rights by other Council of Europe members.⁵⁵

This vote did not affect the cordial relationship Blair and Putin had already established. Just 10 days later, on 16 April 2000 Putin visited London, despite the fact that he was still not formally President of Russia—he was only sworn in on 7 May 2000.⁵⁶ His programme included tea with the Queen at Buckingham

⁵¹ *Ibid.*

⁵² PACE Doc. 8697, 4 April 2000, ‘Conflict in Chechnya—Implementation by Russia of Recommendation 1444 (2000)’, Report, Political Affairs Committee, Rapporteur: Lord Judd, United Kingdom, Socialist Group <<http://assembly.coe.int/main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8697.HTM>> accessed 15 November 2007.

⁵³ These included ‘immediately cease all human rights violations in the Chechen Republic, including the ill-treatment and harassment of civilians and non-combatants in the Chechen Republic by Russian federal troops, and the alleged torture and ill-treatment of detainees’, and ‘seek an immediate cease-fire’.

⁵⁴ Recommendation 1456 (2000)[1], ‘Conflict in the Chechen Republic—Implementation by the Russian Federation of Recommendation 1444 (2000)’ <http://assembly.coe.int/main.asp?Link=/documents/adopted_text/ta00/erec1456.htm> accessed 15 November 2007.

⁵⁵ Reuters, 6 April 2000; via Johnson’s Russia List.

⁵⁶ See ‘Putin flies into legal battle’ *BBC* (16 April 2000) <<http://news.bbc.co.uk/2/hi/europe/714998.stm>> accessed 15 November 2007.

Palace. At a joint press-conference on 17 April 2000, Blair welcomed Putin's commitment that all reports of human rights violations would be looked into by Russia. Referring to Putin as 'Vladimir', he rejected suggestions that Britain should distance itself from Russia because of events in Chechnya. Putin in turn stated that they had agreed on joint responses to problems of organised crime and narcotics.

Thus, said Putin on 22 October 2001, Tony Blair had been instrumental in creating a new situation. He said:

it was just as important for us that the Prime Minister took his initial initiative and established his first contacts with the Russian leadership, with myself personally, we felt and we saw and we knew that our voice was being heard, that the UK wanted to hear us and to understand us and that indeed we were being understood and this was a very good basis upon which together we managed to work jointly and quite effectively to neutralise international terrorism in this instance in Afghanistan.⁵⁷

He was referring to April 2000. Action against Russia could only have been taken by the Council of Europe's Committee of (Foreign) Ministers. Britain is a founder and leading member of the Council. Putin recognised, and expressed his gratitude, for the fact the invitation extended to him so promptly made it absolutely clear that no action would be taken.

Thus, Russia has added a new dimension of obduracy, or even downright non-compliance, to the relationship between the Council of Europe and its mechanism for human rights protection—and one of its largest and newest members.

iv. What Really Happened in Chechnya?

A sobering commentary on the situation in Chechnya was provided by the parallel session, co-sponsored by the International Federation for Human Rights (FIDH) and the International League for Human Rights (ILHR), which took place on 30 March 2005 during one of the last sessions of the UN Human Rights Commission.⁵⁸ Several of the authoritative opinions expressed, by leading Russian actors as well as NGO representatives, are of special note.

A Chechen victim of gross violations, Libkan Bazayeva (she was one of the applicants in the first six Chechen cases at the Strasbourg Court, referred to below), provided some striking casualty statistics. She used, for reference, the roughly 200,000 dead or missing after the Asian tsunami in December 2004. Not long before the start of the First Chechen War, Chechnya's population passed the one million mark. During the 10 years of the two wars, she estimates that between 100,000 and 200,000 civilians have died, although she admitted that estimates

⁵⁷ See 'Transcript of the press conference with Prime Minister Tony Blair and President Vladimir Putin' (22 December 2001) <<http://www.number-10.gov.uk/output/Page1679.asp>> accessed 15 November 2007.

⁵⁸ Record of the Parallel Session <http://www.ngochr.org/view/index.php?basic_entity=DOCUMENT&list_ids=378> accessed 15 November 2007.

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vary considerably due to the difficulty in getting accurate data. The official 2002 census claimed that the population was 1,088,000, which she called a blatant falsification. She believed that the current population is now less than 800,000.⁵⁹

There was further disturbing information, from an independent source. As of 31 March 2005, a total of 32,446 internally displaced persons (IDPs) from Chechnya (7,227 families) were registered for assistance in Ingushetia in the database of the Danish Refugee Council (DRC). Of this total, 12,064 persons (2617 families) were in temporary settlements, and 20,382 persons (4610 families) in private accommodation.⁶⁰

Anna Neistat, the Director of the Moscow office of Human Rights Watch, estimated that between 3,000 and 5,000 civilians had disappeared over the previous five years.⁶¹ Official Russian estimates of 2000 for the same period, although more conservative, were still significant, she said. In the past, most abducted civilians were men between the ages of 18 and 40 and the abductions were usually carried out by Russian forces. That was changing: more women and elderly are being targeted. The 'Chechenization' of the conflict had transferred responsibility to the Chechen authorities and other Chechen groups that are pro-Moscow. With multiple groups involved in abductions, it was difficult to know where to inquire when a friend or relative disappears.

All participants were perturbed by the fact that the European Union, which had in previous years introduced a resolution on Chechnya at the Commission had declined to do so in 2005. Rachel Denber, acting executive director of Human Rights Watch's Europe and Central Asia Division said:

It is astounding that the European Union has decided to take no action on Chechnya at the Commission. To look the other way while crimes against humanity are being committed is unconscionable. Thousands of people have 'disappeared' in Chechnya since 1999, with the full knowledge of the Russian authorities. Witnesses now tell us that the atmosphere of utter arbitrariness and intimidation is 'worse than a war.'⁶²

Human Rights Watch had also published a 57-page briefing paper which documented several dozen new cases of 'disappearances' based on their research mission to Chechnya.⁶³

Many participants were frustrated by the apparent lack of interest by the international community. Tatyana Lokshina, founder of the Demos human rights information service, the best of its kind in Russia⁶⁴, accused organisations like the United Nations, the Commission on Human Rights and the Organization for

⁵⁹ *Ibid*, presentation by Libkan Bazaeva.

⁶⁰ Information from Reliefweb <<http://www.reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6BLKXS?OpenDocument>> accessed 15 November 2007.

⁶¹ Record of the Parallel Session, n 58, presentation by Anna Neistat.

⁶² *Ibid*, presentation by Rachel Denber.

⁶³ Human Rights Watch, 'Worse than a War: "Disappearances" in Chechnya—a Crime Against Humanity' (Briefing Paper) (March 2005) <<http://hrw.org/english/docs/2005/03/21/russia10342.htm>> accessed 15 November 2007.

⁶⁴ See <www.demoscenter.ru>.

Security and Cooperation in Europe (OSCE) of not taking adequate measures. Particularly disappointing was the absence of any resolution at the Commission in 2005 condemning human rights abuses in Chechnya, although in her view the absence did not come as a total surprise. The last resolution was tabled in 2001, before 9/11. Since then, Russia has been seen as a valuable partner in the war on terror. Therefore major players were looking the other way, and allowing Russia to claim that Chechnya was an internal matter, or that it was also another front in the war on terror.⁶⁵

Action of a different kind was, however, being taken at that time, with significant results later in 2005. Both Libkan Bazayeva and Tatyana Lokshina were part of it.

v. Making Use of the Council of Europe's Mechanism for Protection of Human Rights

In early 2000 the author began to work with the Human Rights Centre of the leading Russian human rights NGO *Memorial*, preparing applications for the European Court of Human Rights (ECtHR) at Strasbourg. Russia had ratified the ECHR in 1998. One of the first applicants was Libkan Bazayeva. Her case is described below. In March 2001 the author applied for a grant from the European Commission's European Human Rights and Democracy Initiative to provide resources and support for the Strasbourg applications. In December 2002 a new litigation project, the European Human Rights Advocacy Centre (EHRAC), was founded with a grant of €1 million from the EC. It works in partnership with *Memorial*, and with the Bar Human Rights Committee of England and Wales. The author is Chair of its International Steering Group, and Tatyana Lokshina is one of its members.⁶⁶ EHRAC is now assisting more than 100 Russian applicants, about half of them Chechen, before the Strasbourg Court; as well as conducting cases against Azerbaijan, Georgia, and Latvia. The project employs nine lawyers and support staff in Russia,⁶⁷ including the Vice-Chair of the Steering Group, the Chechen lawyer Dokka Itslaev, who works with extraordinary courage from the Chechen town of Urus Martan.

On 24 February 2005 the First Section of the European Court of Human Rights delivered three resounding judgments in the first six cases to be brought against the Russian Federation in relation to the current conflict in Chechnya. On 6 July

⁶⁵ Record of the Parallel Session, n 58, presentation by Tatyana Lokshina.

⁶⁶ See, for full details, Bulletins, and case information <<http://www.londonmet.ac.uk/ehrac>; and the Russian site <http://www.ehracmos.memo.ru>> accessed 15 November 2007.

⁶⁷ As well as four staff in London, including the Director, Philip Leach, author of *Taking a Case to the European Court of Human Rights* (Oxford, Oxford University Press, 2nd edn, 2006).

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2005 the Court rejected Russia's application to the Grand Chamber, and the judgments became final.⁶⁸

These applications were lodged at the Court in early 2000, and communicated to the Russian government in April 2000. They were given 'fast track' status, but nonetheless it was six years before judgments became final.⁶⁹ This was not perhaps so surprising given the extraordinary load which Russian membership has now placed on the ECHR system.⁷⁰

All three of the judgments in the first six Chechen cases concern the deaths of the children and other relatives of the six applicants as a result of Russian military action at the end of 1999 and the beginning of 2000. The applicants argued that the Russian government had violated their rights under Article 2 (the Right to Life), Article 3 (the Prohibition on Torture) and Article 13 (the Right to an Effective Remedy) of the ECHR.

vi. The Bombing of the Refugee Column

The first case⁷¹ concerned three Chechen women, Medka Isayeva, Zina Yusupova and Libkan Bazayeva—mentioned above—who were victims of the bombing by the Russian air force of the 1000-vehicle civilian convoy which had been given permission by the Russians to leave Grozny by a 'humanitarian corridor' on 29 October 1999. The Russian government did not dispute that its aircraft bombed and killed the applicants' children and relatives, but argued that its use of force was justified as 'absolutely necessary in defence of any person from unlawful violence' under paragraph 2(a) of Article 2. The Court doubted whether there was such 'defence', in the absence of any corroborated evidence that any unlawful violence was threatened or likely. The Court found that the applicants' right to life

⁶⁸ See B Bowring, 'Chechnya Justice' (December 2005) *Counsel* 65–7.

⁶⁹ A six-year delay would in any domestic legal system constitute a violation of the Art 6 right to a judicial decision within a reasonable period. This is completely inexcusable in the context of the facts of the cases.

⁷⁰ On 21 April 2005 Anatolii Kovler, the Russian judge on the European Court of Human Rights, told a conference in Yekaterinburg that more than 22,000 Russian citizens have sent applications to the Court. This figure is now much larger (see <www.rferl.org/newsline/2005/04/1-RUS/rus-210405.asp>). According to the Court's Survey of Activities for 2004 (see <[http://www.echr.coe.int/Eng/EDocs/2004SURVEY\(COURT\).pdf](http://www.echr.coe.int/Eng/EDocs/2004SURVEY(COURT).pdf)>), just 13 judgments were delivered against Russia in 2004, and while 6691 applications were lodged, 374 were declared inadmissible, 232 were referred to the Government, and 64 were declared admissible. Statistics published on 25 January 2005 showed that the Court delivered 718 judgments in 2004, of which 588 gave rise to a finding of at least one violation of the Convention. The Court also declared inadmissible a total of 20,348 applications. The number of cases terminated increased by around 17.5% compared with 2003. In addition, it was estimated that the annual number of applications lodged with the Court rose to about 45,000 in 2004, an increase of approximately 16%. It is known that about 96% of all applications are declared inadmissible; this percentage rises to 99% in the case of Russia.

⁷¹ *Isayeva, Yusupova and Bazayeva v Russia*, (App nos 57947/00, 57948/00 and 57949/00).

had been violated since, even if the Russian military were pursuing a legitimate aim in launching at least a dozen powerful S-24 missiles, the operation had not been planned and executed with the requisite care for the lives of the civilian population.

Furthermore, the Court held that the Russian authorities should have been aware that they had announced a humanitarian corridor, and of the presence of civilians in the area. Consequently they should have been alerted to the need for extreme caution regarding the use of lethal force. The pilots' testimony, that they attacked two isolated trucks, did not explain the number of casualties and was inconsistent. The attack took place over a period of up to four hours and was not a single attack. The weapons used were extremely powerful in relation to whatever aims the military were seeking to achieve.

It is notable that the Russian judge, Anatoly Kovler, voted with the rest of the Court in these three cases. There was no dissent.

vii. The Massacre in a Grozny District

In the case of Magomed Khashiyev and Roza Akayeva⁷² the applicants' relatives were killed in disputed circumstances, while the Russian forces were in control of the Staropromyslovskiy district of Grozny, in which the applicants resided. At the end of January 2000 the applicants, who had fled, learned that their relatives had been killed. The bodies of the deceased showed signs that they had been killed by gunshots and stabbing.

The Court found that where such deaths lie wholly or mainly within the exclusive knowledge of the authorities, just as in the case of persons in detention, strong presumptions of fact will arise in respect of injuries and deaths occurring. The burden of proof is on the authorities to provide a satisfactory and convincing explanation. Despite its strongly worded request, the Court never received the full case files and no explanation was ever provided. The Court found that it could draw consequential inferences.

Although the government never concluded an investigation and those responsible were never identified, in fact the only version of events ever considered by the Russian investigators was that put forward by the applicants. The documents in the investigation file repeatedly referred to the killings as having been committed by military servicemen. The court concluded that, on the basis of the material in its possession, it was established that the victims had been killed by the Russian military. No ground of justification had been relied on by the government and accordingly there had been a violation of Article 2.

⁷² *Khashiev and Akayeva v Russia* (App nos 57942/00 and 57945/00).

viii. The Bombing of a Chechen Village

The case of *Zara Isayeva*⁷³ concerned the indiscriminate bombing of the village of Katyr-Yurt on 4 February 2000. The Russian government did not dispute that the applicant and her relatives were bombed as they tried to leave their village through what they perceived as a safe exit. It was established that a bomb dropped from a Russian plane exploded near the applicant's minivan, killing the applicant's son and three nieces. The government again argued that the case fell within Article 2, paragraph 2(a). The Court accepted that the situation in Chechnya at the relevant time called for exceptional measures. However, the court noted that it was hampered in that no evidence had been produced by the government to explain what was done to assess and prevent possible harm to civilians in Katyr-Yurt. There was substantial evidence to suggest that the Russian military expected, and might even have incited, the arrival of a group of armed insurgents in Katyr-Yurt.

The Court held that nothing was done to warn the villagers of the possibility of the arrival of armed insurgents and the danger to which they were exposed. The Russian military action against the insurgents was not spontaneous but had been planned some time in advance. The Russian military should have considered the consequences of dropping powerful bombs in a populated area. There was no evidence that during the planning stage of the operation any calculations were made about the evacuation of civilians. The use of FAB-250 and FAB-500 bombs in a populated area, without the prior evacuation of civilians is impossible to reconcile with the degree of caution expected from a law enforcement body in a democratic society.

ix. No Effective Remedy in Russia

In all three cases the Court found that the Russian government had violated the applicants' rights under Article 13 (the right to an effective remedy). In cases, such as these, where there were clearly arguable violations of the applicants' rights under Article 2 and Article 3, the applicants were entitled to 'effective and practical remedies capable of leading to the identification and punishment of those responsible'. The criminal investigations into the suspicious deaths of the applicants' relatives had lacked 'sufficient objectivity and thoroughness'. Any other remedies, including civil remedies suggested by the government, were consequently undermined and the government had failed in its obligations under Article 13.

