Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment, or deportation to slave labor, or for any other purpose of civilian population of or in occupied territory, murder, or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c). Crimes against humanity

Murder, extermination, enslavement, deportation, and other inhuman acts done against any civilian population, or persecutions on political, racial, or religious grounds when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII

Complicity 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.

The Iraq International Law Debate

This section sets forth the debate on the legality of the Iraq War. It offers the best examples of the legal defense of the Iraq policy of the Bush administration by government lawyers but also offers a range of critical assessments by independent scholars. It also includes United Nations Security Council Resolution 1441 that accepted much of the American pre-invasion argument but refrained from authorizing and implementing recourse to force. In contrast, the so-called Downing Street Memo of July 2002 reveals beyond serious doubt the unconditional resolve of the United States government months before the invasion to wage war against Iraq without respect for the UN, for the restraints of international law, for the opposition of public opinion, or for the truthfulness of its public justifications for attacking Iraq. This set of realities helps explain why most international law specialists regard the Iraq War as illegal and illegitimate and assess the wider effects of this aggressive war upon the international legal order more generally.

Preemption, Iraq, and International Law

William H. Taft IV and Todd F. Buchwald
AJIL, September 2003

Preemption comes in many forms and what we think of it depends on the circumstances. One state may not strike another merely because the second might someday develop an ability and desire to attack it. Yet few would criticize a strike in the midst of an ongoing war against a second state's program to develop new types of weapons. Between these two examples lie countless fact patterns.

In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.

Operation Iraqi Freedom has been criticized as unlawful because it constitutes preemption. This criticism is unfounded. Operation Iraqi Freedom was and is lawful. An otherwise lawful use of force does not become unlawful because it can be characterized as preemption. Operation Iraqi Freedom was conducted in a specific context that frames the way it should be analyzed. This context included the naked aggression by Iraq against its neighbors, its efforts to obtain weapons of mass destruction, its record of having used such weapons, Security Council action under Chapter VII of the United Nations Charter, and continuing Iraqi defiance of the Council's requirements.

On August 2, 1990, Iraq invaded Kuwait. It is easy to forget the wantonness of Iraq's invasion, which was unprovoked and carried out with particular cruelty, and the horror with which the world received news of it. That invasion rightly shaped forever after the way the world would look at Saddam Hussein's Iraq; and the United States, its allies and friends, and the international community as a whole came to realize that this was a menace from which the world needed special protection. In the midst of over a dozen years of an essentially ongoing conflict, conducted at different times at different levels of intensity, the Iraqi regime committed itself to comply with conditions that would have brought the story to a close. But it could never bring itself to fulfill its commitments.

Virtually immediately, the Security Council adopted UN Security Council Resolution 660, the first of many resolutions condemning Iraq's actions and demanding withdrawal from Kuwait. Additional Council actions were designed to apply further pressure and bring about Iraq's withdrawal. The Council's actions paralleled steps taken by the United States and others pursuant to the inherent right of collective self-defense recognized in Article 51 of the UN Charter. The United States moved forces to the Persian Gulf and then commenced maritime interdiction efforts in response to the Iraqi attack.[n4] But Iraq was intransigent.

Eventually, in November 1990, the Council adopted Resolution 678, which authorized the use of "all necessary means" to uphold and implement Resolution 660 and subsequent relevant resolutions, and to restore international peace and security in the area. The resolution provided Iraq with "one final opportunity" to comply with the Council's earlier decisions and authorized the use of force "unless Iraq on or before 15 January 1991 fully implements" the Council's resolutions. It specifically invoked the authority of Chapter VII of the Charter, which permits the Security Council to respond to either a threat to, or a breach of, the peace by authorizing the use of force to maintain or restore international peace and security.

Iraq refused to comply with the resolutions by the January 15 deadline, and coalition forces commenced military operations the next day. Significantly, the Security Council did not make a further determination prior to January 15 as to whether or not Iraq had taken advantage of the "one final opportunity" it had been given two months earlier. Member states made that judgment themselves and relied on the Security Council's November decision as authority to use force.

On April 3, 1991, the Council adopted Resolution 687. That resolution did not return the situation to the status quo ante, the situation that might have existed if Iraq had never invaded Kuwait or if the Council had never acted. Rather, Resolution 687 declared that, upon official Iraqi acceptance of its provisions, a formal cease-fire would take effect, and it imposed several conditions on Iraq, including extensive obligations related to the regime's possession of weapons of mass destruction (WMD). As the Council itself subsequently described it, Resolution 687 provided the "conditions essential to the restoration of peace and security."

The Council's conclusion that these WMD-related conditions were essential is neither surprising in the wake of the history of aggression by the Iraqi regime against its neighbors nor irrelevant to the legal situation faced by the coalition when Operation Iraqi Freedom began in March 2003. The Iraqi regime had demonstrated a willingness to use weapons of mass destruction, including by inflicting massive deaths against civilians in large-scale chemical weapons attacks against its own Kurdish population in the late 1980s, killing thousands. On at least ten occasions, the regime's forces had attacked Iranian and Kurdish targets with combinations of mustard gas and nerve agents through the use of aerial bombs, rockets, and conventional artillery shells. There was no question that such weapons in the hands of such a regime posed dangers to the countries in the region and elsewhere, including the United States, because of the possibility both of their use by Iraq and of their transfer for use by others. After considering the nature of the threat posed by Iraq, the Council, acting under its Chapter VII authority, established a special set of rules to protect against it.

As a legal matter, a material breach of the conditions that had been essential to the establishment of the cease-fire left the responsibility to member states to enforce those conditions, operating consistently with Resolution 678 to use all necessary means to restore international peace and security in the area. On numerous occasions in response to Iraqi violations of WMD obligations, the Council, through either a formal resolution or a statement by its president, determined that Iraq's actions constituted material breaches, understanding that such a determination authorized resort to force. Indeed, when coalition forces—American, British, and French—used force following such a

presidential statement in January 1993, then Secretary-General Boutros-Ghali stated that the raid was carried out in accordance with a mandate from the Security Council under resolution 678 (1991), and the motive for the raid was Iraq's violation of that resolution, which concerns the cease-fire. "As Secretary-General of the United Nations, I can tell you that the action taken was in accordance with the resolutions of the Security Council and the Charter of the United Nations."

It was on this basis that the United States under President Clinton concluded that the Desert Fox campaign against Iraq in December 1998, following repeated efforts by the Iraqi regime to deny access to weapons inspectors, conformed with the Council's resolutions. To be sure, that campaign did not lack critics, who raised questions about whether further Council action was required to authorize it specifically. Some said that, in the absence of a Council determination that a material breach had occurred, an individual member state or group of states could not decide that a particular set of circumstances constituted a material breach, and there was debate about whether language that the Council had used in the period leading to Desert Fox was equivalent to a determination of material breach. The U.S. view was that whether there had been a material breach was an objective fact, and it was not necessary for the Council to so determine or state. The debate about whether a material breach had occurred and who should determine this, however, should not obscure a more important point: all agreed that a Council determination that Iraq had committed a material breach would authorize individual member states to use force to secure compliance with the Council's resolutions.

This was well understood in the negotiations leading to the adoption of Resolution 1441 on November 8, 2002, and, indeed, the importance attached to the use of the phrase "material breach" was the subject of wide public discussion. The understanding of the meaning of the phrase was also reflected in the structure of Resolution 1441 itself. Thus, the preamble contained specific language recognizing the threat that Iraq's noncompliance and proliferation posed to international peace and security, recalling that Resolution 678 had authorized member states to use "all necessary means" to uphold the relevant resolutions and restore international peace and security, and further recalling that Resolution 687 had imposed obligations on Iraq as a necessary step for achieving the stated objective of restoring international peace and security.

After recounting and deploring Iraq's violations at some length, the resolution in operative paragraph 1 removed any doubt that Iraq's actions had constituted material breaches. Specifically, paragraph 1 stated that "Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under [the WMD and missile provisions] of resolution 687." In adopting the "material breach" language, the resolution established

that Iraq's violations of its obligations had crossed the threshold that earlier practice had established for coalition forces to use force consistently with Resolution 678.

Following this decision that Iraq was in material breach, operative paragraph 2 stated the Council's decision, "while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council. The resolution then required Iraq to submit, by December 8, 2002, "a currently accurate, full, and complete declaration" that, among other things, would include information on "all aspects of its programmes to develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems." At the same time, the resolution established a reinforced program of weapons inspections, and demanded that Iraq cooperate "immediately, unconditionally, and actively with UNMOVIC and the IAEA."

Operative paragraph 4 stated the Council's decision that "false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations." The Council in effect decided that, in view of the past behavior of Iraq, the threat it posed to others, and the fact that the opportunity it was being given to remedy its breaches was a final one, any such violations by Iraq would mean that the use of force to address this threat was consistent with Resolution 678.

No serious argument was put forward in the period following the adoption of Resolution 1441, either that the declaration submitted by Iraq was "currently accurate, full, and complete" or that Iraq had complied with and cooperated fully in the implementation of the resolution.[n17] Under Resolution 1441, the Council had already decided that any such failure to cooperate would constitute a further material breach by Iraq.

Even at this point, however, the United States returned the issue to the Council for further consideration. This course was consistent with Resolution 1441, which contemplated certain steps regarding the reporting of violations and consideration by the Council; in supporting that resolution, the United States had undertaken to "return to the Council for discussions." Specifically, under operative paragraph 4, Iraqi violations that constituted "a further material breach" were to be reported to the Council for assessment under paragraphs 11 and 12. Under paragraph 11, UNMOVIC and the IAEA were directed to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under Resolution 1441.

Under paragraph 12, the Council decided that it would convene upon receipt of a report "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." Paragraph 12 expressly provided for further Council consideration "upon receipt of a report in accordance with paragraphs 4 or 11 above." It thus specifically contemplated that such a report could be provided either by UNMOVIC or the IAEA in accordance with paragraph 11 or by a member state in accordance with paragraph 4. Paragraph 4 called for violations to "be reported to the Council for assessment in accordance with paragraphs 11 and 12," without any limitation on who might submit such a report. Thus, nothing in the language of Resolution 1441 precluded a member state from submitting a report that would be the basis for the Council to convene under paragraph 12.

Violations of paragraph 4 were in fact reported to the Council, including by Secretary Colin L. Powell, whose comprehensive reports drew on human intelligence, communications intercepts, and overhead imagery regarding Iraq's ongoing efforts to pursue WMD and missile programs and conceal them from United Nations inspectors. And the Council did convene and did consider the situation, as provided by paragraph 12.

The Council held numerous formal sessions on this issue. However, nothing in Resolution 1441 required the Council to adopt any further resolution, or other form of approval, to establish the occurrence of the material breach that was the predicate for coalition forces to resort to force. The very careful wording of paragraph 12 reflected this fact clearly. Paragraph 12 contemplated that the Council would "consider" the matter, but specifically stopped short of suggesting a requirement for a further decision. As the British attorney general stated on this point, "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 authorise force."

The language in paragraph 12 contrasts sharply with language on this point in earlier texts circulated among Council members that would have provided for the Council "to convene immediately, upon reception of a report in accordance with paragraph 8 above, in order to decide any measure to ensure full compliance of all its relevant resolutions" The fact that this language was not included in Resolution 1441 as ultimately adopted shows that the Council decided only that it would consider the matter, but not that it would be necessary for it, or even its purpose, to make a further decision. Rather, the Council had already made the decision that violations described in paragraph 4—"false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution"—would constitute a material breach of Iraq's obligations, and thus authorize the use of force to secure Iraqi compliance with its disarmament obligations.

The similarities in this regard between Resolution 1441 and Resolution 678 are striking. Using the same terminology that it later adopted in Resolution 1441, the Council in Resolution 678 decided to allow Iraq a "final opportunity" to comply with the obligations that the Council had established in previous resolutions. The Council then authorized member states to use force "unless Iraq on or before 15 January 1991 fully implemented" those resolutions. It was clear then that coalition members were not required to return for a further Council decision that Iraq had failed to comply; nor did they do so before commencing military operations. The language of Resolution 1441 tracked the language of Resolution 678, and the resolution operated in the same way to authorize coalition forces to bring Iraq into compliance with its obligations.[n23]

What does all this tell us about Iraq and the preemptive use of force? Was Operation Iraqi Freedom an example of preemptive use of force? Viewed as the final episode in a conflict initiated more than a dozen years earlier by Iraq's invasion of Kuwait, it may not seem so. However, in the context of the Security Council's resolutions, preemption of Iraq's possession and use of weapons of mass destruction was a principal objective of the coalition forces. A central consideration, at least from the U.S. point of view, was the risk embodied in allowing the Iraqi regime to defy the international community by pursuing weapons of mass destruction. But do U.S. actions show a disregard for international law? The answer here is clearly no. Both the United States and the international community had a firm basis for using preemptive force in the face of the past actions by Iraq and the threat that it posed, as seen over a protracted period of time. Preemptive use of force is certainly lawful where, as here, it represents an episode in an ongoing broader conflict initiated—without question—by the opponent and where, as here, it is consistent with the resolutions of the Security Council.

National Security Strategy of the USA, White House, 2002

[Cover letter signed by President G.W. Bush, followed by Section V of the report]

The great struggles of the twentieth century between liberty and totalitarianism ended with a decisive victory for the forces of freedom—and a single sustainable model for national success: freedom, democracy, and free enterprise. In the twenty-first century, only nations that share a commitment to protecting basic human rights and guaranteeing political and economic freedom will be able to unleash the potential of their people and assure their future prosperity. People everywhere want to be able to speak freely; choose who will govern them; worship

as they please; educate their children—male and female; own property; and enjoy the benefits of their labor. These values of freedom are right and true for every person, in every society—and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages.

Today, the United States enjoys a position of unparalleled military strength and great economic and political influence. In keeping with our heritage and principles, we do not use our strength to press for unilateral advantage. We seek instead to create a balance of power that favors human freedom: conditions in which all nations and all societies can choose for themselves the rewards and challenges of political and economic liberty. In a world that is safe, people will be able to make their own lives better. We will defend the peace by fighting terrorists and tyrants. We will preserve the peace by building good relations among the great powers. We will extend the peace by encouraging free and open societies on every continent.

Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, that task has changed dramatically. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank. Terrorists are organized to penetrate open societies and to turn the power of modern technologies against us.

To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing. The war against terrorists of global reach is a global enterprise of uncertain duration. America will help nations that need our assistance in combating terror. And America will hold to account nations that are compromised by terror, including those who harbor terrorists— because the allies of terror are the enemies of civilization. The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn.

The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed. We will build defenses against ballistic missiles and other means of delivery. We will cooperate with other nations to deny, contain, and curtail our enemies' efforts to acquire dangerous technologies. And, as a matter of common sense and self-defense,

America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.

As we defend the peace, we will also take advantage of an historic opportunity to preserve the peace. Today, the international community has the best chance since the rise of the nation-state in the seventeenth century to build a world where great powers compete in peace instead of continually prepare for war. Today, the world's great powers find ourselves on the same side—united by common dangers of terrorist violence and chaos. The United States will build on these common interests to promote global security. We are also increasingly united by common values. Russia is in the midst of a hopeful transition, reaching for its democratic future and a partner in the war on terror. Chinese leaders are discovering that economic freedom is the only source of national wealth. In time, they will find that social and political freedom is the only source of national greatness. America will encourage the advancement of democracy and economic openness in both nations, because these are the best foundations for domestic stability and international order. We will strongly resist aggression from other great powers—even as we welcome their peaceful pursuit of prosperity, trade, and cultural advancement.

Finally, the United States will use this moment of opportunity to extend the benefits of freedom across the globe. We will actively work to bring the hope of democracy, development, free markets, and free trade to every corner of the world. The events of September 11, 2001, taught us that weak states like Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.

The United States will stand beside any nation determined to build a better future by seeking the rewards of liberty for its people. Free trade and free markets have proven their ability to lift whole societies out of poverty—so the United States will work with individual nations, entire regions, and the entire global trading community to build a world that trades in freedom and therefore grows in prosperity. The United States will deliver greater development assistance through the New Millennium Challenge Account to nations that govern justly, invest in their people, and encourage economic freedom. We will also

continue to lead the world in efforts to reduce the terrible toll of HIV/AIDS and other infectious diseases.

In building a balance of power that favors freedom, the United States is guided by the conviction that all nations have important responsibilities. Nations that enjoy freedom must actively fight terror. Nations that depend on international stability must help prevent the spread of weapons of mass destruction. Nations that seek international aid must govern themselves wisely, so that aid is well spent. For freedom to thrive, accountability must be expected and required.

We are also guided by the conviction that no nation can build a safer, better world alone. Alliances and multilateral institutions can multiply the strength of freedom-loving nations. The United States is committed to lasting institutions like the United Nations, the World Trade Organization, the Organization of American States, and NATO, as well as other long-standing alliances. Coalitions of the willing can augment these permanent institutions. In all cases, international obligations are to be taken seriously. They are not to be undertaken symbolically to rally support for an ideal without furthering its attainment.

Freedom is the non-negotiable demand of human dignity; the birthright of every person—in every civilization. Throughout history, freedom has been threatened by war and terror; it has been challenged by the clashing wills of powerful states and the evil designs of tyrants; and it has been tested by widespread poverty and disease. Today, humanity holds in its hands the opportunity to further freedom's triumph over all these foes. The United States welcomes our responsibility to lead in this great mission.

George W. Bush
The White House,
September 17, 2002

SECTION V. PREVENT OUR ENEMIES FROM THREATENING US, OUR ALLIES, AND OUR FRIENDS WITH WEAPONS OF MASS DESTRUCTION

"The gravest danger to freedom lies at the crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology—when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends—and we will oppose them with all our power."