Each of these cases was a microcosm of the large-scale violations of human rights committed by Russia in Chechnya. In each case the EHRAC lawyers argued that the use of force by the Russian government was disproportionate, and that

⁷³ *Isayeva v Russia* (App no 57950/00).

there were no effective domestic remedies that the applicants could have pursued. Their arguments were founded exclusively on the principles of European Human Rights Law.⁷⁴

B. How the Chechen Cases Highlighted the Tension between IHR and IHL

One striking difference between IHL and IHR which, for some reason, is not the subject of comment in the scholarly literature on the tension between them which I now review, is that while IHL deals with the personal responsibility and criminal liability—under domestic and international law—of military commanders and politicians, IHR is exclusively concerned with state responsibility.

That is, while the victims of violations of the laws of war, grave breaches of the Geneva Conventions—the relevant part of IHL for the purposes of my argument—may be individuals or groups, only individuals may be prosecuted and punished. In this regard, IHL is unique in international law, of which states are traditionally the only subjects. It may be asserted that while IHR is characterised by methodological individualism in that its subjects, even for minority rights law, are individuals, or the persons who make up relevant groups, it is rigorously collectivist when it comes to its objects. Whatever the post-modernist or ‘globalisation’ arguments as to the weakening or disappearance of the state, the state must in every case answer to allegations of violations of IHR. This vitally important distinction, I would suggest, is the source of the many radical differences between IHL and IHR, manifested first of all in the many differences of terminology.

As I noted above, William Abresch has analysed the implications of the Chechen judgments for the relationship between IHL and IHR.⁷⁵ As he points out, the generally accepted doctrine has been that in situations of armed conflict, humanitarian law serves as *lex specialis* to human rights law. He does not notice, apparently, that the consequences of the application of one regime or the other would be quite different.

This doctrine is apparently supported by the International Court of Justice in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁷⁶ The Court stated that it

observes that the protection of the International Covenant on Civil and Political Rights (ICCPR) does not cease in time of war ... In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely,

⁷⁴ These were the first six cases—the Russian counterpart of *Akdivar and others v Turkey* (App no 21893/93, Decision of 19 October 1994), in view of the importance of these decisions as test cases—and there are many more. The Court’s judgments provide a firm foundation for the work of EHRAC and others in enabling victims of gross violations of human rights to obtain an authoritative finding as to what befell them and their families, and to secure reparation.

⁷⁵ Abresch, n 38.

⁷⁶ Advisory Opinion 8 July 1996, *ICJ Reports* 1996.

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the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life ... is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁷⁷

What is the meaning of the Latin maxim *lex specialis derogat lex generali*? In his paper analysing the ‘fragmentation’ of international law Martti Koskenniemi pointed out that the rule described by this maxim is usually considered as a conflict rule, where a particular rule is considered to be an exception to rather than an application of a general rule.⁷⁸ The point of the maxim is to indicate which rule should be applied. The other way in which such conflicts are dealt with, he continues, is through the ‘doctrine of self-contained regimes’.⁷⁹ The latter is the situation in which a set of primary rules relating to a particular subject-matter is connected with a special set of secondary rules that claim priority to the secondary rules provided by general law.⁸⁰ He gives as an example the fact that human rights law contains well-developed systems of reporting and individual complaints that claim priority to general rules of state responsibility.⁸¹ For Koskenniemi, the rationale for the rule is that the *lex specialis* takes better account of the subject-matter to which it relates.

Nevertheless, he insists that ‘[a]ll rules of international law are applicable against the background of more or less visible principles of general international law’.⁸² These include ‘sovereignty’, ‘non-intervention’, ‘self-determination’, ‘sovereign equality’, ‘non-use of force’, the prohibition of genocide. The reader will recall my argument that the third of these, now recognised as part of *jus cogens*, acquired the status of such a principle, of a right in international law, as a consequence of the decolonisation struggles, of the national liberation movements. Thus, I have no argument with Koskenniemi’s general statement. I maintain, however, that IHL and IHR inhabit quite different moral universes; IHL was historically and remains a limitation on the use of lethal force, irrespective of the legality of the use of force. I cannot agree with Hampson that ‘the ultimate object of the two regimes is broadly similar, but they seek to attain that object in radically different ways’, although she accurately distinguishes the vitally important differences of result.⁸³

⁷⁷ Advisory Opinion, para 24–5; see also ICJ *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras 102, 105.

⁷⁸ M Koskenniemi, ‘Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of “self-contained regimes”’: An outline’, prepared for the Study Group on Fragmentation of International Law of the International Law Commission, at <http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf> 4; and M Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission* (Helsinki, The Erik Castrén Institute Research Reports, 2007).

⁷⁹ Koskenniemi, n 78, at 4.

⁸⁰ *Ibid*, at 8.

⁸¹ *Ibid*, at 10.

⁸² *Ibid*, at 7.

⁸³ Hampson and Salama, n 4, at 13.

Noam Lubell notices that IHL and IHR appear to be quite different languages: teaching IHL to human rights professionals or discussing human rights law to military personnel can seem like speaking Dutch to the Chinese or vice versa.⁸⁴ But he seems not to notice either that individuals or groups will rarely make claims under IHL; it is not that kind of procedure. But they are drawn, despite all the limitations, to seek to make use of human rights mechanisms.

However, Abresch is interested in which rules are being and will be followed in the European Court of Human Rights, which now, in his view, applies the doctrines it has developed on the use of force in law enforcement operations to high intensity conflicts involving large numbers of insurgents, artillery, and aerial bombardment.⁸⁵ He remarks that for IHL lawyers the law of international armed conflict would be the ideal for internal armed conflict. He calls this an 'internationalizing trajectory'.⁸⁶ However, the Strasbourg Court has broken from such a trajectory, in order to derive its own rules from the 'right to life' enshrined in Article 2 of the ECHR. Abresch's optimistic prognosis is that:

given the resistance that states have shown to applying humanitarian law to internal armed conflicts, the ECtHR's adaptation of human rights law to this end may prove to be the most promising base for the international community to supervise and respond to violent interactions between the state and its citizens.⁸⁷

This assessment differs sharply from that of Hampson, who clearly considers that the Strasbourg Court should take IHL into account, and believes that despite the fact that the Court has never referred to the applicability of IHL, 'there is an awareness of the type of analysis that would be conducted under IHL'.⁸⁸ In this she follows the 'classical' model of Doswald-Beck and Vité, who considered that 'the obvious advantages of human rights bodies using [IHL] is that [IHL] will become increasingly known to decision-makers and the public, who, it is hoped, will exert increasing pressure to obtain respect for it'.⁸⁹ Similarly, Reidy considered that in the Turkish cases the Strasbourg Court was 'borrowing language from [IHL] when analysing the scope of human rights obligations. Such willingness to use humanitarian law concepts is encouraging'.⁹⁰ She too saw this development as 'certainly welcome in so far as it contributes to a stronger framework for the protection of rights'.⁹¹

Using the Chechen cases in which I participated as the centre-piece, I have sought to show that the European Court of Human Rights, despite the first generation limitations of the instrument it interprets and enforces, has been obliged to

⁸⁴ Lubell, n 4, at 744.

⁸⁵ Abresch, n 38, at 742.

⁸⁶ *Ibid*, at 742.

⁸⁷ *Ibid*, at 743.

⁸⁸ Hampson and Salama, n 4, at 18; see also Heintze (2004).

⁸⁹ Doswald-Beck and Vité, n 37, at 108.

⁹⁰ A Reidy, 'The approach of the European Commission and Court of Human Rights to international humanitarian law' (1998) *International Review of the Red Cross* 513, 521.

⁹¹ *Ibid*, at 521.

respond to circumstances in which applicants, representing themselves and groups of which they are part, have brought renewed symbolic and material content to human rights. I have insisted that IHL and IHR do indeed speak quite different languages, for reasons that are entirely obvious. IHL itself has been obliged to respond to the anti-colonial struggles and use of force by national liberation movements in the post-Second World War period, but is extremely unlikely to find application in the strictly internal context of Northern Ireland, South-Eastern Turkey or Chechnya. In this regard, the Balkan conflicts are an exception, since the ICTY was able to treat them as international conflicts.

IV. The Problem of Gross and Systematic Violations

The final question concerns the scale of the potential violations committed by the United Kingdom in Iraq. Does the ECHR system have the capacity to deal with gross and systematic contraventions of human rights standards?

The first four decades of the work of the European Court of Human Rights, in the context of the member states of Western Europe, were for the most part concerned with mistaken or negligent government behaviour, even in the case of Northern Ireland. The conflict in Northern Ireland, including heinous acts of terrorism (rightly called by that name) by the IRA on the UK 'mainland', was always a conflict of relatively low intensity,⁹² and the UK was clearly taking considerable trouble to combat terrorism and protect the lives and security of ordinary members of society without violating human rights. This, it is asserted, was not the case in Iraq. In my view, British actions in Iraq have considerably more in common with the campaigns conducted by Turkey against the Kurds, and Russia against the Chechens. What these two conflicts did not have in common with the UK in Iraq is that both took place within the territory of the state concerned. I have explored above the issue of extra-territoriality.

The focus of this section is, therefore, 'systematic' violations, or, rather, 'gross and systematic violations', as they are described in Menno Kamminga's 1994 article⁹³ to which I return below.

'Gross and systematic violations' should be distinguished from 'systemic' violations, which have been analysed by Philip Leach in the context of the recent practice of the European Court of Human Rights.⁹⁴ These are the 'clone' cases, the 'repeat offenders' which the Protocol 14 reforms to the European Convention on Human Rights are intended, in part, to address. In their Resolution of May

⁹² See F Kitson, *Low intensity operations: subversion, insurgency, peacekeeping* (Harrisburg PA, Stackpole Books, 1971).

⁹³ M Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' (1994) 12 *Netherlands Quarterly of Human Rights* 153.

⁹⁴ Leach, n 4.

2004 the Council of Europe's Committee of Ministers urged the European Court of Human Rights to take further steps to assist states by identifying underlying problems—'as far as possible to identify ... what it considers to be an underlying systemic problem'.⁹⁵

The issue of gross and widespread violations has been brought to a head by the conflict in Chechnya, and will without doubt rear its head in relation to Iraq, especially when cases like *Al-Skeini* find their way to Strasbourg; although it was noticed in the scholarly literature as a result of the cases decided by the Strasbourg Court from the early 1990s against Turkey.

It goes without saying that only a minimal range of—almost exclusively civil and political—rights are protected by the ECHR. And although both groups and individuals (as well as legal persons) may apply to the ECtHR, the Court has proved itself incapable of responding adequately to the claims made on it. This became starkly apparent in the 1990s, in relation to the Turkish Kurdish cases.

A. The Strasbourg Court's Inherent Weakness in Dealing with Gross Violations

The Kurdish cases exemplify the Strasbourg Court's difficulty in engaging with circumstances of generalised armed conflict. During the early 1990s the conflict between the Turkish government and the Kurdish Workers Party (PKK) reached new levels of intensity. The government declared a state of emergency in South Eastern Turkey, in the course of which, in order to deny bases and territorial support to the PKK, state forces destroyed thousands of villages, and three and a half million rural Kurdish inhabitants became refugees in their own country. In 1993, the London-based *Kurdish Human Rights Project* (KHRP)⁹⁶ began sending an impressive series of test cases to Strasbourg. The most important of these, the basis for many of the later victories, *Akdivar and Others v Turkey*,⁹⁷ was decided in 1994.

The problem inherent in bringing such cases was identified early on. In 1994, Professor Menno Kamminga warned that '[d]uring the past four decades, the Convention's supervisory system has generally responded disappointingly to gross and systematic violations of human rights'.⁹⁸ He pointed out that '[t]he problem with gross and systematic violations is not so much that they are more complicated from a legal point of view. Rather, the problem is that their consideration tends to give rise to less cooperation from the offending state. This makes it more difficult to establish the facts'.⁹⁹

⁹⁵ Council of Europe, Committee of Ministers Resolution Res (2004) 3 (12 May 2004).

⁹⁶ Founded by Professors Kevin Boyle and Françoise Hampson of Essex University.

⁹⁷ *Akdivar and Others v Turkey* (App no 21893/93) Decision of 19 October 1994.

⁹⁸ Kamminga, n 93, at 153.

⁹⁹ *Ibid.*, at 161.

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He foresaw that as a result of Protocol 11, which stipulated that inter-state applications go straight to the Grand Chamber, states might be even more reluctant than in the past to resort to the procedure. He therefore recommended reforms which would enable the Court to consider situations of gross and systematic violations of human rights *proprio moto*, that is, on information supplied by NGOs.

In 1997, Aisling Reidy, Françoise Hampson and Kevin Boyle, all three of whom represented Kurdish clients through KHRP, published what was in effect a follow-up to Kamminga's article.¹⁰⁰ They correctly pointed out that '[a] pattern of systematic and gross violation of human rights does not occur in a vacuum, or as a result simply of negligence or default on the part of governmental authorities. Rather such a pattern requires the sanction of the state at some level'.¹⁰¹ They posed the question which haunts EHRAC and its Chechen cases as well: 'one can question whether the use of an individual petition mechanism is suited to addressing the nature of complaints arising out of such a conflict'.¹⁰²

Their answer was that recourse to international legal procedure can influence a political situation. They listed the 'fruits' of engaging legal proceedings: a determination of facts which are disputed or denied by the perpetrators; an objective assessment of the accountability of the perpetrators of the violations; the establishment of recommendations or steps (enforceable or otherwise) to be taken to remedy the situation; the determination of the legal standards being violated and therefore the identification of the standards of behaviour which a political resolution will be required to incorporate; the creation of an effective tool for political leverage; the prevention of the continuation of the scale of abuses as a result of the public and authoritative exposure of the situation:

They argued that

[b]y using legal methods to investigate a situation of gross violation the perpetrators' ability to act with impunity can be limited. Those in authority can be exposed and held accountable for their actions and hindered in their ability to continue such practices.¹⁰³

They recognised of course that the extent of any impact would depend on the effectiveness of the legal norms and mechanisms engaged.

All of these considerations have of course informed the strategy of the partnership of EHRAC and *Memorial*. It was plain that the Chechen applicants in the first six cases were not interested in money, especially since the cases take so long. These extraordinarily courageous applicants were primarily interested in obtaining, from the highest court in Europe, an authoritative account of the events through which they lived (and their families died), and recognition of the gross violations they had suffered. In addition, they wanted to lay the basis for the prosecution of the

¹⁰⁰ A Reidy, F Hampson and K Boyle, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey' (1997) 15 *Netherlands Quarterly of Human Rights* 161.

¹⁰¹ *Ibid.*, at 162.

¹⁰² *Ibid.*, at 162.

¹⁰³ *Ibid.*, at 163.

individuals responsible. In their application for individual and general measures in the enforcement proceedings currently before the Committee of Ministers, they insist that the Russian government should investigate with a view to the prosecution of Generals Shamanov and Nedobytko, in whose cases the Court's findings of fact amount to the circumstances of war crimes.

The three authors also highlighted the difficulties individual applicants faced in proving gross and systematic violations, especially where they claim that there is no domestic remedy, and that there has been no effective internal investigation. In many of the Turkish Kurdish cases the Commission (later, the Court) was obliged to carry out fact-finding in Turkey. In January 1997 Mrs Thune, a member of the Commission, reported that there had already been 27 fact-finding investigations, involving 12 members of the Commission, hearing 216 witnesses over 39 days (302 hours) of hearings, generating 6400 pages of transcripts.¹⁰⁴

Despite this extraordinary effort by the Commission and the Court, applicants found it impossible to establish an 'administrative practice' in which first, such violations frequently occur, and second, there is an absence of effective remedies, often coupled with impunity for offenders: a 'practice', in particular, of torture. This amounts to deliberate violation by the state, authorised at the highest levels, rather than mere inadvertence or a failure of discipline in an individual case.