—President Bush from an address given at West Point, June 1, 2002

The nature of the Cold War threat required the United States—with our allies and friends—to emphasize deterrence of the enemy's use of force, producing a grim strategy of mutual assured destruction. With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation.

Having moved from confrontation to cooperation as the hallmark of our relationship with Russia, the dividends are evident: an end to the balance of terror that divided us; an historic reduction in the nuclear arsenals on both sides; and cooperation in areas such as counterterrorism and missile defense that until recently were inconceivable,. . . .

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. Our response must take full advantage of strengthened alliances, the establishment of new partnerships with former adversaries, innovation in the use of military forces, modern technologies, including the development of an effective missile defense system, and increased emphasis on intelligence collection and analysis.

Our comprehensive strategy to combat WMD includes:

- *Proactive counterproliferation efforts.* We must deter and defend against the threat before it is unleashed. We must ensure that key capabilities—detection, active and passive defenses, and counterforce capabilities—are integrated into our defense transformation and our homeland security systems. Counterproliferation must also be integrated into the doctrine, training, and equipping of our forces and those of our allies to ensure that we can prevail in any conflict with WMD-armed adversaries.
- *Strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for weapons of mass destruction.* We will enhance diplomacy, arms control, multilateral export controls, and threat reduction assistance that impede states and terrorists seeking WMD and, when necessary, interdict enabling technologies and materials. We will continue to build coalitions to support these efforts, encouraging their increased political and financial support for nonproliferation and threat reduction programs. The recent G-8 agreement to commit up to $20 billion to a global partnership against proliferation marks a major step forward.
- *Effective consequence management to respond to the effects of WMD use, whether by terrorists or hostile states.* Minimizing the effects of WMD use against our people will help deter those who possess such weapons and dissuade those who seek to acquire them by persuading enemies that they cannot attain their desired ends. The United States must also be prepared to respond to the effects of WMD use against our forces abroad, and to help friends and allies if they are attacked. . . .

The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.

A New International Legal Order

Philip Shiner
AJIL, 2005

In this paper I wish to address three issues:

1. Whether the Iraq war was a "crime of aggression" (which is the "worst of crimes");

2. Whether the way in which the war was conducted involved the commission of "war crimes" and;

3. Whether the subsequent occupation of Iraq involved, and continues to involve, the commission of "war crimes," "crimes against humanity," and other illegal acts.

However, before addressing these themes, I wish to put these matters in the context of a changing international legal order.

There is no doubt that the world has changed post 9/11. And no doubt, too, that international law has been central to that change. Much of the debate about the wars in Afghanistan and Iraq and the so-called "war on terror" revolves around questions of legality. It is plain that the neo-cons and Bush and Blair wish to restructure international law to make it weaker but more flexible and less concerned with the peaceful resolution of disputes. Who can counter this fundamental challenge to all those who are concerned with peace and that international law should underpin and support an absolute legal commitment by all member states that the use of force is, and should remain as, the option of last resort? It is my view that the War Tribunal on Iraq should have this fundamental ideological struggle in its sights. It can make those responsible for the Iraq war accountable, and it can be part of a global struggle in response to the Bush/Blair agenda on international law.

THE CRIME OF AGGRESSION

International law is surprisingly clear and easy to understand on whether the Iraq war was lawful. First, war was abolished by the adoption of the UN Charter in 1947. Thereafter, contracting states entered into a compact. In return for giving up their right to wage war, each vested the right to use force in the collective security provisions of chapter VII of the UN Charter. Second, Article 2 (4) of the UN Charter provides that: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations."

This has been described by the International Court of Justice as a peremptory norm of International Law, from which states cannot derogate. Thus the effect of articles 2 (3) (4) is that the use of force can only be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN's purposes. Third, there are two limited exceptions to the requirement not to use force. The first, enshrined in Article 51, preserves states' rights to self-defense. As this was not an exception relied upon by the U.S. or the UK I need not dwell on it. The second is where the Security Council have authorized the use of force under Article 42 of the Charter. That is the only relevant debate here.

I can remind the panel that a consensus of international lawyers did not accept that such an authorization existed here, or that the UK and the U.S. were entitled to revive Resolution 678 (November 1990) from the start of the first Gulf War. The UK and the U.S. argued that the wording of Resolution 1441 (8 November 2002) allowed them to rely on Security Council Resolution 678 as they were entitled to interpret Iraq's behavior post 1441 as constituting a further "material breach" of Resolution 678 (Article 1) in circumstances where Iraq had been given its "final opportunity" to disarm (Article 2) and was warned of the "serious consequences" of noncompliance (Article 13). This is referred to as the revival doctrine. Not surprisingly, that is not the way international law works post-UN Charter. If the Security Council wish to authorize force, they do so in clear terms, latterly using the phrase "all necessary means" or "all measures necessary."

One example of that consensus is a letter from sixteen international law professors and teachers from the UK, which made headline news on March 7, 2003. It warned that:

> "Before military action can lawfully be undertaken against Iraq, the Security Council must have indicated its clearly expressed accent. It has not yet done so. . . A decision to undertake military action in Iraq without proper Security Council authorization will seriously undermine the international rule of law."

What I have done is to footnote to this paper all the relevant legal material so that you, the jury, may be satisfied that this war did not have legal authorization from the Security Council. The jury need to address the consequences of that. If there was no Security Council authorization, does it necessarily mean that the war was illegal? If it was illegal, was it automatically a "crime of aggression" and thus a "crime against peace?"

Professor Philippe Sands tackled this question head on during an interview last Thursday for the Australian Broadcasting Corporation. He said:

> "Most people now realize that the war on Iraq was illegal and under international law an illegal war amounts to a crime of aggression."

Others have said the same. Here is the 18 March 2003 resignation letter of Elizabeth Wilmshurst, Deputy Legal Advisor to the Foreign Office, who resigned because she did not believe the war with Iraq was legal:

> "I cannot in conscience go along with the advice . . . which asserts the legitimacy of military action without such a [Security Council] Resolution, particularly since an unlawful use of force on such a scale amounts to a crime of aggression. . . . "

Over the last weekend, the controversy over the legality of the war, at least from the UK government's perspective, has flared up again. This time the row focuses on a number of leaked and secret memoranda between UK government members and top officials detailing what had been agreed among Tony Blair and President Bush and Condoleezza Rice as early as March 2002. In particular, the following needs some explanation, if the UK government are to continue to protest they went into Iraq because of the threat of WMD, rather than for regime change:

> "We spent a long time at dinner on Iraq. It is clear that Bush is grateful for your [Blair] support and has registered that you are getting flak. I said that you would not budge in your support for regime change but you had to manage a press, a parliament, and a public opinion that was different from anything in the States. And you would not budge, either, in your insistence that if we perused regime change it must be very carefully done and produce the right result. Failure was not an option."

Thus, we are dealing with the crime of aggression. And let us remind ourselves of the enormity of that crime. This is the opening speech of Mr. Justice Robert Jackson at The Nuremburg Tribunal:

> "It is not necessary among the ruins of this ancient and beautiful city with untold numbers of its civilian inhabitants still buried under its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes."

In his opening speech, he also described aggressive war as "the greatest menace of our time," and made it clear that if International Law "is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment." He also said:

> "This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and commit aggressions against the right of their neighbors."

ACCOUNTABILITY FOR THE CRIME OF AGGRESSION AND PROPORTIONALITY

But how can the actions of the U.S. and the UK in committing the worst of crimes be made accountable to International Law, and specifically the International Criminal Court (ICC)? There are two routes that the ICC Prosecutor can take which would give him jurisdiction to examine the legality of the Iraq war notwithstanding that the US has deratified the ICC Statute, and that the ICC will not have jurisdiction over the "crime of aggression" until the necessary Elements of Crime have been agreed, which may not be for several years.

Here is how the first argument goes. If the coalition forces had used force against Iraq pursuant to Security Council Resolution that Resolution would have set the parameters of the authorization both in dictating lawful military objectives, and over time. The authorization would have been carefully targeted, using a phrase such as "all necessary measures" focused on the threat of WMD. Accordingly, decisions about military objectives, and thus crucially, in considering whether the use of force as exercised constituted "war crimes," and judgments as to whether the force used was proportionate to those objectives should have been taken within the framework of a Security Council authorization tailored to eliminating the threat to international peace and security of Iraq's WMD. However, in the absence of such an authorization, and with the coalition's unstated objectives of regime change coming into play, these crucial decisions about military objectives and proportionality became very different. It is arguable, for instance, that using a "bunker buster" bomb on a restaurant in a civilian residential area cannot be justified on the ground that Saddam Hussein was believed to be dining there.

It is arguable also that, leaving aside the inherently indiscriminatory nature of cluster munitions, if the military objective pursued was the threat of WMD it is hard to see how their use in urban and residential locations could be justified or proportionate. Further, the British Armed Forces Minister, Adam Ingram, declared during an interview with the BBC that cluster weapons had been used against concentrations of military equipment and Iraqi troops in and around built-up areas around Basra, Iraq's second largest city. For the U.S., General Myers confirmed that cluster munitions were used against "many" military assets in populated areas.