It was the former European Commission of Human Rights which first coined the description 'administrative practice' during its deliberations at the admissibility stage; this became 'practice' at the merits stage. The Commission found the principle to be applicable in individual cases, for example in 1975 in *Donnelly & others v UK*.¹⁰⁵ The Court finally dealt with the issue at the merits stage in 1978 in the notorious inter-state case concerning violation of Article 3 of the ECHR, *Ireland v UK*.¹⁰⁶

However, in *Aksoy v Turkey*¹⁰⁷ neither the Commission nor the Court addressed the question of the practice of torture, which had been pleaded by the applicant, citing the lack of evidence produced by them, despite the fact that the reports of the UN Committee Against Torture and the European Committee for the Prevention of Torture were before it. Reidy, Hampson and Boyle ask:

How then can an applicant adduce the kind of evidence required to establish practice? ... a single applicant or group of applicants is put in a position of providing evidence they simply do not have the resources to deliver.¹⁰⁸

For obvious reasons, the issue of 'administrative practice' was raised by the individual applicants in many of the Kurdish cases from south-east Turkey. The

¹⁰⁴ Verbatim Record, Case of *Mentes and Others v Turkey* (App no 23186/94) European Court of Human Rights, 22 January 1997. The author took part in two fact-finding hearings in Ankara, in the cases of *Aktas v Turkey* (App no 24351/94, judgment of 24 April 2003) and *Ipek v Turkey* (App no 25760/94, judgment of 17 February 2004).

¹⁰⁵ *Donnelly and Others v UK* (App no 5577-5583/72) Admissibility Decision of 15 December 1975, 4 D&R 4.

¹⁰⁶ *Ireland v UK*, Series A, no 25. Judgment of 18 January 1978.

¹⁰⁷ *Aksoy v Turkey*, 100/1995/606/694, Judgment of 18 December 1996.

¹⁰⁸ Reidy *et al*, n 100, at 171.

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Commission never found it necessary to deal with the issue. As a result, in not one of the Turkish cases was there a finding of fact on the basis of which the Court could decide that there had indeed been an 'administrative practice'. This was despite the fact that in many of the decisions the Court found an absence of effective domestic remedies, thereby absolving the applicants from seeking to exhaust them, in circumstances that were tantamount to 'administrative practice', and otherwise inexplicable. 'Administrative practice' was also pleaded, using the same arguments, in the first six and subsequent Chechen cases, but has been similarly ignored by the Court.

In essence, applicants face the problem of persuading the Court that the government in question, Turkey or Russia, is guilty not only of individual violations, but also of 'administrative practice' as defined by the Court. Of course, the Court is reluctant to take such a bold step, since a finding of 'administrative practice' would amount to a finding that a state is deliberately violating human rights.

But then the evidence in the *Al-Skeini* case (and evidence adduced in the associated courts martial¹⁰⁹) tends to show that the decision to inflict such harsh treatment on Iraqi detainees, leading to the death of one of them, was taken at a much higher level than the soldiers who found themselves prosecuted.

In her Study for the Council of Europe on human rights protection during situations of armed conflict,¹¹⁰ Hampson also noted the fact that the former Commission had recognised that the issue of repeated violations, which could also properly be described as 'systemic' violations, raised distinct issues apart from, although linked to, 'administrative practice'. Among other things, the fact that repeated violations could only occur as a result of deliberate government policy meant that domestic remedies were necessarily ineffective.

It is highly likely that this will become an issue when Iraq cases against the UK begin to find their way to Strasbourg. I have already mentioned the sorry story of the courts martial following the murder of one Iraqi detainee and the systematic ill-treatment of others.

V. Conclusion

The Strasbourg Court is today in deep crisis, overwhelmed by the tidal wave of complaints coming from Russia.¹¹¹ Russia's refusal on 20 December 2006 to ratify

¹⁰⁹ See Leader: 'Army on trial' *Guardian* (London 15 March 2007) <<http://www.guardian.co.uk/Iraq/Story/0,,2034335,00.html>> accessed 15 November 2007.

¹¹⁰ F Hampson, 'Study on Human Rights Protection During Situations of Armed Conflict, Internal Disturbances and Tensions' Council of Europe, Steering Committee for Human Rights (CDDH), Committee of Experts for the Development of Human Rights (DH-DEV), DH-DEV(2002)001.

¹¹¹ Now some 25% of the Court's case-load, 19,000 in all in the past year. See also B Bowring, 'Russia in a Common European Legal Space. Developing effective remedies for the violations of rights by public bodies: compliance with the European Convention on Human Rights' in K Hober, (ed), *The Upsala Yearbook of East European Law 2004* (London, Wildy, Simmonds and Hill, 2005) 89–116.

Protocol 14 of the Convention,¹¹² on reform of the procedure of the Court, when every other Council of Europe member state has done so, appears to threaten the very future of the Court. The question posed by this chapter is whether the legitimacy of the Convention system is now in doubt. Will the Court have the capacity and intellectual resources to measure up to the challenge of cases relating to Iraq?

This chapter has answered with a qualified 'yes'.

First, the Court has now, despite a set-back in the *Bankovic* case, developed a strong line of cases showing quite clearly that a Member State can indeed be held responsible for violations of Convention rights committed outside its territory. This has now proved highly disagreeable for a number of states, especially those with a colonial past. There is an excellent recent example. On 11 January 2007 President Putin of Russia was asked by the former Constitutional Court judge and leading human rights promoter Tamara Morshchakova specifically about the refusal to ratify Protocol 14. Putin replied:

Unfortunately, our country is coming into collision with a politicisation of judicial decisions. We all know about the case of *Ilascu*, where the Russian Federation was accused of matters with which it has no connection whatsoever. This is a purely political decision, an undermining of trust in the judicial international system. And the deputies of the State Duma turned their attention also to that ...

We can expect similar protests in future from the United Kingdom.

Second, the Chechen cases discussed in detail above show that the Court will refrain from applying IHL to complaints by civilians of violations by members of armed forces committed in the context of armed conflict. IHL is predicated upon the existence of a state of war, in which casualties are inevitable, and it is to be expected that civilians will suffer. By applying to these cases the rich jurisprudence through which it explained and extended Article 2 (on the right to life), the Court has shown that states will be held to account under the very much more stringent standards according to which a state must show that it has taken every possible precaution to protect the lives and welfare of civilians.

Third, I have sought to answer the question whether the Court now shows itself to be paralysed in the face of gross and systematic violations of human rights, especially those committed in the context of armed conflict, of an internal or international nature. Again, the Chechen cases, despite the fact that decisions followed almost six years after the violations in question, show that the Court is capable of adjudicating in a decisive and creative manner.

Whether of course it will have the courage to do so in the case of the United Kingdom is an open question; but there are already a number of first-rate precedents.

¹¹² 'Duma "gives it" to the European Court' *Kommersant* (21 December 2006) <http://www.kommersant.com/p732043/r_500/State_Duma_European_Court> accessed 15 November 2007.

The Future for International Law after Iraq

SIR NIGEL RODLEY

I. Introduction

I am not a futurologist and tend to suffer from the traditional academic disease of scepticism, albeit tempered by the meliorative syndrome of optimism. The latter tendency is nourished by a (possibly insufficiently educated) expectation that the institutional normative and cultural advances of civilisation cannot be turned back, despite occasional attempts to do this, such as the rise and spread of fascism in mid-20th century Europe. This volume is concerned with significant attempts by major players on the world stage to re-write the international rule book. Like other authors, I shall look at some of these. My conclusion, however, is that any setbacks are limited and probably temporary. Because those same players have wilfully conflated Iraq and the atrocities of 11 September 2001 and the transnational terrorism they symbolised,¹ I shall not try too hard to exclude developments stemming from the counter-terrorism campaign, rather than the Iraq conflict strictly understood.

I shall consider primarily the law relating to the legality of states' resort to force beyond their frontiers (*jus ad bellum*). This will be followed by briefer sections on the legality of the methods of applying force in a conflict situation (*jus in bello*) and a section on the human rights issues at stake. The less well-travelled terrain of the power of the Security Council to override treaty commitments will be touched upon.

¹ See, eg, 'President Bush Outlines Iraqi Threat' (White House Press Release) (7 October 2002) <<http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html>>; 'Blair defends al-Qaeda claim' *BBC News* (5 February 2003) Politics <http://news.bbc.co.uk/1/hi/uk_politics/2728535.stm>; cf 'Leaked report rejects Iraqi al-Qaeda link' *BBC News* (5 February 2003) <<http://news.bbc.co.uk/1/hi/uk/2727471.stm>>.

II. Resort to Force (*Jus Ad Bellum*)

The first and most obvious challenge to international law is the decision by the US/UK-led Coalition to invade Saddam Hussein's Iraq. There are two main grounds on which the use of armed force across international frontiers may be justified: one is self-defence; the other is authorisation by the United Nations Security Council responding, under chapter VII of the Charter of the UN, either to an act of aggression or to a threat to, or breach of, international peace and security. A third—decidedly controversial—ground would be intervention (not authorised by the Security Council) to protect human rights.

It is necessary to bear well in mind that the only legal justification for invading Iraq given by the UK officially, and I do not believe plausible spokespersons for the US have argued otherwise,² is that the invasion was indeed authorised by the Security Council. The argument boiled down to a view that the last resolution on Iraq before the war (UN Security Council Resolution 1441),³ by finding a material breach of the cease-fire resolution (687),⁴ revived the original authority to use force under resolution 678.⁵ The fact that the Council expressed itself to be waiting for reports from the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) in the case of possible non-compliance by Iraq, that both these agencies had urged that they be allowed to complete their investigations, that the Council had decided to convene immediately should either of them report non-compliance, that several Council members had explicitly stated at the time of the adoption of Resolution 1441 that any use of force would require further authorisation, and that the Council remained seized of the matter, was seemingly of no account in the Coalition's determination that the use of force was permissible. Nor was the fact that the British Foreign and Commonwealth Office's legal stance was at odds with the view of the Attorney-General of the UK, that 'resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended'.⁶ Indeed, according to then State Department Legal Adviser, William Howard Taft IV, earlier texts circulated had envisaged that the language contemplating convening the Council had included the words 'in order to decide any measure to ensure full compliance with all of its resolutions'.⁷ The absence of such language, it was suggested, must be read as excluding the

² See Attorney-General's Written Answer (Hansard 17 March 2003) para 9. Full text of parliamentary written answer available at <http://news.bbc.co.uk/1/hi/uk_politics/2857347.stm> accessed 12 Dec 2007; for guidance on the US position see, WH Taft IV and TF Buchwald, 'Pre-emption, Iraq, and International Law' (2003) 97 *AJIL* 557; Taft, the then State Department Legal Adviser, although seeing the need for pre-emption as part of the context, concentrates on Security Council resolution as the principal pillar of the argument.

³ United Nations Security Council (UNSC) Res 1441 (8 November 2002) UN Doc S/RES/1441.

⁴ UNSC Res 687 (3 April 1991) UN Doc S/RES/687.

⁵ UNSC Res 678 (29 November 1990) UN Doc S/RES/678.

⁶ UK Attorney-General n 2, para 9.

⁷ Taft and Buchwald, n 2, at 562.

necessity for further decision.⁸ Of course, there may have been many reasons for the exclusion, such as the need to ratchet up the pressure on Saddam Hussein.

I suggest that a simple thought experiment would be sufficient to expose the flimsiness of the case. Imagine that France and Russia, possibly suspecting that intervention might result in greater access to Iraqi oil, and anyway concerned that an unstable Iraq could affect their security, had decided to use force, while the USA, the UK and their allies were trying to keep the diplomatic and inspections routes open. Would authoritative legal opinion in the USA and the UK (especially that of the politically appointed lawyerdom seen to have been in the driving seat) have found the argument, now used against their interests, to have any merit? My traditional scepticism leads me to think not. Indeed, I cannot help supposing that there would have been some robust questioning of the good faith of those making the argument. In brief, it seems clear to me that the use of force was not authorised, directly or indirectly, by Security Council Resolution 1441. Unless, therefore, it can be justified on some other ground, then the conclusion drawn by Elizabeth Wilmshurst in her letter of resignation from the FCO Legal Adviser's office, of which she had been Deputy Legal Adviser, is inescapable: 'an unlawful use of force on such a scale amounts to the crime of aggression'.⁹

Before considering possible other grounds, it is important to recall that Resolution 1441 was the only ground officially advanced to justify the action. Regarding the possible impact on international law, the official line is narrowly drawn. It is a question of the interpretation of a resolution. It is not in its terms an assertion of new doctrine. Some comfort may be drawn from this.

On the other hand, whatever canons of interpretation of Security Council resolutions may apply,¹⁰ it is likely that one consequence of the interpretative flexibility shown by the US/UK-led Coalition in this instance will be to cause greater difficulty in drafting resolutions in any future case where it is feared that a state might seek the cover of a Security Council resolution to justify a resort to armed force or other coercive action that some Council members would wish to avoid.

Indeed, the difficulties of agreeing a resolution in response to the 9 October 2006 nuclear test announced by the Democratic People's Republic of Korea (DPRK), eventually adopted on 14 October 2006, illustrates the point. The text of UN Security Council Resolution 1718 (2006), which condemns the nuclear test and imposes sanctions on DPRK, contains novel language. The invocation of chapter VII of the UN Charter in its tenth preambular paragraph is qualified by the phrase 'and taking measures under Article 41'. Since Article 41 refers to 'measures not involving the use of armed force', this was clearly designed

⁸ See Taft and Buchwald, n 2, at 562.

⁹ Letter of resignation of Elizabeth Wilmshurst (Minute to Michael Wood of 18 March 2003) available at <http://news.bbc.co.uk/1/hi/uk_politics/4377605.stm> accessed 12 Dec 2007.

¹⁰ See, eg, R Sonnenfeld, *Resolutions of the United Nations Security Council* (Dordrecht, Nijhoff, 1988) 127–9 which suggests a rather open-textured 'contextual' approach; E Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) 56 *ICLQ* 83 posits a 'collective will' or 'intersubjectivity' approach that does not sustain the UK/US interpretation.

to assuage the fears of some, notably China and Russia, that the USA, which proposed the text, might use the resolution to justify resort to force. Even this language, first proposed in an earlier draft, was not sufficient to allay those fears. The US sponsor had to add a further new paragraph with yet more novel language, in which the Council '[u]nderlines that further decisions will be required should additional means be necessary'. 'Additional means' refers to those measures involving armed force, establishing that a further Council decision would be required for coercive measures beyond the sanctions authorised by the resolution. Despite all of these caveats, there remained serious doubts about the provision in paragraph 8(f) for inspection of cargo to and from the DPRK. The fear was that such inspections could metamorphose into an embargo, technically provided for under Article 42, with all the consequent possibilities for increasing tension. This explains, perhaps, why, despite the fact that the paragraph not only authorises but 'calls on all member states' to take action including inspections, China announced continuing concerns about the risks of such measures.