These are important concerns which the ICC Prosecutor must address, and he has been urged to do so in a report, from eight leading international law professors, submitted to the ICC Prosecutor by Peacerights on 20 April 2004 following the London Tribunal which supports this inquiry. This is how the report summarized the professors' concerns:

> "Were methods of warfare or weapons systems used, or locations of attacks chosen, such that:
>
> - Impermissible military objectives were excluded, for example, those concerned with 'regime change' rather than the elimination of any existing WMD;
> - The proportionality requirement was at all times respected and in particular all feasible precautions were taken to avoid and in any event minimise incidental loss of civilian life, injury to civilians and damage to civilian objects . . . "

The second route into the examination of the crime of aggression is through joint criminal enterprise and the context of any ICC investigation. Again, this is a matter already put to the ICC prosecutor by the London Tribunal. The ICC has jurisdiction over individuals who are nationals of state parties and the UK ratified the ICC Statute on 4 October 2001. In addition to those who perpetrated the crimes, the ICC also has jurisdiction over those who may have ordered, solicited, induced, aided or abetted, or otherwise assisted in their commission or attempted commission. So the relationship between the U.S. and the UK in the coalition does need to be determined, and questions answered as to the criminal responsibility of UK nationals of acts jointly committed with the U.S.. In particular, did UK nationals have prior knowledge of any internationally wrongful acts? The Peacerights Report records that the panel had concluded:

> "The evidence presented (that UK commanders were informed by the U.S. of their military activities, and the selection of targets, and that they were concerned about the use of cluster bombs) suggests that the UK did have knowledge of the circumstances of the internationally wrongful act." (para. 3.8)

This leads us to the prospect of senior members of the UK Government being criminally responsible before the ICC for the commission of international crimes through joint criminal activities with individuals from the U.S., and this takes us into the illegality of the war.

It seems clear that the U.S. and UK governments—and thus senior members of both as individuals—acted with a common purpose in waging aggressive war against Iraq.

In simple terms, it is not necessary here that the participation of UK nationals be an indispensable condition, or that the ICC prosecutor needs to be satisfied that the attacks or incidents would not have occurred at all without their participation. Instead, the question is: were the UK nationals at least a cog in the wheel of events? The London Tribunal members answered this question in the affirmative.

Building on this, the concept of "joint criminal enterprise" is now well accepted in international criminal law and is particularly useful in examining issues of liability when one of the parties in the joint criminal enterprise goes beyond what was originally agreed, even if the other party did not have full knowledge of this, provided that the act was a necessary and foreseeable consequence of the agreed joint criminal enterprise. And, of course, the joint criminal enterprise we are most concerned with here is that of waging aggressive war.

It does, however, need to be stressed, as the London Tribunal did, that in examining these issues in the context of aggressive war it is not that the ICC would be attempting to actually hold any person accountable for that crime, as it must be recalled that the elements of crime have not yet been agreed. Instead, "it would merely be reaching the view that the criminal enterprise of waging aggressive war had been committed as a preliminary circumstance to the prosecution of criminal acts over which it may exercise jurisdiction—namely, crimes against humanity and war crimes."

OTHER ISSUES OF WAR CRIMES AND THE USE OF FORCE

In the above section I have touched upon issues concerning the use of an indiscriminate weapons system such as cluster munitions in residential areas; the risk that impermissible military objectives unrelated to the threat of WMD might have led to war crimes being committed because attacks were not justified (according to military objective) or were disproportionate; and lastly, the link between the "crime of aggression" and joint criminal enterprise. These are three very important issues that I would invite the panel to examine in detail and consider whether to refer these matters to the ICC.

There are others arising from the use of force (rather than the occupation which I deal with below). They all arise from the London Tribunal, and thus, the Peacerights Report. I summarize them below with their references:

1. The use of UK bases for the launch of U.S. air attacks involving cluster munitions, or otherwise (para. 2.1.3).

2. Attacks on media outlets (paras. 2.2.2, 2.2.3).

3. Attacks on civilians and civilian, not military, objectives (paras. 2.2.4, 2.2.5 and 2.2.7).

4. Attacks other than ones involving cluster munitions which did not discriminate between civilians and combatants (para. 2.2.5).

5. Deliberate targeting of civilian infrastructure and, in particular, electricity supplies (para. 2.2.6).

I invite the panel to explore seriously all the above.

THE ILLEGALITY OF THE OCCUPATION POLICY

I do not intend to focus on whether the UN Security Council had the power to give the coalition forces the legal status of occupying powers, as it purported to do by Security Council Resolution 1483. Although we now see the use made of Security Council resolutions to undermine and disengage fundamental human rights protections, it seems that, on balance, on the narrow question—was the UN Security Council entitled to give *de jure* authority to the UK and U.S. as occupying powers—the answer remains, it was.

Thus, the focus of this section is on the illegality of the policy and acts that took place in the occupation. I want to briefly explore two matters. Both involve U.S. and UK troops. The first is deaths and torture in detention and the second, unlawful killings during policing operations.

Those here today will be aware of the abuses by U.S. troops at Abu Ghraib prison. Who could forget the outrageous photographs of prisoners on a leash, being attacked by dogs or sexually humiliated? But how many are aware of more widespread and similar abuses by U.S. troops at other facilities, including Mosul and Camp Bucca? And who knows how many other atrocities have been committed by U.S. troops at other

facilities. To make it clear that these are torture allegations, I read below extracts from statements of two of my clients. First, an engineer aged 46:

> "I saw a young man of fourteen years of age bleeding from his anus and lying on the floor. He was Kurdish and his name was Hama. I heard the soldiers talking to each other about this guy; they mentioned that the reason for this bleeding was inserting a metal object in his anus. I suspected that this was caused by a sexual assault but could not confirm it."

Second, the statement of an agricultural engineer:

> "They have shown me in that room photos of certain people whom I knew and I was asked to make certain confessions against them. Once, they placed a detainee on a chair in front of me and asked me to say certain words that indicated that I had confessed against him. They brought a man I knew, who was fully dressed with a can of Coke and some food in his hand; they pointed out that if I would confess I would be in pleasant status like that man. I insisted that I had nothing else to say and I was innocent. Then they advanced the chair I was sitting on very close to a wood fire that they lit which left burns on my leg (photographed). . . . They inserted some strange objects into my anus and asked me to take very humiliating positions while they messed with me and moved these objects in different directions. They were calling these positions some names, which I did not understand. They took many photos while I was in these positions; they were laughing and enjoying it. There was also a male and a female soldier who sat behind me; they were messing with each other. Their game was that the male soldier would aim at my injured and swollen leg with a piece of rock. As soon as he hit his target and I scream of pain she would reward him by letting him kiss her or fondle her. The stronger my pain was and the louder my scream was, the more he would get from her."

We know now of the U.S. efforts to redefine torture and, in particular, the memorandum of 1 August 2002, from Jay S. Bybee, head of the Justice Department Office of Legal Counsel, in which he wrote:

> "We conclude that for an act to constitute torture . . . it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death."

We know also of the U.S. interrogation techniques involving unusual methods designed not to leave marks. What we do not seem to fully appreciate is how closely UK interrogation techniques resemble those of the U.S.. This is not rhetoric. I am acting in three cases where UK troops have tortured Iraqi civilians to death, ten other torture in detention cases, and additionally for nine victims of abuse and torture at Camp Breadbasket. The statements of these victims make it clear that, like the U.S., members of the UK armed forces engaged in practices of sexual humiliation and systematic humiliation of male Muslims, routinely using women to sexually excite male detainees, devised games and routines to humiliate and disorient detainees, used methods of abuse designed not to leave marks, and, in fact, did everything we now know U.S. troops did, save for the use of bright lights and loud music. To make this explicit, I read an extract from one of my client's witness statements from a successful High Court case of 14 December 2004. His name is Kifah Taha al-Mutari. He gives evidence about the death in detention of his colleague, Baha Mousa, as well as the torture that he suffered which led to acute kidney failure. He says:

> "Baha appeared to have much worse ill treatment than the others. Two or more soldiers would beat him at a time whereas the rest of us were beaten by one soldier. Baha may have been punished more than the others in an act of revenge. Baha's father, who witnessed the arrest, had informed the officer in charge that he had seen the soldiers stealing money from the hotel. Baha received much more beating than myself and the other detainees. He was not able to stand up and the soldiers continued beating him even while he was on the floor. The soldiers used particular sharp jabbing movements into the area beneath the ribs, which was particularly painful.
>
> "We all had another hood put on top of the first hood. We were given water by it being poured over the hood so that we had to lick droplets that seeped through the hood. Freezing water was poured on to us and this was very painful as the temperatures in detention were 40 degrees plus. We were given one meal a day consisting of rice with extremely spicy soup, which we could not eat.
>
> "Soldiers took turns in abusing us. At night the number of soldiers increased, sometimes to eight at a time. We were prevented from sleeping throughout the three days, as soldiers introduced the "names game." Soldiers would mention some English names of stars or players and request us to remember them, or we would be beaten severely.