Returning to the invasion of Iraq in 2003, it is noteworthy that the doctrine of self-defence was not invoked as an official justification for military intervention. Under the doctrine as widely understood, not least by the International Court of Justice,¹¹ the notion of self-defence arises only, in the words of Article 5 of the UN Charter, 'if an armed attack occurs'.¹² Clearly, the Saddam Hussein government had not initiated an armed attack against anyone since the catastrophic invasion of Kuwait 13 years earlier. However, the doctrine of pre-emptive self-defence, sustained traditionally by some scholars and a few governments, had just been resuscitated by the United States. In its 2002 National Security Strategy document, the White House reaffirmed the doctrine of pre-emptive self-defence in the context of its concern about 'rogue states' that would not hesitate to use or threaten the use of weapons of mass destruction against the United States. It did so in the following terms:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

There is no reference here to the UN Charter and the need for an armed attack in Article 51. Imminent danger of such attack was enough. Yet, apparently the doctrine still represented too much of a straitjacket for the United States. It was

¹¹ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.

¹² Art 51 provides: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'.

now necessary to 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries'.¹³

A similar message suggesting the need for a 'pre-emptive and not simply reactive response' to international crises was echoed by British Prime Minister Tony Blair in a 2006 policy speech on how the 'rule book of international politics has been torn up'.¹⁴ What is more, such a response would have to be 'on the basis of prediction not certainty'. Of course, the speech is a political contribution focused on politics, not law, but it does talk of intervention in a context that is explicitly inspired partly by the precedent of Kosovo. The same speech is also much concerned with the continuing conflict in Iraq, and there may have been an innuendo of pre-emptive justification for the Iraq intervention. In an earlier speech (5 March 2004) the Prime Minister had made clear that in the case of 'an imminent direct threat to Britain we would have taken action in September 2002; we would not have gone to the UN'.¹⁵

While the 2006 speech may represent a bid to untrammel the hands of governments feeling under threat, there is in the end no formal new legal doctrine being asserted here. This is fortunate, as this 'Blair doctrine' would not seem to stop even at the need for an imminent attack against the intervening country or any other country. It is particularly troubling that the revived doctrine of pre-emptive or anticipatory¹⁶ self-defence does not give thought to the consequences of a mistaken basis for the 'defensive' use of force, namely that no armed attack was in the offing after all. Given the acknowledged absence of weapons of mass destruction, whose existence had been the main underpinning of the political and legal justification of the attack on Iraq, the concern is hardly hypothetical even if self-defence as such was not the legal basis for the intervention. Ironically, if a ship of one state stops a ship of another state on the high seas on suspicion of being engaged in piracy, the slave trade or unauthorised broadcasting, or of not having a nationality, or flying a false flag ('right of visit'), and it turns out that the suspicion, however reasonable, was unfounded, then the intercepting state is

¹³ 'The National Security Strategy of the United States of America' (September 2002) 15, available at <<http://www.whitehouse.gov/nsc/nss.pdf>> accessed 12 Dec 2007. The US Strategy document describes among the characteristics of rogue states that of displaying 'no regard for international law' (14.) The 2006 Strategy document (available at <<http://www.whitehouse.gov/nsc/nss/2006/>> accessed 12 Dec 2007) reaffirms the notion of pre-emption, but, as laconically pointed out by JR Crook, '[t]he document does not contain the words "international law."': JR Crook, 'Contemporary Practice of the United States Relating to International Law' (2006) 100 *AJIL* 690, 691.

¹⁴ Prime Minister's foreign policy speech, of 26 May 2006, available at <<http://www.number10.gov.uk/output/Page9549.asp>> para 6 (accessed 12 Dec 2007).

¹⁵ Prime Minister's speech of 5 March 2004, available at <<http://www.number10.gov.uk/output/Page5461.asp>> accessed 12 Dec 2007.

¹⁶ Like Professor Franck, I use the terms interchangeably, on the understanding that each requires the threat of attack to be imminent. If the proposed intervention is merely preventive, then no interpretation of self-defence will justify action not authorised by the Security Council: TM Franck, 'Collective Security and Non-Aggression: the Contemporary State of the Law', 30th FA Mann lecture, 6 November 2006, Lincoln's Inn, London.

obliged to pay compensation.¹⁷ No such obligation seems to be acknowledged by those who seek a right to invade another state on the basis of similarly mistaken suspicion.

The final justification for the invasion would have been humanitarian intervention. The position of the UK was clear in this respect. As Mr Blair put it in his 5 March 2004 speech, 'however abhorrent and foul the regime ... regime change alone could not be, and was not, our justification for war'.¹⁸ This distancing from the rhetoric of US President George W Bush is salutary, but on the other hand, he was equally clear that humanitarian grounds could under some circumstances justify intervention and that the law should be less rigid. Thus, he reaffirmed the legitimacy of the response in Kosovo to a 'humanitarian catastrophe'. According to him, 'the notion of intervening on humanitarian grounds has been gaining currency'. Of course, to the extent that such intervention may be authorised by the UN Security Council, his prediction was realised with the acknowledgement in the 2005 World Summit Outcome that the Council could act under chapter VII of the UN Charter (restoring international peace and security) in response to genocide, ethnic cleansing, war crimes and crimes against humanity.¹⁹ Given that only five years earlier a similar summit baulked at this very notion,²⁰ there has now been a major development in the world's understanding of what constitutes threats to, or breaches of, international peace and security, since the acts in question may and, typically do, occur without trans-frontier consequences.²¹

However, the major controversy relates to intervention not authorised by the Security Council. Not content with taking for granted the legitimacy of the Kosovo intervention (by contrast with Iraq, this was 'not a hard decision for most people') and despite the continuing doubts among the majority of scholars, the Prime Minister went on to argue in March 2004:

It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe (though the 300,000 remains in mass graves already found in Iraq might be thought by some to be something of a catastrophe). This may be the law, but should it be?

¹⁷ UN Convention on the Law of the Sea (1982) art 110.

¹⁸ See n 15.

¹⁹ UNGA 2005 World Summit Outcome Document (15 September 2005) UN Doc A/60/L.1 para 139.

²⁰ UN Millennium Declaration, UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2; the silence was despite the urging of the Secretary-General for the Security Council to consider 'humanitarian intervention' as a 'last resort': K Annan, 'We the Peoples; The Role of the United Nations in the 21st Century' ch IV, 'Freedom from Fear', section on the 'Dilemma of Intervention'.

²¹ See, eg, NS Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: the Legal Framework', in Rodley (ed), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (London, Brassey's, 1992), also S Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, Oxford University Press, 2002).

So, even in the absence of such a humanitarian catastrophe, it is implied that brutal regimes ought to be able to be changed by force.²² It may be that this part of the speech was aiming at a more robust United Nations, since it went on to advocate 'reforming the United Nations so its Security Council represents 21st century reality'. If so, perhaps his thirst will have been quenched by the World Summit Outcome document. If, on the other hand, the implication is that, absent Security Council authorisation, freedom-loving, human-rights-respecting democracies can feel entitled to deploy armed force to liberate peoples from the yoke of regimes they consider brutal and oppressive, then there will be little left of the prohibition of the unilateral use of force that was the cornerstone of the United Nations. This is especially so if the democratic peace theory holds true.²³

III. International Law of Armed Conflict (*Jus In Bello*)

The 9/11 attacks and the Iraq conflict put adherence to the Geneva Conventions and customary international humanitarian law under severe strain. The United States Administration took the position that neither Al-Qaeda (and 'its affiliates and supporters'—a troublingly elastic category—anywhere in the world, including, of course, Iraq), nor the Taliban who had wielded power in Afghanistan, were protected by the Geneva Conventions.²⁴ They were not 'protected persons' under the Geneva Conventions either because they did not belong to a Contracting Party (Al-Qaeda) or because they did not comport themselves according to the international rules of armed conflict (Taliban and Al-Qaeda). Moreover, they were not protected by the bedrock rules, covering all those in the hands of a party to a conflict, of common Article 3 of the Conventions, applicable in non-international armed conflict, as this was an international armed conflict. The fact that those rules have been universally understood as reflecting customary international law was ignored, as was the argument that Article 75 of Additional Protocol I (to which

²² The language is reminiscent of Lord Palmerston's justification for non-forcible intervention to protect British nationals abroad: 'We shall be told, perhaps, ... that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives. ... We may be told this, but this is not my opinion, nor do I believe it is the opinion of any reasonable man' (HC Debs, 3rd Series, CXII, col 387; 6 BDIL 290; taken from DJ Harris, *Cases and Materials on International Law* (London, 4th edn, Sweet & Maxwell, 1991) 498.

²³ The democratic peace theory, holds that democracies never (or seldom) go to war; see, eg, J Bohman, 'Beyond the Democratic Peace: An Instrumental Justification of Transnational Democracy' (2006) 37 *Journal of Social Philosophy* 127. Amartya Sen also upholds the value of democracy in averting famine and other disasters: eg A Sen, 'Democracy as a Universal Value' (1999) *Journal of Democracy* 6.

²⁴ The Bybee Memorandum of 22 January 2002, 'Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees', in KJ Greenberg and JL Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge, Cambridge University Press, 2005) 81.

the USA was not a party) contained similar rules.²⁵ Presumably, this could be ignored because, while the Geneva Conventions were incorporated into US law²⁶ and their violation could therefore lead to criminal and other legal proceedings in US courts, customary international law provided no such right or cause of action. The Supreme Court in *Hamdan* brought the USA back into the legal community by asserting that, not only were common Article 3 and (in the view of a plurality of the bench) Additional Protocol I Article 75 customary international law, but that common Article 3 applied not just to internal conflicts but to any conflict that was not governed by the rules relating to international armed conflict.²⁷

Just as *Rasul*²⁸ and *Hamdi*²⁹ had pulled Guantánamo and other detainees out of the 'black hole' of US law, despite Administration arguments that *habeas corpus* did not apply outside the United States proper (eg to Guantánamo or to 'unlawful combatants' even in the United States) *Hamdi* rescued them at least temporarily from the 'black hole' of international law that the Administration had invented. The case may also have been instrumental in the Administration's decision to produce, if only to Guantánamo, the 14 'high-value' detainees that they had seen fit to subject to enforced disappearance³⁰ for up to three years. The fact that the Administration maintained its right to do the same again in appropriate circumstances takes little away from the retreat it now had to beat. It is also true that it was the judicial branch of the US government that was able to force the retreat, rather than the weight of legal, political and moral international opinion, although that opinion may well have affected the willingness of the Court to reach its decision.

Meanwhile, there have been some backward steps. Under strong pressure from the US Administration, in the lead-up to highly charged mid-term congressional elections, Congress agreed to legislation that purports to end *habeas corpus* for people detained in connection with the 'war on terror' (that is, the very recourse that led to the various Supreme Court decisions); to deny any legal remedy to

²⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, 1125 UNTS 3, reprinted in 16 ILM 1391.

²⁶ War Crimes Act of 1996, HR 3680 EH; Uniform Code of Military Justice, UCMJ, 64 Stat 109, 10 USC Ch 47.

²⁷ *Hamdan v Rumsfeld*, Supreme Court of the United States [2006] 126 US 2749.

²⁸ *Rasul v Bush*, Supreme Court of the United States [2004] 542 US 466.

²⁹ *Hamdi v Rumsfeld*, Supreme Court of the United States [2004] 542 US 507.

³⁰ On secret detention, see Human Rights Watch, 'Ghost Prisoner: Two Years in Secret CIA Detention' (Report) (February 2007) vol 19.1 at 31 <<http://hrw.org/reports/2007/us0207/us0207web.pdf>>; Art 7.2(i) of the Rome Statute of the International Criminal Court defines the 'enforced disappearance of persons' as meaning 'the arrest, detention or abduction of persons by, or with the authorization, support, or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time'; and the International Convention for the Protection of All Persons from Enforced Disappearance, (adopted, not yet entered into force), provides in Art 1.2 that 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance'.

victims of violations of the Geneva Conventions; to immunise prior violators; and to shackle the courts to a purely US interpretation of the Conventions. These restrictions were designed not so much to protect the military, the horror of professional military lawyers had contributed to the world's awareness of the legal jiggery-pokery that was being used to permit practices traditionally considered unlawful, as it was to protect non-military security and intelligence services which continued to engage in such practices. The military have, in fact, been brought back into the fold of relatively humanitarian-law-compliant behaviour.³¹ Whether an enemy holding a US military prisoner and considering how to treat him or her would distinguish between how the military behaves, as opposed to how the CIA does, is doubtful. On the other hand, it is also doubtful that the US Supreme Court will necessarily accept the restrictions or the Administration's reading of them.³²

IV. International Human Rights Law

Inevitably, in the light of post-9/11 counter-terrorist activity, as well as Iraq-centred counter-insurgency, both of which put a high premium on intelligence gathering, states have bridled under the restrictions imposed by various categories of human rights, especially the prohibition of arbitrary detention (the right to liberty and security of person), the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and the right to privacy.

The United States has reaffirmed its traditional view that the International Covenant on Civil and Political Rights does not apply outside the territory of states parties,³³ despite a long history of contrary interpretation by many states, by the Human Rights Committee³⁴ and by the International Court of Justice.³⁵ The USA appears to have been joined in this by the United Kingdom, which has also sought, with less textual justification, to take the same view of the European Convention on Human Rights.³⁶ However, for the moment the UK courts and the European Court of Human Rights seem set to continue to consider the ECHR applicable wherever the state party in question exercises 'effective control'.³⁷ Only the United States and

³¹ The US Detainee Treatment Act of 2005, HR 2863, restricts interrogation techniques to those authorised in the Army Field Manual.

³² On 12 June 2008, the Supreme Court in *Boumediene et al v Bush et al*, No 06-1195 (Slip Opinion) decided that the provisions of the Detainee Treatment Act and Military Commissions Act purporting to deprive detainees at Guantanamo access to habeas corpus was unconstitutional.

³³ Combined Second and Third Periodic Reports of the United States under the ICCPR, CCPR/C/USA/3 (2005) Annex 1.

³⁴ The practice preceded US ratification of the ICCPR.

³⁵ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] 4.3 ILM 1009 ('ICJ Wall Case').

³⁶ See, for instance, *Al-Skeini and Ors v Secretary of State for Defence* [2007] UKHL 26; see generally F Coomans and M Kamminga, *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2004).

³⁷ *Ibid.*

Israel seem to take the further view that human rights law does not apply in armed conflict situations.³⁸ This unsubstantial assertion is also at odds with a plethora of evidence including the case law of the International Court of Justice.³⁹

One aspect of this area of international law under which states have chafed is that prohibiting the return of people to countries where they face a real risk of being subjected to torture or other prohibited ill-treatment. The US system of 'extraordinary renditions' appears to fall foul of this prohibition. Nonetheless, the US strategy is to maintain that its only obligation in this field is under the UN Convention against Torture (UNCAT), which confines itself to prohibiting such transfers in the case of a risk of torture but not in the case of other prohibited ill-treatment. The US also points to its 'understanding' of Article 3 UNCAT, according to which the risk threshold has to be 'more likely than not'. It denies that it sends people back to such situations, if necessary by seeking (unspecified) satisfactory assurances of appropriate treatment.

The UK, by contrast, accepts the validity of the rule, as applied by the European Court of Human Rights in *Chahal v United Kingdom*,⁴⁰ that there can be no transfers to a situation where there is the risk of torture or other ill-treatment, even in cases involving threats to national security. Nor can such threats be taken to raise the threshold of risk. On the other hand, the UK is seeking a reconsideration of the rule in the European Court of Human Rights. In *Saadi v Italy* the Court resoundingly rebuffed this unfortunate strategem, vigorously reaffirming the rule of *Chahal*.⁴¹

The UK is also seeking to establish a system of obtaining satisfactory assurances (that returned persons would not be tortured or otherwise ill treated) that would consist of more than mere verbal expressions of commitment to comply with what is already an obligation of international law. The notion is that, by a combination of framework agreement and *ad hoc* arrangements on a case-by-case basis, measures of external monitoring and scrutiny would be put in place to remove the real risk of torture or ill-treatment. However, as suggested by the Human Rights Committee, the more systematic the practice of torture or ill-treatment, the less likely it will be that any measures of scrutiny will be sufficient to eliminate the risk.⁴² It would therefore be unthinkable that the UK

³⁸ See US periodic reports, n 33, at para 130.

³⁹ *ICJ Wall Case*, n 34, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ <<http://www.icj-cij.org>> accessed 12 Dec 2007 ('*ICJ Armed Activities*').

⁴⁰ *Chahal v United Kingdom* [1996] 23 EHRR 413.

⁴¹ *Saadi v Italy* Application No 37201/06, Grand Chamber Judgment, 28 February 2005.

⁴² Concluding observations of the Human Rights Committee: United States of America (15 Sep 2006) UN Doc CCPR/C/USA/CO/3, para 16; the UN High Commissioner for Human Rights, the current UN Special Rapporteur on Torture and major NGOs would go further, ruling out the acceptability of assurances in any situation in which it might be thought they would be needed; 'Press Conference on Torture by High Commissioner for Human Rights' (7 December 2005) <http://www.un.org/News/briefings/docs/2005/051207_Arbour.doc.htm>; 'Press Conference by Special Rapporteur on Torture' (26 October 2005) <http://www.un.org/News/briefings/docs/2005/051026_Torture_PC.doc.htm>; Human Rights Watch, 'Still at Risk: Diplomatic Assurances No Safeguard Against Torture' (Report) (April 2005) Vol 17.3 <<http://hrw.org/reports/2005/eca0405/>>, all accessed 12 December 2007.

might negotiate an agreement of this sort with a country such as Egypt, where resort to torture, especially in security cases, is as systematic as anywhere on the globe and where, moreover, previous (inadequately monitored) assurances given to Sweden seem to have been ignored.⁴³

A related issue has been the matter of the admissibility, in deportation proceedings concerning suspected terrorists, of evidence that may have been obtained by torture abroad. The UK Home Office claimed a right to be able to use any evidence, however obtained, but the House of Lords ruled against this view, relying on the Human Rights Act, UNCAT and British constitutional principles. Nevertheless, a majority of the panel was unwilling to impose on the government the burden of proving that the evidence in question was not obtained by the prohibited means, even if it did not require the subject of the proceedings to prove that it was so obtained.⁴⁴

The UK became restive under the inhibitions of the ECHR as understood by the UK courts in application of the Human Rights Act 1998 (HRA). This was partly due to the issues just mentioned, partly to other issues, especially *A and Ors v Secretary of State for the Home Department* which ruled that prolonged administrative internment of the very people it wanted to send abroad, but could not precisely because of fears about their treatment, was incompatible with the ECHR.⁴⁵ Accordingly, two studies were undertaken to consider the possibility of amending the HRA, one by the Home Office, one by the Department of Constitutional Affairs.⁴⁶ Both reviews concluded that amendment was not to be recommended.⁴⁷ The problem, seemingly, was the judges' interpretation of the law, not the law itself. Politicians usually handle this problem by changing the law. However, the ECHR was not for changing, denunciation was politically unthinkable and, whatever restrictions could be imposed on British judges, they could not bring the judges of the European Court of Human Rights into line once cases from the British courts were reviewed there.

So far, we have been addressing the issue of ill-treatment that may be or has been inflicted by others outside the jurisdiction where the persons are detained. In the United States there has been a move, as already noted in the section on

⁴³ *Agiza v Sweden*, Decision of the UN Committee Against Torture [24 May 2005] Communication No 233/2003; *Al-Zery v Sweden*, Decision of the UN Human Rights Committee [10 November 2006] Communication No 1416/2005.

⁴⁴ *A and others v Secretary of State for the Home Department* [2005] UKHL 71.

⁴⁵ *Ibid.*

⁴⁶ *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, July 2006; see also 'The Human Rights Act: the DCA and Home Office Reviews: Government Response to the Joint Committee on Human Rights' Thirty-second Report of Session 2005-06' (January 2007) <http://www.dca.gov.uk/publications/reports_reviews/human_rights_act_reviews.pdf> accessed 12 December 2007.

⁴⁷ See 'The Human Rights Act: the DCA and Home Office Reviews: Government Response to the Joint Committee on Human Rights' Thirty-second Report of Session 2005-06' (January 2007) <http://www.dca.gov.uk/publications/reports_reviews/human_rights_act_reviews.pdf> accessed 12 December 2007.

humanitarian law, to find ways of engaging in 'coercive' interrogation. Since the only treaty obligations that the US acknowledges as applying in respect of extra-territorial acts are those contained in UNCAT, the strategy has been to interpret the definition of torture to exclude, in its opinion, anything that the USA has done (including 'water-boarding', or mock drowning) that all international authorities have no difficulty in considering as torture. It has also defined other 'cruel, inhuman or degrading treatment' in terms of its own constitutional standards under the Fifth, Eighth and Fourteenth Amendments, but not those of the more generously interpreted Fourth Amendment.⁴⁸ In any event, the UNCAT provisions on cruel, inhuman or degrading treatment do not give rise to criminal liability in US law, so the perpetrators could be held immune from liability for such treatment not amounting to torture.

On occasion, states invoke their obligations under the UN Charter to give effect to Security Council resolutions as a justification for possible non-compliance with their human rights obligations. In particular they cite Article 103, which requires Member States to accept that their Charter obligations trump their obligations under any other international agreement.⁴⁹ The UK and the EU courts seem to have taken the view that the effect of this article, read together with Article 25 (obligation to carry out the decisions of the Council) is to permit Security Council decisions to override all states' human rights obligations, whether in an international agreement or otherwise, except perhaps their *jus cogens* obligations.⁵⁰ In other words, the 15 members of the Security Council or indeed any nine of them, as long as no permanent member dissents, can throw out all the political, constitutional and rule of law underpinnings of all states, established after however many decades or centuries of struggle. This can apparently be done by the executive branch of government exercising a vote on a text whose language may have been hastily concocted and negotiated (in secret) without any domestic or international accountability. This bootstrap, or rather gimcrack, argument manages blithely to ignore the fact that the Council itself is obliged by Article 24 to act in accordance with the purposes and principles of the UN, including the purpose of promoting respect for human rights and fundamental freedoms.

So far, the courts have not had the nerve to resist this theory, even if it could put them all out of business. Perhaps, their timidity in an area in which they have previously shown vigour and courage is attributable to the narrow problems they have been called upon to adjudicate, problems in which the executive actions in question, based on Security Council resolutions, have been manifestly reasonable

⁴⁸ Second United States Periodic Report under UN CAT, CAT/C/48/Add.3/Rev.1 (2006) para 21.

⁴⁹ Art 103 of the UN Charter provides that in 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'.

⁵⁰ *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Court of First Instance (Judgment) (21 September 2005), and *The Queen (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

to the point of being dictated by necessity.⁵¹ It is nevertheless urgent for the courts to narrow the legal basis on which they made their decisions in such cases, otherwise a world constitutional coup could be in the offing.

V. Conclusion

Despite sustained assaults on basic principles of relatively settled international law—an achievement of the last half or so of the 20th century—it may cautiously be hazarded that the worst is over. I offer this untypical hostage to fortune, despite official expectations of more terrorist atrocities to come, on the basis of some evidence.

To start with, the assault was more oblique than was sometimes perceived. There was no wholly novel assertion of a right to effect ‘regime change’ (as preposterous a claim as could be imagined that would leave the international legal system in tatters). Rather a resolution was parsed in a way that, having undermined a post-Cold-War developing trust among the five permanent members of the Security Council, will make more difficult the adoption of Security Council responses to future crises. It is clear, however, that the notion of anticipatory self-defence has received a boost, but may be it was something of a pipe dream of those of us who argued that an armed attack had to have manifested itself before the right to self-defence was triggered. In any event, it cannot be expected that potential target states must, before reacting with force, await major armed attacks to be launched, not by governments, but by ruthless clandestine organisations, operating in failed states or states too weak to control the organisations’ activities.

Certainly, Iraq has done nothing to consolidate the precedential value, whatever it may have been,⁵² of the Kosovo action by NATO as support for a right of humanitarian intervention not authorised by the Security Council. The notion of overwhelming humanitarian necessity was clearly not relevant at the time of the intervention, however much it may have been in the earlier years of Saddam Hussein’s reign of blood.

As far as international humanitarian law is concerned, it has arguably been strengthened. The US Supreme Court in *Hamdan* accepted the better, but not incontrovertible, view that any conflict not falling within the Geneva Conventions’ understanding of an international armed conflict, constitutes a non-international armed conflict within the meaning of common Article 3, regardless of whether it occurs in the territory of the concerned state party. There is no protection gap.

⁵¹ For example, the need to prolong military or administrative detention in a post-war counter-insurgency situation.

⁵² See N Rodley and B Çali, ‘Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law, (2007) 7 *Human Rights Law Review* 275, and literature cited at n 7–9 therein.

As to the disreputable legislation aimed at securing immunity in the US courts for some violators, this can only be seen as a very bad example even if done in a context that reaffirms the law as stated in *Hamdan*. This is something, insofar as the challenge is more to encourage US compliance with the law, rather than to amend or re-codify the law.

The international human rights law picture is more mixed. The attempt to take all armed conflict out of the purview of the international legal regime for protecting human rights has been unsuccessful. There has, however, been some traction in the attempt to deny extra-territorial effect to the ICCPR, but this was a traditional (and still not widely shared) view of the United States.

Perhaps the potentially most damaging assault on the human rights construct has been that on the integrity of the prohibition of torture and cruel inhuman or degrading treatment or punishment, as regards both the interrogation methods used or contemplated for use and the willingness to expose persons (by removal) to methods incontrovertibly within the prohibition. Yet even here there has been a counter-attack, albeit through the vehicle of international humanitarian law that has only left uncertain how far, if at all, the secret services of the United States may be able to violate the prohibition with impunity. The uncertainty lies in the secrecy surrounding the methods that are or have been authorised.

My sense that the bottle may only have lost a few drops, rather than having its contents drained away, is not just based on the limited nature of the damage so far inflicted. It takes account of a number of factors that seem to have been in play.

First, there was the appalling overreaching of the Bush Administration, followed either complaisantly or with insufficient protest by the Blair government. The exorbitance of the claims to rewrite 'the rulebook' genuinely shocked all who thought that the book broadly reflected the values our societies were seeking to defend.

Second, the same two governments came to be seen to be exploiting the 9/11 and, to a lesser extent, 7/7 mass murders for partisan political purposes. They were playing politics with the greatest threat their societies had faced since the Cold War and, unlike in that 'war', they were discarding bipartisanship for blatant electoral goals.

Third, the policies were being seen to fail. Instead of consolidating constitutional government in Afghanistan (an intervention barely challenged by the 'invisible college of international lawyers'⁵³), that country was left to deteriorate, since Iraq had to be tamed after the original intervention had brought it to virtual failed state status. What is more, the basis for the original intervention had not even withstood subsequent scrutiny. And then there was Abu Ghraib, a name once associated with the barbarity of Saddam Hussein's regime. Instead of it being decommissioned as the first act of liberation, it was became the scene of the lurid

⁵³ Phrase coined by Oscar Schachter: O Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern Uni L Rev* 217.

scandal of US torture on video, the stigma of the name now squarely transferred to the would-be liberators.

These, then, were the elements that provided a context for other forces to assert themselves. Leaders of intergovernmental organisations had already spoken out against falling into the trap of fear that would allow trading human rights for perceived counter-terrorist efficiency.⁵⁴ International and national human rights NGOs eventually managed to react and gain traction for their work. They brought test cases to the courts, invoked international human rights machinery and in general gradually, with the crucial assistance of distinguished sections of the Press, helped mobilise public opinion against the impugned practices and policies.

The judiciary played an important role. Stung by claims by the executive to wage this 'global war on terror' with unfettered freedom from traditional checks and balances, while invoking 'national security' in language similar to that of the most brutal Latin American military dictatorships, the US courts began to address the legal no-go area that the executive had attempted to create. Unprecedented language was used by fraternal judiciaries to encourage US judicial resistance to the 'black hole' policies.⁵⁵

Politicians too became less mesmerised by the White House. Indeed, once internal legal memoranda were leaked making it clear that an attempt was being made, despite firm opposition from professional military lawyers, to create a space for torture, politicians of integrity realised that the coalition was doing more harm to itself and the world community than Al-Qaeda would ever have dared hope.⁵⁶

Much of this was facilitated by a national and international public opinion that, touched by scandal, misrepresentation and incompetence, became disaffected with a project that had played on their fears, but been unable to relieve them. Of course, it can only be speculated whether, had the policies been more successful, public opinion might have evolved differently and what difference that would have made.

In the end, it seems not too over-optimistic to believe that the law has for the most part been strengthened. For any failed attempt to destroy a human achievement tends to leave that achievement more embedded than before. Nevertheless, there must remain concern for the hidden landmine of expansive claims for Security Council powers, based on a virtually unrestricted interpretation of UN Charter Article 103. On this, it is time for our invisible college to bestir itself and be vigilant.

⁵⁴ See 'Kofi Annan Warns of Risks to Civil Liberties from the War on Terrorism' *Civil Liberties* (25 November 2002) <<http://archive.democrats.com/preview.cfm?term=Civil%20liberties>>; Council of Europe SG, valedictory statement of NSR to GA, November 2001.

⁵⁵ L Steyn, 'Guantanamo Bay: the Legal Black Hole' (27th FA Mann Lecture 25 November 2004) <<http://www.statewatch.org/news/2003/nov/guantanamo.pdf>> accessed 12 December 2007.

⁵⁶ See, eg, Greenberg and Dratel, n 24, M Danner contributions in *Abu Ghraib: The Politics of Torture* (New York, New York Review Books, 2004); N Rodley, 'The Prohibition of Torture: absolute means absolute' (2006) 34 *Denver J Int'l L and Policy* 145; and see the writings of ME O'Connell, eg 'Affirming the Ban on Coercive Interrogation' (2005) 66 *Ohio State Law Journal* 1231.

Between Hope and Despair: The Iraq War and International Law Futures?

JAYAN NAYAR

I. Introduction

Indeterminacy prevails. Debates will rage among ‘international lawyers’ about many technical legal aspects of the ‘War on Iraq’; about the legality or otherwise of the invasion of Iraq by the so-called ‘Coalition of the Willing’; about the conduct of hostilities and its violation or otherwise of international humanitarian law; about the nature and conduct of the subsequent ‘Occupation’ and its compliance with the obligations under the ‘Laws of Occupation’; about the legal validity or otherwise of the ‘transfer of sovereignty’ via an occupier-defined and led political process; about the legal status of the ‘insurgents’ etc. Lawyers will scrutinise the texts of relevant international treaties and varyingly determine whether such and such an act falls within the ambit of the permissions, prohibitions, discretions and obligations therein enshrined. Lawyers will thereby make pronouncements accordingly. Whatever the answers, failing a determination that counts (and just who might in the foreseeable future be given such a privileged function to slam down the ultimate international legal hammer in judgment?) the realities of legalities (or otherwise), criminalities (or otherwise), continue on the trodden grounds of human bodies. Still, that is the nature of the game; it is a law-thing, reasoned, ‘scientific’, ‘objective’; a search for legal-truth.

Yet, what other questions are raised about international law as a result of the Iraq War? What other judgments are pressing, given that tens of thousands of lives have been lost, untold socio-economic sufferings have been inflicted, and the ‘liberation’ of the Iraqi people only too evident in its daily cruelty? How does international law stand given these human consequences of indeterminate, possible, legal truths? I frame this question not as how international law, the international legal system, and the UN Charter-based conception of international order stand challenged by the ‘Iraq War’, but rather, on how these stand implicated. There is, I think, something wholly absurd, yet utterly revealing of the ‘truth’ of international law when we frame a consideration of it in terms of how a perceived violation or departure posits a challenge to it! It is absurd because it suggests that

the ‘violation’ rather than the ‘law’ is the fixed reality, the non-negotiable, and the point of reference—from which a ‘future’ may be discerned. It is revealing because it inadvertently states the truth that ‘international law’ stands subservient to the desires of the most powerful.