> "One terrible game the soldiers played involved kickboxing. The soldiers would surround us and compete as to who could kickbox one of us the furthest. The idea was to try and make us crash into the wall.
>
> "During the detention, Baha was taken into another room and he received more beatings in that room.
>
> "On the third night, Baha was in a separate room and I could hear him moaning through the walls. He was saying that he was bleeding from his nose and that he was dying. I heard him say, "I am dying . . . blood . . . blood . . ." I heard nothing further from him after that.
>
> "On the morning of the third night, the other detainees and I were woken up from the only two hours' sleep we had been allowed in three days. One soldier asked us to dance like Michael Jackson."

Unfortunately, there is much more to come, and worse. In the Camp Breadbasket incident, a court martial heard evidence to explain the background to the taking of twenty-two photographs, publicly available now, of abuse, and humiliation of Iraqi civilians. The UK government's position was that the victims of the abuse could not be found and that what happened was that a few "rogue soldiers" took too seriously the order to "work hard" some Iraqi looters inside a food depot. One man was photographed strung up on the forks of a forklift truck. The evidence to the court martial was that soldiers had been playing around and had moved him out of the sun and it all got out of hand.

Before the court martial concluded, three victims asked my firm to act for them. Their evidence, which they wanted to put to the court martial, was compelling and put a completely different light on events. This included that the victims had lawful authority to be in the camp, that the abuse included torture, that women and sexual humiliation were involved, that officers were involved, and that the camp was being used as a detention center. Further, the Iraqi photographed in the forklift truck had lawful authority to be at the camp and was being punished for refusing an order to sever the finger of a fellow Iraqi. When I tried to have the victims' evidence heard, the court martial decided to ignore it and the attorney general threatened me with contempt of court proceedings if I attempted to alert the public and media as to what had happened.

Additionally, I have complained to the UK's attorney general that there is clear evidence that the UK had a systematic torture policy, which requires investigation. The attorney general has refused to recognize the importance of the issue and refused an investigation.

Both the U.S. and UK forces have been responsible for large numbers of civilian deaths whilst carrying out policing functions. It is important to emphasize that there is a different set of legal rules during an occupation, as compared to a war, and both the U.S. and UK were bound by Geneva Convention IV, which protects civilians. Further, both had legal powers of policing through Security Council Resolution 1483 and the Coalition Provisional Authority (CPA). The CPA passed a huge amount of legislation during the period 22 May 2003 and 28 June 2004 through 11 Regulations (R1-11), 97 Orders (O1-97), 14 Memoranda (M1-14) and 11 Public Notices (PN1-11). These included weapons control (M5, O3).

I have about thirty cases of deaths at the hands of UK troops during policing functions. The following points can be made:

1. The soldiers killed civilians, some in their homes, whilst operating under rules of engagement, which should have been changed from the war to the different circumstances of the occupation.

2. The soldiers appear not to have been trained in the basic elements of Iraqi civil society. For example, people were killed after the customary discharge of guns at funeral parties were mistaken for gun battles.

3. In virtually all cases, the commanding officer concluded on the basis of the soldiers' evidence only that there had been no breach of the ROE, which remain secret.

4. That no soldier, let alone officer, has been charged with any of the detention incidents let alone these unlawful killing cases.

5. That there appears to be a large number of civilian deaths at the hands of UK troops during the period May 2003 to January 2004.

As for U.S. troops' actions during the occupation, much of what they have done is hidden from view because of the role of the media. I want to focus on events in Falluja to give some legal input before the witness evidence in tomorrow's fourth session. It seems from what we know that U.S. troops engaged in acts of collective punishment towards the civilian population of Fallujah from at least April 2004 onwards. Some of the few eyewitness accounts that exist are now emerging. One of the few reporters to reach the city is American Dahr Jamail of the Inter Press Service. He interviewed a doctor who had filmed the testimony of a sixteen-year-old girl:

> "She stayed for three days with the bodies of her family, who were killed in her home. When the soldiers entered she was in her home with her father, mother, twelve-year-old brother, and two sisters. She watched the soldiers enter and shoot her mother and father directly, without saying anything. They beat her two sisters, then shot them in the head. After this her brother was enraged and ran at the soldiers whilst shouting at them, so they shot him dead."

Another report comes from an aid convoy headed by Doctor Salem Ismael. He was in Fallujah in February 2005. As well as delivering aid he photographed the dead, including children, and interviewed remaining residents. He reports:

> "The accounts I heard . . . will live with me forever. You may think you know what happened in Fallujah, but the truth is worse than anything you could possibly have imagined."

Doctor Ismael relates the story of Hudda Fawzi Salam Issawi from Falluja:

> "Five of us, including a fifty-five-year-old neighbor, were trapped together in our house in Fallujah when the siege began. On 9 November, American Marines came to our house. My father and the neighbor went to the door to meet them. We were not fighters. We thought we had nothing to fear. I ran into the kitchen to put on my veil, since men were going to enter our house and it would be wrong for them to see me with my hair uncovered. This saved my life. As my father and neighbor approached the door, the Americans opened fire on them. They died instantly. Me and my thirteen-year-old brother hid in the kitchen behind the fridge. The soldiers came into the house and caught my oldest sister. They beat her. Then they shot her. But they did not see me. Soon they left, but not before they had destroyed our furniture and stolen the money from my father's pocket."

Naomi Klein has also produced evidence about what she sees as the U.S. forces laying siege to Fallujah "in retaliation for the gruesome killings of four Blackwater employees." She speaks of hundreds of civilians being killed during the siege in April 2004, and of a deliberate tactic of eliminating doctors, journalists, and clerics who focused public attention on civilian casualties previously.

All of the above acts are arguably "crimes against humanity," defined by section 7 (ICC Statute) as "murder" (Article 7 (1)(a)), "extermination" (Article 7 (1)(b)), or "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health" (Article 7 (1)(k)). Further, they may be "war

crimes" (defined by Article 8 of the ICC Statute) as a "willful killing" (Article 8 (2)(a)(i)), "willfully causing great suffering or serious injury to body or health" (Article 8 (2)(a)(iii)) or "intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities" (Article 8 (2)(b)(i)) or "intentionally launching an attack in the knowledge that such an 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 be clearly excessive in relation to the concrete and direct overall military advantage anticipated" (Article 8 (2)(b)(iv).

As for the latter, questions need to be addressed as to military objectives and proportionality. If the force used was "clearly excessive in relation to the concrete and direct overall military advantage anticipated" then it would be disproportionate and unlawful. However, it must be remembered that this was a lawful occupation authorized by Resolution 1483. In its recitals, this recognized "the specific authorities, responsibilities, and obligations under applicable international law of [both] states as occupying powers under unified command." The UK and U.S. had to respect Geneva Convention IV. Thus decisions about military objectives and proportionality cannot be approached as if this were a time of war. But even if they could, it is hard to see how the U.S. could possibly justify these acts, if proven. Further, liability does not stop with the U.S. I have already set out the arguments about joint criminal enterprise and thus the responsibility of the UK for the acts of the U.S. Legally, these arguments as to joint responsibility are enhanced during the occupation. Not only were both states acting under *de jure* authority as occupying powers but also they were also senior partners within the CPA and thus responsible for all the legislative and administrative functions I have noted above. Thus, a legal analysis of the issue of accountability for incidents such as these from Fallujah, which may involve "war crimes" and "crimes against humanity," must begin by recognizing, first, the lawful authority of the U.S. and UK to both occupy and administer Iraq, and second, recognizing the protection of civilians through international humanitarian law, specifically Geneva Convention IV, and international human rights law, especially the International Covenant on Civil and Political Rights and the ECHR. It is also critically important to appreciate that any proper accountability is entirely dependent upon a lawful independent investigation being conducted. That is the importance of the protection given to the Right to Life (ECHR, Art 2; ICCPR Art 6) by the requirement to hold such an inquiry. For example, if states know at the outset that killings and torture during an occupation will be investigated independently, then this knowledge should be reflected in improved training for armed forces and, thus, more human rights-compliant behavior. Further, the requirement for independence is not met by the military investigation. It is only

when such an independent investigation unearths who is responsible that one gets to deal with questions as to who, if anyone, should be charged with "crimes against humanity" or "war crimes." Accordingly, one sees that it is prejudging the issues arising from the incidents in Fallujah to say that those responsible in a few incidents were acting within the rules of engagement and using proportionate force.

The U.S. and UK should have been proceeding on the basis that a lawful approach to international humanitarian law and international human rights law relevant to the protection of civilians in an occupation would be expected of them and rigorously enforced by the international community through, for example, if appropriate, critical resolutions of the Security Council. But it is not too late for accountability, and this Tribunal may be part of a future process that leads to it.

CONCLUSION

The Iraq war and occupation challenges us all to face the threat to international law by the actions of the U.S., UK, and other members of the coalition. We must be resolute in our determination to make international law stronger and more concerned with peace. There must be accountability for the dreadful numbers of Iraqi civilian casualties in this aggressive war and bearing in mind the use of indiscriminate methods of attack. There cannot be impunity for the acts of torture in detention—and in some cases deaths—nor the wanton killing of civilians during the occupation. Insofar as U.S. and UK interrogation techniques violate Article 1 of UN Convention on Torture, it cannot be acceptable that there be impunity. Accountability—rather than impunity—rests on two building blocks:

1. That there be an independent investigation to establish who is responsible for what acts and how far up the chain of command should responsibility lie. That is the importance of the positive obligation of Article 3 of the ECHR, and thus the critical importance of UK cases that attempt to establish that the ECHR did apply during the occupation.

2. That the ICC prosecutor fulfills its functions to make those responsible for these "war crimes" and "crimes against humanity" accountable through principles of individual criminal liability. In decisions over the next few months as to how, if at all, to investigate and prosecute these matters, it is important that he recognize the fundamental duty he has to uphold the rule of law.

Contesting Empire's Law and Human Rights as "Swords of Empire"

Amy Bartholomew
AJIL, 2003

1. THE BUSH DOCTRINE AND "EMPIRE'S LAW."

The horror that is the United States' illegal war of aggression against Iraq—the act that the Nuremberg Tribunal, which was largely a creature of the United States, called the "supreme international crime"—is one that will make sure that the U.S. "live[s] in infamy."[1] This was recognized, not long ago, by Arthur Schlesinger, Jr., a former advisor to the American Kennedy administration. Schlesinger was also important for calling the Bush Doctrine that underpins the attack on Iraq "a fatal change in the foreign policy of the United States."

Why is this considered a fatal course of events? I think there are four major reasons that stretch beyond the immediate horror, the literally "fatal" consequences that have been imposed on Iraqis by this illegal war:

First: The legitimacy of war as "an instrument of policy" was renounced shortly after the First World War, a prohibition that was entrenched with the signing of the United Nations' Charter. And, yet, the Bush Doctrine explicitly reinstates and defends waging war as an instrument of American policy.

Second: The Bush Doctrine articulates the principle of "preventive" war—a principle that violates the heart of the UN Charter and international law which requires armed attack, the reasonable anticipation of immediate armed attack,[4] or the decision of the Security Council that a threat to the peace is sufficiently grave as to require action to legitimize and render legal a military response.

* Third: The U.S. defends its right to decide upon and wage war unilaterally, again explicitly violating both the letter and the spirit of the UN Charter.

But even more important than these three immanent threats that are posed by the Bush Doctrine is the fact the Bush administration has not just set out a policy to break the law, to flout it—it does not, as some critics have maintained, simply attempt to act "lawlessly," which of course it surely does—but it also sets out to define and to state

the law, to constitute it unilaterally—monologically, as we might say. This fourth dimension of the Bush Doctrine poses a "revolutionary" challenge to the project of international law: it is an "international constitutional moment" in which the American Empire attempts to establish a new world order based on "absolute security" for itself.[7] It is important to grasp that it is not mere lawlessness, then, that lies at the core of the Bush Doctrine, but something much more threatening. It is an attempt to establish an order "whose law is not yet [entirely] visible." The Bush Doctrine means that the law that will now rule the globe is "Empire's Law," that is, a form of unilaterally constituted and imposed, illegitimate, unaccountable rule by a global power that attempts to perform the role of a global sovereign declaring itself to be "the exception." With regard to aggressive war—to war as an instrument of policy—the threat is that the U.S. is attempting to establish a new norm of preventive war which would be available, on its view, only to itself, but from the point of view of legality would be a norm recognized as available to all. Either of these results is obviously ripe with draconian implications. With regard to legality, the threat is that the U.S. treats law as merely a "derivative of the will of the sovereign," that is, itself, the global sovereign.

2. WHO DEFINED AND WHO SUPPORTS THE BUSH DOCTRINE?

The Bush Doctrine goes back well before the U.S. National Security Strategy of 2002, even though that is typically taken to be its first official articulation. Its chief architects were those associated with the Project for a New American Century who, long before September 11, 2001, made the case for American Empire stalking the earth in the quest for a *Pax* Americana and an "empire's law"—a *Lex* Americana—to further that aim.

This is bad enough. But what makes all of this even more troubling is that it is not only the neoconservative hard-liners in and around the Bush administration who have pursued illegal aggressive war and run roughshod over international legality by justifying its evasions, exceptions, rejections, and instrumentalizations in this way. The Bush administration was supported and encouraged by forces whom I will call the "human rights hawks" who—drawing on the previous decade's innovations in legitimizing (if not legalizing) humanitarian intervention and "humanitarian wars," aimed, at least ostensibly, at the protection of peoples from massive abuses of human rights—supported this war on human rights as well as security grounds. This is as true of Tony Blair as it is of American liberal public intellectuals like Michael Ignatieff and the majority of the Democrats in the American Congress.

The human rights hawks gave sustenance early on to the aims of American Empire as they articulated the case for a "humanitarian war" against Iraq, a theme that has now become more deeply imbricated within the Bush administration itself as it fights to

"spread democracy and freedom across the world" and "end tyranny" through continuing war and occupation (both *de jure* and de facto). Espousing their humanitarian concern and their cosmopolitan moral solidarity, the human rights hawks gave crucial support to the project both of undermining legitimate legality as a medium of regulation–international and otherwise—and of turning it into Empire's Law, a form of rule that is deeply at odds with the post-World War II project of globalizing its obverse, that is, "law's empire."

While the earlier post World War II project of extending law's empire was responsible for developing regimes of human rights and international law and foreshadowing (albeit highly imperfectly) a future order of democratic cosmopolitan law, Empire's Law seeks precisely to derail that project and to do so unilaterally, brutally, and by the projection of military as well as economic and political power across the globe. Thus is a new phase in the American imperial project born.

It is, therefore, crucial to address the fact that the responsibility for the terrible destruction of Iraq and the brutal killing, torture, and insecurity of the Iraqi people is shared by these hawkish liberals and neoconservatives alike, for the former—the human rights hawks—gave the Iraq war the ideological and moralistic justification that was required to gain, and especially to sustain, support for it by the citizens of American Empire, particularly as it became glaringly apparent that WMD were a conjured fantasy. Viewed as a war of liberation, the decimation of Iraq, the terrible disregard and squandering of life, culture, and resources, seemed to many in the liberal camp, at least for a while, to be "worth the price." And the fact that it would be an American Empire that would wage the war was not cause for concern for them. Michael Ignatieff, for example, one of the organic intellectuals of the war, famously maintained (and I quote) "the moral evaluation of Empire gets complicated when one of its benefits might be freedom of the oppressed." For Ignatieff, the "disagreeable reality" was not just that "war may be the only remedy" for cases like Iraq, but that the only power capable of addressing this reality was the American Empire, with its "general world duty." According to Ignatieff, who spoke for the liberal hawks: "The case for Empire is that it has become, in a place like Iraq, the last hope for democracy and stability alike."

How far liberal human rights hawks have strayed from Arthur Schlesinger, Jr., who, it will be remembered, recognized in the Bush Doctrine "a fatal change in the foreign policy of the United States," likening it to Japanese imperialism prior to the end of World War II such that now it is the U.S. that will "live in infamy"!

But it must not be thought that it is only liberals or neoconservatives who could possibly defend such a stance, who could possibly treat human rights as "swords of empire." Consider for a moment the argument made by the British Marxist political theorist, Norman Geras. Geras has chastised his progressive colleagues for failing to address the needs of strangers which, he maintains, in the case of Iraq required military

"regime change" in order to meet the demands of cosmopolitan moral solidarity. He argued, in addition, that there is a "universal right to aid" and a "universal obligation" to meet it while insisting that those who opposed the war in terms of anti-imperialism, anti-Americanism, and anticapitalism have failed to appreciate the "manifold practices of human evil" in places like Saddam's Iraq. He concluded with a eulogy for the antiwar Left: "So much for solidarity with the victims of oppression, for commitment to democratic values and basic human rights."

But even if we accept the importance of showing cosmopolitan moral solidarity and confronting "manifold practices of human evil," as I think we must, one does not have to belabor the obvious, that with greater hindsight than these analyses could provide there is no plausible argument to be generated that this was, in fact, a humanitarian war. It is crystal clear that the war waged against Iraq was never a humanitarian war and neither has the occupation been a humanitarian or transformative one. But, it is even more important to insist that, long before the war was launched against Iraq, it was clear that neither its aims nor its most likely consequences were to be humanitarian. Both the officially declared but illegal war and the occupation have been light-years away from the sort of liberal policing, rather than military, model that would have to animate any truly humanitarian intervention where, for example, the intervenors would place civilian safety at least on par with their own and refuse to use indiscriminate weapons, including those that will surely decimate the environmental, genetic, and health future of Iraq (and likely its neighbors) for centuries, if not millennia, to come. All of this death, pain, and destruction unleashed ostensibly in the name of extending freedom, human rights, and liberation to the Iraqi people is enough thoroughly to discredit claims of humanitarianism.