I do not intend, in this chapter, to peer into some crystal ball to envision a future of/for international law from the haze of the present. I do not think this is possible. Futures after all are contingent upon actions undertaken, towards specific desired directions of movement, based on particular understandings of how aspirations may be attained from the conditions of present realities. All that is possible in this regard instead is an appreciation of the types of futures-talk in international legal discourse.

The ‘Iraq War’, it must be stated at the outset, has been seen both as a sign of hope for the future of international law as well as one of despair. Notwithstanding the acceptance that the majority of ‘legal opinion’ would fall within the later category, that there exists such a duality of readings is of critical importance in any analysis of how international law futures-talk is to be understood and how the future of futures-talk is to be contemplated. Particularly interesting is how commentators posit ‘challenges’. I will consider the urgings for international legal imaginations and the implications that follow from such futures-talk. Three main strands will be highlighted. These are described as follows: the New Global Orderists; the UN Charterists; and the TWAIL-ers (Third World Approaches to International Law). There is no intention here of suggesting that this categorisation is exhaustive, they simply represent my interpretation of three interesting types of international law assertions. The aim here is to get a flavour of the various trajectories envisaged for international law that derive from differing ideological and political motivations regarding the role of law in international order(ings). In the final section, I will briefly consider a further strand of what I name ‘Subalternist’ international law thinking, which is less concerned with projections of possible international futures than with insurrectionary political law-doing. The future, then, is left for the many actions of histories-in-the-making that we may as actors in the world choose to undertake.

II. The New Global Orderists

For the proponents of the Iraq War, be they those who assert legality or those who accept illegality yet affirm justification/righteousness, the actions undertaken by the ‘Coalition of the Willing’ signify movement to a more just, and ordered international political–legal future. Two quotations may be illustrative. First:

Indeed, humanitarian intervention imperatives can even buttress, rather than discredit, strategies of anticipatory self-defence. Today’s attacks by rogue states and al Qaeda-type groups typically involve attacks on civilians, rather than strikes against military

targets. ... In this connection, it certainly is reasonable to argue that removing from power a man like Saddam Hussein—who sought nuclear weapons, developed, deployed, and used both chemical and biological weapons on his own people and his neighbours, viewed himself as a modern day Saladin, and defied security Council resolutions for well over a decade—was entirely consistent with the UN Charter and the various Security Council resolutions authorizing the use of force against Iraq.¹

And second;

However the post-war efforts in Iraq turn out, the United States will likely confront pressures to curb the use of force. These it must resist. ... The greater danger after the Second Gulf War is not that the United States will use force when it should not, but that, chastened by a post-war nation-building quagmire, the public's opposition, and the economy's contraction, it will not use force when it must. That the world is at risk of cascading disorder places a greater rather than a lesser responsibility upon the United States to use its power assertively to halt or slow the pace of disintegration.²

What these positions assert is that the action to war, regardless of restrictive readings of the UN Charter, point to a desirable movement to bring international law in line with the necessities of confronting and defeating contemporary threats posed by recalcitrant elements (of modern-day Saladin types) be they non-state or rogue-state actors.³ The world we inhabit, in the eyes and understandings of these advocates of transformation, is one in which moral choices are clear, and self-evident. There exists, in this world, the forces of good, of progress, democracy, free trade and enterprise, liberty, cultural and civilisational leadership, on the one hand, and the forces of evil, of regress, totalitarianism and (Eastern) religious fanaticism, economic stagnation, 'unfreedom', cultural and civilisational aberrations, on the other. Thus, we cannot speak of moral equivalence or equality in determining the value of such competing actors within the 'international' sphere. We cannot uphold a vision of law that seeks parity of treatment based on a legitimacy of being in confronting the civilisational challenges at a global level. Choices need to be made and these choices are pressing. 'Violation' of a cumbersome, anachronistic, conservative, international law therefore must be seen as necessary for better law-futures on the whole.⁴ A restatement of the right to disobey unjust

¹ DB Rivkin, Jr, LA Casey, M Wendell DeLaquil, 'Preemption and Law in the Twenty-First Century' (2005) 5 *Chicago Journal of International Law* 467, at 496.

² MJ Gleeson, 'The UN Security Council in a Unipolar World' (2003) 44 *Virginia Journal of International Law* 91, at 111.

³ See, eg, M Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 *European Journal of International Law* 227; J Yoo 'Using Force' (2004) 71 *Chicago Law Review* 729; C Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *International Affairs* 301.

⁴ The argument against the international law framework of multilateralism, its irrelevance in the real world of power's right and responsibility to preserve order and the need for US assertion of such a role in international relations is most forcefully put by the 'Neo-Con' ideologue Robert Kagan in his *Of Paradise and Power: America and Europe in the New World Order* (London, Atlantic Books, 2004); see also W Kristol and R Kagan, 'The U.N. Trap?' *The Weekly Standard* (18 November 2002) <www.ceip.org/files/publications/2002-11-18-kaganwklystandard.asp>.

law for the greater good of law, perhaps. Or a celebration of the explicit assertion of those characteristics in international law, described by one author as 'hegemonic international law'⁵, where it is the very need to entrench hegemony that drives the envisioned progress in international law, and order, imaginations.

Many of us might not share this benign reading of the New World Order, of 'Empire' as many have described it. Yet, that such futures-imaginations are present, and are presented as beneficial for international law in general, cannot be ignored, not least because they correspond to the futures being driven by Power's actions on the ground of reality. Such futures therefore require no further push, simply that power continues on its current trajectory. It is not the burden of their proponents to speak the 'impossible', the 'unrealistic', to counter the thrust of power, to urge conscious resistance to hegemonic international law. For them, the challenge faced by international law is not one to conserve some cherished value that has been violated, to return it to some noble condition prior to corruption. Rather the challenge is to enable the revitalisation of international law's relevance to current political imperatives; it is one of promise and normalisation, to accept the givenness of Power's interpretation for a world more prosperous, more safe and ultimately more ordered. Theirs is not a contemplation of a future that is confronted with a crisis of 'illegality'. Rather theirs is a projection of a future for a 'new' international law arising from the embers of previous failures and inadequacies. Indeed, for them the crisis of international law is precisely what the 'Iraq War' corrects. They are not faced with the dilemma of reconciling their aspirations for the 'discipline' of international law with discordant realities. Their international law future does not lie in some distant difficult horizon. It is now unfolding. Tomorrow's international law is for them today being enacted and acted. The tone of their futures-talk is not one predicated upon despair. It is entirely hopeful.

III. The UN Charterists

Opponents of the legality of the 'War on Iraq', on the other hand, are availed with no similar comforts. Contemplations of the future of international law, when undertaken from a point of view that takes the 'Iraq War' as both illegal and illegitimate, are beset with despair and pregnant with appeals. Hope is stated less with confidence than with wishfulness, even wistfulness. The point always stressed being the necessity for a reclaiming of international law for the project of humane humanity, essentially despairing the undermining of the multilateral pillars upon which the status quo of the Charter conception of international law's order is based. Hope for the UN Charterists is placed therefore on a revival

⁵ See DF Vagts, 'Hegemonic International Law' (2001) 95 *AJIL* 843.

of Charter-based sensibilities, and the curbing of the sensibilities of power-lust through the rule of law.

By way of illustration, Duncan Curie suggests:

The international community finds itself at a critical juncture. The guarantees of international peace and security and the determination to avoid the scourge of war put in place following World War II have been undermined and even imperilled by the use of military force under the doctrine of 'preventive war' and the invasion of Iraq. It is critical that member States following the attack on Iraq re-acknowledge their commitment to avoiding war and to the principles and purposes of the United Nations Charter, in order that the role of the rule of law in avoiding future wars may prevail.⁶

Similarly, Hans von Sponeck tells us:

The challenge to any reform of international structures will be the willingness of super-powers to operate within a multilateral framework and to accept international law. In the case of Iraq, it must be remembered, the United States as the dominant global power in this era decided to step outside this multilateral framework and determine its approaches on a unilateral basis. ... Global security, a major concern for all countries, must not be seen as an issue one can handle with military might. *The priority is human not military security.* Of course, those who endanger international security, terrorists, have to be caught and brought to justice. However, in order to improve global and regional security, it is much more important to understand the causes of terrorism and act accordingly ... The agenda for reform of the international machinery for peace, conflict resolution and international development remains formidable but is achievable if all nations, including the most powerful, accept *multilateralism* as the starting point.⁷

Renewal and reform are the clarion calls for such imaginings of international law futures; renewal of the values of the UN Charter, for collective security, for multilateral decision-making, for the rule of law over the rule of might; reform of the multilateral framework to better represent the post-colonial constituency of international law and the post-statist realities of global interdependence. Thus, the reform agenda envisioned for a more humane and democratic future for international law comprises, amongst others, the institutional reform of the United Nations Security Council through enlargement and a reviewing of veto privileges, the greater incorporation of global civil society actors into the UN multilateral framework, the strengthening of the anti-impunity aspiration manifested in the form of the International Criminal Court, the consolidation of these 'cosmopolitan' values into domestic legal cultures through effective national enforcement of international legal standards etc.⁸

⁶ DEJ Curie, "'Preventive War' and International Law After Iraq' (2003) <http://www.globelaw.com/Iraq/Preventive_war_after_iraq.htm> 11.

⁷ H von Sponeck, 'Iraq and the United Nations, Post-War and Pre-Peace: The Dilemmas of the Future' (2005) <http://www.transnational.org/SAJT/forum/meet/2005/Sponeck_Iraq.html> 10–11.

⁸ For a comprehensive review of the UN project from the perspective of the 'South', and an assessment of possible futures, see S Amin, 'Wither the United Nations', in A Bartholomew (ed), *Empire's Law: The American Imperial Project and the War to Remake the World* (London, Pluto Press, 2006).

For all its obvious common-sense appeal, these urgings for a revitalisation of a rule of law sensibility in international relations are confronted with two related and seemingly intractable, most often unmentioned, difficulties. The first results from the very claim to illegality itself. The second, from the required political will for such reaffirmations to come about.

The rejection of the pro-war position that forms the basis of judgment that we face a critical juncture for international political-legal futures lies in the assertion of illegality/criminality arising from the invasion and subsequent occupation of Iraq. But if the invasion and occupation of Iraq were deemed to be unlawful, and the conduct of the offensives, past and continuing, non-compliant with international humanitarian and criminal law, then we are faced with the uncomfortable prospect of an international law regime in utter disrepute as a consequence of the fact of Power's ability to normalise violation. It is not violation here that gives rise to the crisis in and of international law, but rather the irrelevance of such a claim of violation to the ongoing *de facto* acceptance of its presence, absent any sanction. The issue here is not simply that the rule of might is able to override prescriptions of right, but that such deviance thus makes the reality of international life. Notwithstanding all the judgments of illegality/criminality therefore, international law in this reading stands essentially as an irrelevance, its articulated platitudes a cruel joke upon the peoples of the 'international community'.

Thus, the urgings for 'the future' aim to avoid another instance when the international community fails to avoid the scourge of war. But here again, desires seem subject to the dictates of Power's refusal towards compliant behaviour. The question is, why would the United States choose to voluntarily pledge its subordination to multilateral rule of law constraints just at the moment when it has wrested an apparently unchallenged right to unilateralism from such shackles?⁹ Perhaps, a resort to some notion of 'enlightened self-interest' on the part of the 'hegemon' could be relied upon to advance these proposals for renewal and reform. Perhaps, the signs that imperial overstretch will inevitably lead to the United States adopting a more conciliatory stance with respect to multilateral desires suggests that such a future will eventually be attainable.¹⁰ Perhaps, the dual factors of self-interest and over-reach limitations will enable the ascendancy of 'cosmopolitanism' in international law constructions. Anything is possible, of course. Yet, more likely a position that will have to be adopted by this first strand of anti-'Iraq War' international lawyers *vis-à-vis* the future of international law, may be as reflected by the following statement by Nico Krisch:

⁹ The point is clearly stated by Robert Kagan when urging for the explicit and unilateral claiming by the United States of its pre-eminent position in international relations in his disdainful retort to European multilateralist aspirations; see Kagan, n 4. There is, it has to be said, much truth in his analysis of the power differentials between the US and Europe, and in his reading of the resulting multilateralist posturings of France and Germany leading up to the war.

¹⁰ For the argument that US foreign policy is inevitably leading towards imperial overstretch, dominated by corporate and military desires for global control, see R Burbach and J Tarbell, *Imperial Overstretch: George W. Bush and the Hubris of Empire* (London, Zed Books, 2004).

international relations are marked by inequality, and if international law were simply an order of equals, its role would be weak indeed. Power relations are inevitably inscribed into international law, as they are into all forms of law, sometimes more, sometimes less visibly ... Thus, we can see more clearly now the precarious position that international law finds itself in. It is always under pressure from powerful states and needs to bow to their demands in order not to be entirely sidelined. Yet it can provide its particular value to the powerful only if it does not completely bow to them; once it appears merely as their tool, it will be unable to provide them with the legitimacy they seek. International law thus always needs to reflect both the demands of the powerful and the ideals of justice held by international society at a given moment. Oscillating between both, it will occupy an unstable, yet ultimately secure, place.¹¹

This might be read as a voice of compromise and balance, rescuing international law, it seems, from both demise and unreasonable expectation, grounded in a sober appreciation of the interplay between ‘realism’ and ‘idealism’, accurate in its nuanced recognition of how international law functions within an age of ‘complexity’.¹² For the international lawyer concerned with preserving the authority of international law following the apparent rupture of the ‘Iraq War’ such a compromise may hold out some hope for renewal. There is something to work with here after all—the crisis of legality being averted by a renegotiation of legitimacy with Power. However, another reading of the balance urged is that it states explicitly an outrageous and unacceptable truth regarding the subservient role of international law to Power’s global ordering imperatives as currently constituted. From this perspective, the violation of international law that was the ‘Iraq War’ and Occupation points not simply to a crisis of legality, but to reinforcing the long-held indictment against the crisis of legitimacy of international law itself. This, is the point of departure for the next strand of thought within international lawyers opposed to the ‘Iraq War’.

IV. The TWAIL-ers

Articulating a self-consciously ‘Third World’ perspective, having recently come together under the collective banner ‘Third World Approaches to International Law’ (TWAIL),¹³ the TWAIL-ers do not begin with the ‘Iraq War’ in analysing trajectories for the future of international law. Rather, the war is taken as indicative of an inherent imperialistic tendency within international law itself. A couple

¹¹ N Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16 *European Journal of International Law* 369, 408.

¹² See D McGoldrick, *From ‘9-11’ to the Iraq War 2003: International Law in an Age of Complexity* (Oxford, Hart Publishing, 2003) for a balanced account of the realism–idealism, power–justice tensions facing international law futures.