The American Empire's disregard for humanitarian concerns was as apparent then, at the outset, as was its disregard for international law, international institutions, the safety, security, and human rights of the Iraqi people, and global public opinion. Rather, from Abu Ghraib to Kandahar, Baghdad to Guantanamo, the U.S. is asserting the sharp edge of Empire, governing so-called problem states through military violence and what Amnesty International has called an "archipelago of prisons" around the world which, as critical commentators have emphasized, have more in common with concentration camps than they do with prisons, all the while the U.S. proclaims its moral and political superiority—and its 200 year old constitution— as a justification for doing so.

Human rights justifications are being used to install by these very means, "by fire and sword" as Jurgen Habermas has put it. And this, of course, is a very particular conception of the rule of law, the rule of Empire's Law—a rule that has virtually nothing to do with democracy or with human rights, but which is aimed at the expansion by

military domination of a neoliberal conception of good governance based upon market capitalism. This is combined with the imposition of a political structure via a constitution that, far from extending political democracy to Iraq, seeks to extend Empire's Law over it, treating it as mere terrain to be conquered, to be enveloped within the imperium's thorny embrace, a problem state to be pacified while being freed only insofar as that freedom is in line with the values and interests of the Empire and democracy is really the name for another client state.

It is clear, therefore, that it was an egregiously irresponsible act for the human rights hawks to support the war against Iraq. In supporting virtually unilateral war, the human rights hawks, alongside their neoconservative counterparts, performatively justified future forms of unilateral war and rallied against global justice. The important consequence is: Those who gave intellectual and ideological support should be held morally responsible for the devastation of human rights and global justice, the destruction of Iraq and the wanton murder of Iraqis as well as for the "moralization of politics" that has accompanied this war such that Empire's Law seeks to trump law's empire in an Alice in Wonderland sort of inversion of legality. And those ostensibly humanitarian warriors who had the political power to decide whether or not to breach international law, both in terms of committing the crime of aggressive war and in terms of committing grave violations of international humanitarian law—Tony Blair for one—o must be held legally as well as politically accountable alongside those at the pinnacle of the American Empire who have aimed at the creation of a new world order through criminally culpable behavior.

3. EMPIRE'S LAW OR LAW'S EMPIRE?

We would do well, under these conditions of the Bush Doctrine in general and the aggressive war waged against Iraq in particular, to remember the words of the American chief prosecutor at the Nuremberg Tribunal. He (Associate U.S. Supreme Court Justice Robert Jackson) said that the crime of aggression cannot be justified by any political or economic conditions. He went on to say that:

> "If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."

This statement by the chief prosecutor at the Nuremberg Tribunal expresses the most elementary principle of legal justice: that legitimate law must be universalistic,

displaying equal recognition, equal applicability, and impartiality. In order to be legitimate, law must be judged to be equally good for all. And in the contemporary context this judgment must issue from the perspective of each. But the Bush Doctrine violates all of these principles of legality. It has, in fact, definitively raised the question of whether international law is to remain a medium for the regulation of problems between states. Is the global spread of law's empire in the post World War II era now to be definitively replaced by Empire's Law by the only power capable of constituting such a wrongheaded global politics—the American Empire? Will we accept the combined import of the Bush Doctrine and the war against Iraq? Will we accept that the American imperium holds the right of empire to rule, to run roughshod over its self-declared enemies, to act as a self-declared trustee of the interests of the world and to undermine international legality?

CONCLUSION:

No.

We, the people of the world, must demand that the perpetrators of the aggressive, illegal, immoral, and irrational war against and occupation of Iraq—who at the same time seek to undermine law's empire in favor of the nonreciprocal right of American Empire—be held responsible morally, politically, and legally for their aggressive war, for the war crimes they have committed, and for seeking to undermine the entire post-World War II order of international legality.

Jean-Paul Sartre perceptively recognized the importance of the norms of international legality when, in his Inaugural Statement to the Bertrand Russell War Crimes Tribunal convened during the Vietnam War, he argued both that Nuremberg represented victor's justice and that once the principle of legality was inscribed, due to its "implicit universality," it would become difficult for those powers to avoid its reach. The Nuremberg Tribunal created an "ambiguous reality," he argued, in which an "embryo of a tradition," a precedent, was created that, while it was never extended after the Tribunal to the victors, nevertheless "created a real gap in international affairs." That gap lay in the fact that no institution had been created to affirm the universality that lies at the principled heart of the Nuremberg Tribunal. But that gap "must be filled," he said. Sartre went on to argue that where no official institution would do so it was up to the people. And, most interestingly, he maintained that that Tribunal should be aimed at making "everybody understand the necessity for international jurisdiction—which it has neither the means nor the ambition to replace and the essence of which would be to resuscitate the *jus contra bellum* [i.e., the rule against war], stillborn at Nuremberg, and to substitute legal, ethical laws for the law of the jungle."

Sartre's perspective should inform our own. The struggle for legality and for legal responsibility must be viewed as one of our weapons against the Bush administration, against Empire's Law and against the "moralization of global politics," all of which lay behind the violations that the U.S. war against Iraq perpetrates against humanity in general and against Iraq in particular.

But we must now recognize the constitutively unequal structure of relations implicit in American Empire. If that is the case, if what we confront is an Empire, we must ask the question: how can we hope to bring such an empire to account? Not much is clear about the answer to this question except for the overly general answer that we will require contestatory politics that are anti-empire in orientation, not just the politics of pursuing a return to legality, and certainly not just antiwar politics. Our politics must be oriented toward contesting the U.S.'s imperial position—whether it issues from the Bush administration, the Project for a New American Century, the human rights hawks, or some future "benevolent" U.S. administration that may be expected to promote imperial versions of legality led by the U.S. Our project must be to support a critical cosmopolitanism that is aimed at contesting the imperial power, in part, but only in part, through legal means. And this politics must develop a very sober analysis of the prospects of the project of legalization even while it demands it. It must be a politics that publicizes the crimes of an "empire that is no longer concealed" as it builds the case against it.

- We must demand that the U.S. pull out of Iraq now, respect the Iraqis' right to self-determination, and pay reparations.
- We must demand that the U.S. commit itself to international law and institutions.
- We must demand that the perpetrators of aggressive war and war crimes be put on trial.
- And we demand that those who have supported this war assume political responsibility, along with their leaders, for the devastation they have wrought for humankind.
- Finally, we must reject that Empire's self-proclaimed right to rule, and we must and will express that rejection through manifold acts of resistance.

Iraq: One Year Later

Mary Ellen O'Connell, Anne-Marie Slaughter, Richard Falk,
Thomas M. Franck, and James Crawford

Almost exactly one year ago, during her presidential speech at the 2003 Annual Meeting of the American Society of International Law, Anne-Marie Slaughter spoke of the use of force that began in Iraq shortly before that Annual Meeting. She concluded that the war was unlawful but nevertheless potentially legitimate. That conclusion provoked a great debate from the moment her speech ended. Our purpose today is to take up that debate.

Dean Slaughter will have a chance to return to her remarks today and assess for us whether she has concluded that the use of force in Iraq was legitimate and if not what could have made it so. She will also remark on the idea that some uses of force should be considered legitimate even if they violate international law.

She will be followed by Richard Falk, who helped conceive the notion that major uses of force, while unlawful, could still be considered legitimate. Professor Falk made this contribution in the independent Kosovo Commission's Report in 2000. He told Dean Slaughter last year before her presidential speech that the use of force in Iraq was both unlawful and illegitimate. He still defends assessing uses of force as sometimes legitimate even if unlawful but will clarify for us today why Iraq is not such a case and why he knew one year ago that it was not.

Next is Thomas Franck, who has serious concerns about the whole idea of introducing considerations of legitimacy in the face of illegality. In his most recent book on our subject, *Recourse to Force: State Action Against Threats and Armed Attack* (2002), he shifts focus from the substantive rules prohibiting force, which he wants to preserve, to the consequences of violating the rule. While we cannot adjust the rules during or after a violation, Professor Franck says we can adjust the consequences, depending on the circumstances of the wrong. For him, Kosovo was a case for mitigating consequences; Iraq is not. In his remarks today he focuses on the hubris that led the United States to war in Iraq, a war wholly lacking immediate necessity.

Mary Ellen O'Connell follows next. She will look at whether Professor Franck's mitigation doctrine is likely to accomplish for international law what he hopes: preservation of robust substantive rules but with greater flexibility than the system currently allows. Professor O'Connell argues that what international law needs now is less flexibility, not more. Both Secretary Powell and Secretary Rumsfeld have said that no

Security Council resolution was needed for Kosovo and one was not needed for Iraq. Mr. Blair and Mr. Bush speak of humanitarian considerations for the Iraq invasion, drawing comparisons to Kosovo. The flexibility introduced into the law since Kosovo has rendered it far more difficult to convince leaders that international law is real law.