¹³ For a platform statement of the TWAIL project, see M Mutua, ‘What is TWAIL?’ (2000) 94 *American Society of International Law Proceedings* 31.

of statements by some of the leading proponents illustrate this. Issa Shivji, for instance;

I want to suggest that the Empire's lawlessness in the sense described here can no longer be explained in terms of the divergence between the ideal and the real. It is no more a question of double standards or not matching deeds with words. Rather, the very 'word' is wanting. The Law and its premises, the liberal values underlying law, the Law's Empire itself needs to be interrogated and overturned. In other words, fascism is not an aberration, it is the logical consequence of imperialism, and when imperialism runs amok, you get 'Iraq'.¹⁴

And Antony Anghie;

Imperialism has once again become the focus of analysis in international relations, initially, as a consequence of the victorious emergence of the United States as the single global superpower intent on exercising its unprecedented influence to ensure its own security and further its own interests ... For many scholars who have focussed on the history of the non-European world—and, I suspect, for many people in the Third World—imperialism has never ceased to be a major governing principle of the international system, and the only novelty of current developments lies in the fact that it has re-asserted itself in such an explicit form that it has become unavoidably central to any analysis of contemporary international relations.¹⁵

Unlike those who urge for a return to multilateralism, TWAIL-ian perspectives are grounded on a general critique of the past and continuing, colonial/imperial foundations of international law. From this follows the project for 'TWAIL-ed' international law futures, stated as comprising three objectives:

The first is to understand, deconstruct, and unpack the issues of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions ... Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.¹⁶

Projections towards international law futures, therefore, are not wholly preoccupied with legality within existing international law, for legality alone does not preclude the imperialistic foundations and tendencies of international law so revealed. It is not a return to international law that defines future-oriented imaginings for this group. Rather, futures are envisioned in terms of transformation; to overturn the philosophical (constructions of sovereignty), doctrinal (substantive

¹⁴ I Shivji, 'Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law' (2003) 1 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/shivji2/>.

¹⁵ A Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge, Cambridge University Press, 2004) 273–4.

¹⁶ Mutua, n 13, at 31.

legal principles-rules) and material (political-economic power) bases of contemporary international law.

The first task envisaged towards this project is the rejection of claimed normalities within international orderings. Mere renewal of a multilateral international legal order premised on the legacies of historical colonial/imperial privilege would not suffice, therefore, to address the concerns of such advocates for a truly post-colonial international law. More importantly, orientations that begin with imperialism as the core referent for international legal evolution view current trends in world ordering as consistent with the violent civilising histories of domination and subjugation that define the international political-legal order. Globalisation and the globalisation of governance, the appropriation of human rights languages by transnational capital in its pursuit of unlimited commodification of Third World resources, the claimed universal and globalised 'war on terror' and the concomitant rights of intervention against 'failed' or 'rogue' states in the guise of humanitarianism, are all identified as patterns of international law's dispossession of any meaningful Third World self-determination and a reconstruction of the civilising discourse. The ruse of sovereignty which brought the post-colonial Third World into the juridical family of international law, therefore, is seen as the vehicle of continuation; sovereignty, being the title of ascension by the uncivilised to the civilised order created by and through plunder, entrenches and enables the legalised perpetuation of material inequalities through the neo-colonialism of an order among 'equal' unequals. Thus, the post-colonial order is from its inception a neo-colonial order. And the 'Iraq War' signifies the confident and explicit assertion that such is the way of the world, if before, such a right of domination was not quite so confidently claimed.

If the task of critique, exposé and deconstruction is potently carried out by the TWAIL-ers, the second and third tasks for the transformation of international law futures is less often presented with any certainty. The most elaborate envisioning of futures is attempted by Bhupinder Chimni who sets out an eight point agenda comprising: 1) increasing transparency and accountability of international institutions; 2) increasing accountability of transnational corporations; 3) conceptualising permanent sovereignty as a right of peoples and not states; 4) making effective use of the language of rights; 5) injecting peoples interests in non territorialised legal orders; 6) protecting monetary sovereignty through international law; 7) ensuring sustainable development with equity; and 8) promoting the mobility of human bodies.¹⁷

Two features of such TWAIL-ian futures-talk are interesting to note, highlighting also the essential difficulty which confronts their project. First, much of the substantive agenda for transformation, and for that matter, the underlying

¹⁷ See BS Chimni, 'Third World Approaches to International Law: A Manifesto' in AAnghie *et al* (eds), *The Third World and International Order: Law, Politics and Globalization*, (Leiden, Martinus Nijhoff, 2003) 68–72.

critique which informs them, have a long and rich pedigree in Third World international legal discourse. Second, notwithstanding the uncompromising critique of international law's complicity, if not centrality, in maintaining neo-colonial inequalities, hope is still invested in international law for the transformatory project. With respect to the first, it might be regarded that the TWAIL project is a reaffirmation, and an attempt to reinvigorate, the tradition of postcolonial international law discourse at a time when US-led imperialistic 'globalisation' projects for international law futures are in the ascendancy. Rather than a renewal of international law, therefore, TWAIL represents an attempted renewal of the energy and political thrust of a Third World 'counter-hegemonic' tradition of international legal thinking which had its heyday in the 1960s and 1970s with its agenda for the creation of a New International Economic Order. The haunting of the past however inevitably bears heavily on the present. Herein lies the underlying contradiction in TWAIL-ian futures imagination.¹⁸ While an attempt to revive a tradition since dissipated is unsurprising, the experience of the past and the reasons for previous failures to realise the substantive transformation of international law impinges constantly on present imaginings, thus making the continued reliance on international law for the transformatory project less understandable.¹⁹ So why this reliance? Essentially because, for some prominent TWAIL-ers, there is no alternative to international law!²⁰ Coupled with this is the clinging on to a hope that tiny pockets of redemption exist within the international legal *corpus* to engage as sites of struggle for emancipatory projects. In this respect, such TWAIL-ian futures-talk appears less insurrectionary, and more in-line with the hope-statements found in international legal discourse, tenuously maintaining scathing critique with urgings for international law's promise to be fulfilled, a sense of desperation in pleas for hope.²¹ How TWAIL envisages real and substantive opposition to the claims of an imperial right to intervention and

¹⁸ For an engaged critique of TWAIL, see, DP Fidler, 'Revolt Against or Within the West? Twail, the Developing World, and the Future Direction of International Law' (2003) 2 *Chinese Journal of International Law* 29.

¹⁹ Rajagopal, for example, has criticised the forefathers of TWAIL in their struggle to transform international law for failing to delink themselves from the racist discourse of 'development' subsequent to their powerful critique of international law's colonial and colonising legacies. The NIEO project thus, he argues, is heavily laden with colonised internalisations of third world inferiority and 'underdevelopment' upon which international law's civilising mission is predicated; see B Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge, Cambridge University Press, 2003) ch 4. The question for Rajagopal, however, is why this critique of the past, the internalisation of colonial discourses, is not applied also to 'law' as a colonial and colonising construct of third world subjugation? Just as a 'post-development' perspective is urged, should not also a post-law, decolonised imagination be prioritised?

²⁰ See eg, A Anghie 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27.5 *Third World Quarterly* 739, 752; and Chimni, n 17, at 72.

²¹ Fidler states the contradiction clearly, thus:

TWAIL confronts, however, the sobering fact that this description of the challenge is neither novel nor perhaps persuasive. Bull argued well over twenty years ago that the prospects for international society depended on the development of a consensus among the great powers and other states

force, as exemplified by the 'Iraq War', and the consequent world ordering agendas of contemporary 'Empire', therefore, is unclear, aside from the usual protestations of illegality and imperial illegitimacy.

V. International Law Futures and the Global Context

What is evident from these brief tasters from the menu of international law futures-talk is that projections and assertions of futures have little to do with questions of legality in the abstract. They are rather statements about the political vision of 'order' in international/transnational/global relations. The future of international law in this respect is centrally concerned with the constitution of the global political order to which international law is envisaged to give normative articulation. Hope and despair in post 'Iraq War' international law imaginings, therefore, correspond with how current ordering projects are perceived differently as either progress or regress in the unfolding story of human political-legal civilisation. This new constitutional ordering, may be described as follows:²²

1. Within the new global legal order, some laws are more equal than others.
2. There is no international law, deriving from the UN Charter conception of an international order based on the sovereign equality of states and the prohibition of intervention in international relations that can be interpreted as applying to supersede the construction of the global order through the rights of intervention consistent with imperial designs.
3. All international law supporting the unrestrained movement and penetration of capital across territorial boundaries shall be inviolable, and shall be enforced through global, international and national enforcement agencies.
4. All laws at the national or sub-national levels that aim to preserve and protect the political, economic and cultural projects of the global order shall be inviolable, and must be respected and protected through effective enforcement by all relevant authorities.
5. All laws that seek to preserve, protect or promote national or sub-national 'self-determination' and autonomy in matters pertaining to the construction

that took into account the demands of weak and poor countries in Asia, Africa and Latin America. TWAIL scholarship highlights the extent to which (1) those demands are still not heeded; and (2) solidarism has powerfully coalesced around liberal political and economic thinking rather than broadening into a more pluralistic project. ... In this quest, TWAIL confronts an international system structurally and substantively more inhospitable to its message than the system faced by developing-country international lawyers in the period of decolonization. TWAIL conclusions that the decolonization effort to de-center and re-conceptualize international law failed to leave lasting marks on international law's development haunt TWAIL's much more difficult quest today for a post-hegemonic global order. (Fidler, n 18, at 75–6) (footnotes omitted)

²² See J Nayar, 'Taking Empire Seriously: Empire's Law, Peoples' Law and the World Tribunal on Iraq' in Bartholomew, n 8, at 314.

and conduct of the global order are repugnant to the idea of ‘civilisation’ and shall thereby be non-enforceable by reason of unlawfulness, and shall be subject to repeal or ‘harmonisation’.

In essence, what this transformation signifies is a shift from a political legal imagination that is premised on the ‘national/international’ duality in political constitution to one which is founded on a transcendent global constitutional reality. We no longer inhabit a split national–international legal order but an all encompassing emergent global law order. Viewed in this light, it would appear that the ‘Iraq War’, rather than signalling a ‘violation’ of the prevailing legal order, represents more the explicit counter-posing of an alternative legal imagination for a ‘global’ polity; international law standing confronted by an emergent global law, an emergent order of Empire’s Law. If this indeed be the case, then any projection for international law futures must begin with a recognition of the global law order in being.

In contrast to previous wisdom that the ‘international’ is constituted by the inter-relationships of the ‘national sovereigns’, therefore, it may be that the reverse is true—that the ‘national’ is increasingly being constituted by the necessities of the global relations. That the ‘promised’ egalitarian foundations of a negotiated settlement by independent and autonomous state entities perceived to inform the UN Charter international legal order no longer prevail upon the consciousness of globalising relations, must therefore be acknowledged as the starting point from which futures need be imagined. To do otherwise would be to render irrelevant any proposals for change, however noble they might appear. This said, it would seem therefore that the following three options lie before all international law futurologists in confronting the present and imagining a future:

1. Promote the transformations currently underway for the UN Charter based international law to be subsumed by the dictates of a global law order. For the New World Orderist, the path forward is clear. Continued assertions of the righteousness of the global order against the ‘evil’ of the agents of dissent and obstruction will perpetuate the ideological thrust of the ordering process. Bluster rather than negotiation and persuasion best enables the entrenchment of asserted legalities as the normalcy of contemporary ‘global law’. The New Global Order will come to be so long as it is said to be, and not materially resisted.
2. Accept such transformations and aspire for a new accommodation to be reached between current international law and the global law order, involving a renegotiation of the basic principles of sovereignty, non-intervention, collective security, human rights etc. Notwithstanding the protestations of the UN Charterist, the realities of the fact of Empire, mean that desires may be subject to the search for compromise. Appeals to enlightened self-interest, to the benefits of multilateral, consensual projects, and the struggle for ‘checks and balances’ may be the only open path available for future ‘international

law' journeys. 'Humanisation' may be the plea of the times, the humanisation of war, of neo-liberal economics, of poverty, of the violence of the global order.

3. Recognise the reality of the global political order yet reject its inevitable translation into a global legal order, recognise the acquiescence, if not complicity, of the international political-legal system in permitting the transformation of the UN conception of international order, and reframe the 'post-colonial' political-legal project. TWAIL-ers are faced with a real dilemma. Their vision of the violence of the global order is crystal clear, their understanding of the inherent imperialism of international law so too, yet no easy paths appear to avail themselves. To follow on from their understanding and critique would lead to the uncertain prospect of losing all that is familiar—better the devil (of international law) that we know and all that. To draw back from such conclusions and resorting again to never-ending urgings appear a feeble recoiling from their destiny.

VI. A Different Futures Possibility: Becoming Uncivilised?

My sympathies, if it were not already obvious, lie with the third of the options outlined above. My concern is the apparent bind by which the TWAIL-ian perspective finds itself constrained. It is this which I address. The struggle for futures, I suggest, is once again one of confrontation between the coloniser and the colonised; the struggle of the coloniser to inculcate the values and psychologies of colonising civilisation into the colonised, and conversely, the struggle of the colonised to maintain, if not project, an identity of uncolonised un-civilisation in confrontation with the coloniser.²³

From the onset of historical colonialism, the non-European (along with the dispossessed classes of the metropolises) has been subject to the civilisation of colonising international law.²⁴ Initially performing the function of exclusion, and subsequently, of inclusion, international law has defined the humanity of the colonised, determined the conditions of their recognition, and defined their possibilities of 'legitimate' being. Regardless of whether the colonised sought assimilation or resistance, international law named them, gave them voice and language, chastised them or praised them, violated them or promoted them. From the colonial, an international legal construction of being, so too the post-colonial was created by international law's conference of subjectivity. The post-colonial 'native',

²³ See, eg, F Fanon, *The Wretched of the Earth* (London, Penguin Books, 1967); and A Memmi, *The Colonizer and the Colonized* (New York, Orion Press, 1965).

²⁴ For an excellent re-telling of the story of international law, see C Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden, Brill, 2005); also, Anghie, n 15.

was never a decolonised native; quite the opposite, the post-colonial may indeed be regarded as the very perfection of colonising civilisation. However recalcitrant and rebellious they might have appeared, civilised in the image of international law they successfully were; and, so we still are.

Analysed in these terms, it is clear that the orientations of the New Global Orderists and the UN Charterists, fall wholly within the discourse of colonising civilisation. The former may be regarded as an explicit assertion of a right to reconstitute the global order to fit the contingencies of contemporary colonising desires, redefining the terms of humanity, recognition, status, legitimate action etc. The latter, although resistant to contemporary transformations, conforms to the historical settlement of an unequal statist international political—legal system which, notwithstanding protestations, perpetuates structures of continued and persistent post-colonial exploitations, dominance and subservience. The TWAIL-ian predicament, on the other hand, arises precisely as the result of the colonial complex, born out of related discursive and locational complicities. The colonised, culturally stripped of an alternative discourse to the coloniser's international law, remembers little of other languages with which to speak emancipation, regeneration, decolonisation, but through those prescribed and proscribed by the coloniser; the eternal struggle being to incorporate into these languages normative assertions which better the lot of the colonised, sometimes granted by the coloniser, sometimes not. TWAIL-ers, are also compromised by the simple existential reality that finding themselves in discursive locations, academic institutions, sites of national and international policy-making, that are very much part of the colonised elite order of the world, they are themselves intimately and inextricably conjoined with the colonising order, beneficiaries of that order, whose life aspirations and very existence is dependent on the structures that prevail. To the international lawyer, TWAIL-ian or otherwise, international law quite simply pays the bills. The return to the embrace of international law, the refusal to discard the 'hope' of international law, is understandable therefore. Being essentially devoid of identity minus international law's socio—cultural and 'professional' framework, being so civilised, TWAIL-ians continue to seek meaning for humanity in international law, presuming inclusion to be symbolic of the recognition of difference and authenticity that are so aspired.

This said, there are voices on international law from the Third World which seek to 'think outside of the box'.²⁵ For example Ngugi makes the following appeal:

If Third World scholars are serious about bringing about real and effective changes, they must look from outside the existing framework with its inherent biases. ... To carry out emancipation projects in international law, there is a need to challenge more seriously the categories that now construct international legal discourse and the way they frame

²⁵ See, eg, J Ngugi, 'Making New Wine for Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalisation?' (2002) 8 *UC Davis Journal of International Law and Policy* 73.

issues for resolution. ... [E]very time we invoke the categories presented to us by the biased international legal system, we must remember that we cannot use the master's tools to destroy the master's house. We might win one International Court of Justice (ICJ) case here, get political asylum for one hundred refugees there, or get a five-year grace period for the implementation of certain trade agreements, and perhaps win some political rights for some human rights activists. The question remains, however, whether these token projects advance the case for the three billion people living in conditions that are less satisfactory as a result of a skewed international system.²⁶

Clearly, much of the evidence suggests that international law has failed, and will ever more so fail the case for the three billion people referred to above, if the tendencies pointed at by the 'Iraq War' are anything to go by. The next question, therefore, is what 'thinking outside the box' of international law may entail. The perspectives of those commentators who might be regarded as 'Subalternists', I believe, provide the most grounded response to the imperialism of international law as it continues to evolve.

Boaventura de Sousa Santos leads the way for a subalternist movement in legal thinking by asserting the realities of peoples' resistance to hegemonic globalisation.²⁷ Following from this observed presence of grassroots imagination and resistance, Santos calls for the recognition and celebration of 'Subaltern Cosmopolitan Legality', a people's movement orientation to international law which seeks to reflect and articulate voices of the dispossessed and marginalised, out of 'absence' into 'emergence' as it were. Derived from a view of law that maintains the real existence of legal pluralism, and cognisant of the realities of the multiple social contexts of law regimes, Subaltern Cosmopolitan Legality asserts the doing of law by those otherwise denied 'subject' status as a positive reclaiming of the emancipatory tradition of law, long relegated by the regulatory dictates of global capitalism.

Closely related to Santos's elevation of the subaltern voices of law is Balakrishnan Rajagopal's assertion of the emergence of 'international law from below'.²⁸ Concentrating on the activist engagements of social movements, Rajagopal suggests that the struggles for life and subsistence which drive most of these movements against the forces of 'development', both national and 'international', represent a corrective, third world, people's international law movement, giving substance to the otherwise lifeless words of international legal promises.

Both Santos and Rajagopal provide refreshing, rebellious readings of the international legal landscape. The very naming of Cosmopolitan Subaltern Legality and International Law from Below itself represents a blow against the hegemonic

²⁶ *Ibid* 105–6.

²⁷ See B de S Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London, Butterworths, 2nd edn, 2002) especially ch 9; see also B de S Santos and CA. Rodriguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge, Cambridge University Press, 2005).

²⁸ See Rajagopal, n 19.

aspirations of global law, against the attempted normalisation of Empire in legal terms. What is left unanswered is the extent to which what is described may be regarded as movements towards decolonisation. The real examples that Santos and Rajagopal provide mainly involve the social movement's resistance to power by way of what might be regarded as activist law-doing.²⁹ They are in other words examples of struggles for 'interpretation', to instil into law the meanings given by communities of suffering, or, to put it differently, to demand that law takes suffering seriously. In this sense, Santos goes somewhat further than Rajagopal, at least in terms of the basis upon which Cosmopolitan Subaltern Legality is derived conceptually, even if not in the specific examples given; Santos claims as one of the major drivers, as well as sources, of subaltern legality, the many manifestations of social forums which generate a law creating counter-politics to that prescribed by power as legitimate.³⁰ That such an explicit non-statist basis for self-construction of subaltern legality is asserted is, I believe, of fundamental importance towards decolonised thinking with respect to international law. It must be clear that what is being suggested goes beyond 'protest' and resistance within the landscapes of law, to provide directions for the constructions of an anti-colonial, uncivilisation.

Santos and Rajagopal provide an important first step. More, however, needs to be asserted, and I use the term 'asserted' here consciously, for it is in the very assertion of decolonisation that the first steps of truly anti-colonial TWAIL-ian futures may be charted. What follows is a brief outline of what such a process of decolonisation towards uncivilisation might involve given the contexts of Empire's Law we confront.

First, some basic postulates:

1. We exist within a global system, not an international system. Any decolonisation imagination must therefore delink from the state/international duality that presupposes much political framing.
2. As a result, what is traditionally regarded as international law now falls increasingly within an encapsulating global law regime where contrary to the international legal precept of state sovereignty as the primary determinant of law, it is the global law precept of devolved management which defines the statist division of the world into legal zones of control. Any decolonisation imagination must therefore delink from the national law/international law duality that presupposes much legal framing.
3. The global law system is constructed and put into effect by global legal actors; in public law terms, by the new coordinated networks of regulation policed

²⁹ See J Nayar, 'A People's Tribunal Against the Crime of Silence?—The Politics of Judgement and an Agenda for People's Law' 2001(2), *Law, Social Justice & Global Development (LGD)*, <<http://elj.warwick.ac.uk/global/issue/2001-2/nayar.html>>.

³⁰ See B de S Santos, 'Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality' in Santos and Rodriguez-Garavito, n 27, at 29.

by national regulatory authorities;³¹ in private law terms, by the transnational regimes of global social domains exemplified by the new *lex mercatoria*.³² Any decolonisation imagination must therefore assert a counter presence of personality standing in confrontation and conflict with networks of global law.

From these, we see that the TWAIL-ian project cannot be to humanise international law from the clutches of global law forces, but rather to make explicit the nature of the decolonisation conflict as it stands. Towards this direction, it is critical to emphasise the third of the postulates mentioned above.

Decolonisation, as perceived in terms of historical colonialism, had as its point of reference the appropriation of the national territory, and with it the national political-legal space. The state, existing within an 'international system', was envisaged therefore as being expressive of a decolonised articulation, a potential being-ness in opposition to the constructions of imposed civilisations effected by colonial rule. And through such decolonised articulations of being, collectively voiced with the increase of 'post-colonial' states emerging within the international system, was believed would follow the construction of a truly post-colonial world order.³³ Efforts such as the New International Economic Order, mentioned earlier, provided evidence of such transformatory attempts. It is precisely this assumption of the 'national' in opposition to the international/global that requires review.

By postulate 3 above, I intend to suggest that there exists no 'national' space outside of the global. There exists similarly, no national actor separate from the global. The 'public law' system, that cherished space of constitutionalism, administrative law, citizen's rights etc, is intrinsically linked to the global functioning of social relations, both political and economic. National law, in this sense, notwithstanding the residual language-form of national identity and citizenship, is fundamentally a global instrument, to be consistent with the aspirations and desires of 'globalised' social relations. Public actors, it follows, are functionaries within this trans-territorial social space. Slaughter is correct so to identify, even if her benign reading of the positive implications of such a 'world order' may be subject to considerable scepticism.³⁴

³¹ See A-M Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004). For a contrastino reading of the implications arising from such elite networks which transcend conventional understandings of inter-national relations, see BS Chimni, "International Institutions Today: An Imperial Global State in the Making" (2004) 15 *European Journal of International Law* 1.

³² G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without a State* (Aldershot, Dartmouth Publishing, 1996) 3. For further elaborations of the implications of global social and thereby legal fragmentation, see A Fischer-Lescano and GTeubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003-4) 25 *Michigan Journal of International Law* 999.

³³ For a discussion of the legal discourse of Third World scholars towards the transformation of colonial international law, see K Mickelson, 'Rhetoric and Rage: Third World Voices in International Law' (1998) 16 *Wisconsin. International Law Journal* 353.

³⁴ For a flavour, Slaughter identifies the benefits of the paradigm-shift in international legal analysis and prescription as follows:

This evolution of the ‘international’ system to a global system, I argue, is not simply a matter of historical accident; an aberration from the decolonisation trajectory still available as a potential to be realised. It is rather the very natural progression of the civilisation project. To repeat the assertion, the postcolonial international order may be understood as the perfection of colonising civilisation. Decolonisation requires something different.

Decolonisation is first and foremost, I believe, an assertion of beingness in opposition to constructedness. It is an assertion of a ‘we’ that exists independently of any ascribed subjectivity and personality that are derived from the coloniser’s terms of reference; a recognition of selfhood, to authority and authorship, to judgement and imagination.

What contemporary understandings of the globalised order reveal to us ever more clearly is that the ‘decolonisation’ sought to be achieved through the post-colonial international order was always one beset by ‘conditionality’, such conditionalities presently being forcefully imposed upon the post-colonial subjects of the global order. Contemporary ‘globalisation’ and the confident assertions of ‘global law’ as evidenced by the Iraq War, re-state the contingency of post-colonial statehood within the politics of colonising desires. The state, we may understand, is being explicitly reclaimed for the purposes of global colonialism.

Following from this realisation, our orientation of a decolonised perspective on law may begin with a rejection of the idea of ‘law’ as immutable, as that pre-determined, colonially constructed, civilising institution of legitimate articulation. Just as law defined the civilising of the pre-legal colonised savage, so it remains the arbiter of civilised beingness within the broader sociality of continuing colonialisms.³⁵ This is not to argue for any ‘Third World’ statism in opposition to ‘double standards’ on the part of the North; statist and corporate-statist violence is the one sure legacy of colonial civilisation globally. Rather, it is to recognise that the law, both national and international/global is constitutionally designed towards universalism, and thus to imperialism—the national being simply an economy of scale. It seems unlikely to me, therefore, that the post-colonial state, constituted as it was

National and supranational officials participating in a full-fledged disaggregated world order would be accountable not only to specific national constituencies, but also to a hypothetical global polity. They would be responsible for defining and implementing ‘global public policy’. It would be impossible to define the substance of that polity in the abstract. But the officials responsible should be guided by general ‘constitutional’ norms in their relations with one another. In this context, I propose five basic principles designed to ensure an inclusive, tolerant, respectful, and decentralized world order. They include the horizontal norms of global deliberative equality, legitimate difference, and positive comity, and the vertical norms of checks and balances and subsidiarity. (footnotes omitted) (n 31, at 31)

No mention, however, is made to power, imperialism, hegemony, vested interests, in this account of a ‘happily-ever-after’ future for global order.

³⁵ The point is powerfully made with respect to the discourse on the civilising mission of ‘human rights’ by M Mutua, ‘Savages, Victims, and Saviours: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201. See also, F Mégret, ‘From “Savages” to “Unlawful Combatants”’: A Post-Colonial Look at International Humanitarian Law’s “Other”’, in A Orford (ed), *International Law and its “Others”* (Cambridge, Cambridge University Press, 2006) 265, for a discussion of the continuities of colonial histories with current constructions of ‘humanitarian law’ categories.

to serve a global sociality, can unmake its nature; notwithstanding past and present claims to an anti-imperialism of the North, the post-colonial state may merely assert opposing visions of global sociality, not counterpose an independent and decolonised locality. Any remaining faith in its once heralded promise towards decolonisation must now be seen in light of the explicit embrace of the post-colonial state of globalisation,³⁶ albeit competing globalisations. Furthermore, this renewal of the global function of statism is made more obvious by the developments of communication technologies which serve as facilitators of elite global socialities as these find expression and institutionalisation.³⁷ National law is indeed subject to global law desires, not merely co-existent with it.

So what then for communities of suffering, who witness these realities of their social locatedness, as projections of international law futures are articulated and advanced? TWAIL-ers, for all their anti-colonial and anti-imperial sensibilities would seem to require of the peoples of suffering to bear faith ever more to the transformatory potential of international legal discourse one day to present an altered reality of global humaneness. Instead, would a different futures perspective, one which brings to the fore the conflict inherent in the process of decolonisation and its essential element of uncivilisation as I call it, be more likely to reflect the realities of contemporary and coming struggles?

I argue for a perspective of uncivilisation, to describe the conscious politics of decolonisation that currently prevails. Uncivilisation involves the rejection of the conditionalities of legitimate beingness as prescribed and constituted by law's naming. The rejection of law as the historical arbiter and enforcer of 'civilisation', in this sense, therefore is the rejection of the limits set by law's colonising imagination. It is the rejection of the political boundedness of the state as the site of law, and of the authority of law to speak human experience and name normalcy of being and aspiration.³⁸ It is the reclaiming of the authority to be, speak and act notwithstanding law's recognition and sanction. Such a suggestion is not as

³⁶ Fanon long ago described the dangerous realities of post-colonial governance, where the call to radical peoples' struggle against the coloniser is replaced by the gradual entrenchment of material interests by the new rulers within the colonial structures left unchanged:

There exists inside the new regime, however, an inequality in the acquisition of wealth and its monopolization. ... Privileges multiply and corruption triumphs, while morality declines. ... In these poor, under-developed countries, where the rule is that the greatest wealth is surrounded by the greatest poverty, the army and the police constitute the pillars of the regime; an army and a police force ... which are advised by foreign experts. ... By dint of yearly loans, concessions are snatched up by foreigners; scandals are numerous, ministers grow rich, their wives [and husbands] doll themselves up, the members of parliament feather their nests and there is not a soul down to the simple policeman or the customs officer who does not join in the great procession of corruption. (n 23, at 138)

³⁷ See Santos, citing Yves Dezalay's and Bryant Grant's argument that there exists today 'new legal orthodoxies' that unite transnational elites, at 10, n 27.

³⁸ An inspiring narrative of contemporary decolonised thinking and of peoples' struggles to reclaim their humanity from colonising ideologies and the violence of prescribed 'developmentalisms', building on the experience of the Zapatista uprising in Chiapas, Mexico, can be found in G Esteva and MS Prakash, *Grassroots Postmodernism: Remaking the Soil of Cultures* (London, Zed Books, 1998). It is a wonder that such literature does not find greater space in anti-colonial discussions in relation to law.

blasphemous to law's 'majesty' as it might seem. It is interesting to note that it is precisely this sort of self-naming and becoming which is asserted on the part of trans-territorial social actors (the most obvious being in the sphere of trans-national economic relations), transcending the idea of law as being bounded by territorial conceptions of society, to declare global law. The proclamation of an existent *lex mercatoria* as global law, does not come with much coyness. I only argue that a similar confidence is necessary for those concerned with decolonisation, for the assertion of 'unlawfulness'.

Towards uncivilisation, as with Santos and Rajagopal, I envisage a futures approach to 'legal' re-conceptualisation which begins with the authorship of peoples in struggle against colonising violence. 'Law' is therefore de-robed of its statist majesty and sovereignty prised away from its colonial political-legal construction. In addition to their elaborations, however, I suggest that this conscious and explicit decolonisation from law involves the rejection of law's claimed authority to negotiate such a subaltern claiming of the law's mantle—what is aimed for here is not to have a peoples' interpretative input into law's content but to begin from a sovereignty altogether without law's consent, if need be. I have elaborated on this elsewhere as a Peoples' Law perspective.³⁹ Without repeating the basis upon which Peoples' Law is put forward, it is worth emphasising the basic tenets of decolonisation which inform its authority:

Judgement: the right/power of peoples to judge the 'realities' that are inflicted upon them and to name as violation that which is otherwise proclaimed as normalcy by the dominant powers.

Authorship: the right/power of peoples to author/create 'law' and to define the structures and nature of social relationships conducive to a life of security and welfare.

Control: the right/power of peoples to control (and not merely 'participate' in) the processes of decision-making and judgement in relation to the matters which affect the daily life-conditions of their communities.

Action: the right/power of peoples to effect the 'implementation' of their alternative visions of social relationships in ways that reinforce and celebrate the diversity of humanity, for humanity.

It is clear that this rebellious naming and claiming of a peoples' authority would bring such communities of struggle in direct confrontation with law's institutions of the enforcement of colonising discipline. This recognition of conflict, I believe, is inescapable. That such uncivilised struggles increasingly are the realities of the 'subaltern' in conflict with law as in instrument of globalising desires can not be disregarded. The question is whether, as international lawyers committed to the struggles of resistance and regeneration against Empire's violence, we wish to validate such acts of decolonisation or not.

³⁹ See Nayar, n 22.

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