Following Professor O'Connell is James Crawford. Professor Crawford will consider how politicians are using international law and possibly this very debate over legitimacy and legality for their own purposes. He, too, takes up the concept of "unlawful but legitimate," and even more the concept of "unlawful but potentially legitimate," to expose how distant such ideas are from the international community's agreed law, and how potentially destructive to it they are.

THE USE OF FORCE IN IRAQ: ILLEGAL AND ILLEGITIMATE

by Anne-Marie Slaughter

A year ago, when the United States and Britain decided to send troops to Iraq without a second UN resolution, I argued that their action was illegal under international law but *potentially* legitimate in the eyes of the international community. I set forth three criteria for determining the ultimate legitimacy of the action:

1. Whether the coalition forces did in fact find weapons of mass destruction;

2. Whether coalition forces were welcomed by the Iraqi people; and

3. Whether the United States and Britain turned back to the United Nations as quickly as possible after the fighting was done.

A year later, I conclude that the invasion was both illegal and illegitimate. The coalition's decision to use force without a second Security Council resolution cannot stand as a precedent for future action; rather, it was a mistake that should lead us back to genuine multilateralism.

None of the criteria I put forward has been fully met. Above all, no weapons of mass destruction have been found. The best President Bush could do in his State of the Union address was to claim that U.S. inspectors had found "dozens of weapons of mass destruction-related program activities." As dangerous as Saddam Hussein may have been to the world, he did not pose the kind of imminent threat necessary to justify preemptive action.

Second, the vast majority of Iraqis are indeed glad to be rid of Saddam Hussein,

but an equal number appear to perceive the coalition presence more as an occupation than a liberation. Third, the U.S. administration is only really "going back to the UN" now, when it has been forced to recognize that it cannot broker a political settlement without UN assistance, and when it is likely looking for someone else to blame if Iraq descends into chaos in the months leading up to the presidential election.

Why distinguish between legality and legitimacy in the first place? After the NATO intervention in Kosovo, a distinguished international commission found that it was illegal but legitimate. It is sometimes necessary to break international law to change it; where the law does not permit what the international community approves, the commission argued, the law must be updated "to close the gap between legality and legitimacy."[1] It thus concluded that UN rules and international law generally needed to be updated to permit armed intervention for purposes of humanitarian protection under carefully specified conditions.

The lesson of the invasion of Iraq is quite different. The nations that insisted on more evidence that Iraq actually possessed weapons of mass destruction, more time for the inspectors to do their work, more time for a fully mobilized international community to exert diplomatic pressure, proved to be right. I believe that the Iraqi people are unquestionably better off without Saddam Hussein, and that the prospects for creating a stable and more democratic Iraqi government are still alive, although they are going to require coordinated international effort and assistance for many years. But the ends cannot justify the means with regard to war, any more than we can authorize police to detain and search ordinary citizens on a false warrant as long as they ultimately find some evidence of criminal activity. The United States offered the world a false warrant.

UN rules should be updated to make it easier, in Kofi Annan's words to the General Assembly this past September,[2] to consider "early authorization of coercive measures," which is UN-speak for collective preemption. The world faces very different threats than it did in 1945; international law must adapt. In particular, nations must be prepared to recognize the combined threat of a government that has access to weapons of mass destruction and no internal checks on its power, as evidenced by massive human rights abuses, complete control of the media, and an absence of any

1. Independent International Commission on Kosovo, *The Kosovo Report* 10 (Oxford University Press 2000).
2. Kofi Annan, Address by Secretary-General Kofi Annan, UN Doc. SG/SM/8891, Sept. 23, 2003, available at <http://www.un.org/News/Press/docs/2003/sgsn8891.doc.htm>.

political opposition. The UN Security Council must be prepared to enforce its resolutions consistently and unanimously.

But the most important lesson of the invasion of Iraq is that the safeguards built into the requirement of the *multilateral* authorization of the use of force by UN members are both justified and necessary. If nations seeking to use force cannot mount strong enough evidence of a security threat to convince a majority of the Security Council and to avoid a veto (provided that the veto is not clearly motivated by countervailing political interests), the world should wait and try another way before sending in the troops.

THE IRAQ WAR AND THE FUTURE OF INTERNATIONAL LAW

by Richard Falk

A year after the initiation of the Iraq War is not too soon to assess, if tentatively, the impact of this globally controversial war upon international law. My assessment is organized around five questions that deserve responses at this point:

1. Should the Iraq War be treated as *a defining moment* for international law?

2. Should refusal to endorse the Iraq War be regarded as *a triumphant moment* for the United Nations, especially the Security Council?

3. Can the Iraq War be interpreted as an *illegal but legitimate* war of choice?

4. Should the legal norm of nonintervention in the internal affairs of sovereign states be abandoned?

5. Does the Iraq War provide an occasion for incorporating *new norms* of international law governing the use of force?

My response to each of these questions is a resounding "No." The remainder of this brief presentation will give the essential reasoning behind the answer.

1. Should the Iraq War be treated as a defining moment for international law? No.

There is some temptation to contend that the Iraq War was a defining moment for international law and for the authority of the United Nations. It could be argued, of course, that the Iraq War vindicates nondefensive wars of choice, and that UN opposition has made, as President Bush warned in his speech to the General Assembly of September 12, 2002, the organization "irrelevant." Such a temptation is easily resisted.

Recourse to war against Iraq in March 2003 on the facts and allegations that existed at the time is regarded around the world as so flagrantly at odds with international law and the UN Charter as generally understood to have little or no weight as a *legal* precedent. It is better understood as a prominent instance of a violation of the core obligation of the UN Charter, as embodied in Article 2(4); as such it qualifies as a potential Crime Against Peace in the Nuremberg sense. It provides an occasion to reaffirm the fundamentally sound idea embodied in international law that force can only legally be used under conditions of palpable *defensive necessity* (or possibly on the basis of an explicit mandate from the Security Council).

Note that defensive necessity is broader than "self-defense"; it does take realistic account of the post-9/11 world that could validate preemptive uses of force under exceptional conditions of demonstrated threat. The Afghanistan War might qualify under such legal reasoning as a valid claim of defensive necessity. Several of the staunchest supporters of the Iraq War as a matter of strategic and moral necessity, such as the British Prime Minister Tony Blair and the influential American neoconservative Richard Perle, have stated that respect for international law was not warranted to the extent that it would have precluded the Iraq War. In effect, the most articulate advocates of the Iraq War concede, implicitly or explicitly, either its "illegality" or that if "regime change" of this sort was precluded, then it was "bad law."

It is notable that the Bush administration made only the most minimal effort to provide a *legal* rationale for the Iraq War. Its public justifications were based on a confusing mixture of security and humanitarian rationales. As for the irrelevance of the UN, the difficulties of the occupation have increasingly led even the Bush administration to seek UN help in bringing stability to Iraq.

Shifting ground, I would argue that if the Iraq War had turned out to be successful as a political project, it might well have been a defining moment for American foreign policy and the character of world order. It could have become a precedent for American unilateralism within the context of recourse to war and for regime-changing interventions. If this pattern were established, it would have produced what might be called a *geopolitical norm*, that is, a use of power in a predictable pattern to achieve specified goals. The main feature of such a norm would be a repudiation of the authority of international law and the UN Charter by state practice that violates a consensus that joins the views of the majority of states and world public opinion.

At present, the U.S. government seems to be claiming the role of the legislative agency

for creation of geopolitical norms, reinforced by ad hoc coalitions of the willing, in at least two areas impinging on the legal norms governing the use of force: (1) intervention in sovereign states to achieve regime change; and (2) selective coercive pressure to promote counter-proliferation goals beyond the mandate of the nonproliferation treaty regime. To the extent that these geopolitical norms are acted upon, it represents a fundamental shift from world order based on the principles of territorial sovereignty to world order based on hegemonic edict. Such a world is best denominated an *imperial* world order and would likely be challenged by statist and nonstatist forms of armed resistance.

2. Should the refusal to endorse the Iraq War by the United Nations, especially the Security Council, be viewed as a triumphant moment? No.

Many opponents of the Iraq War have praised the UN Security Council for remaining steadfast in the face of formidable U.S. pressure for a formal mandate for initiation of a regime-changing war against Iraq. I agree that the Security Council deserves some credit for this result, but I would argue that it did only about 25 percent of the job entrusted to it by the UN Charter. If the American-led claims against Iraq were evaluated from the perspective of international law or by reference to the war prevention goals of the Charter, the UN performance was still 75 percent or so deficient.

There are several dimensions of this deficiency:

1. The UN imposed on Iraq a punitive peace via SC Resolution 687 (April 3, 1991) comparable in the setting of the Gulf War to the discredited Versailles approach to Germany after World War I.

2. The UN lent its authority to more than twelve years of punitive sanctions against Iraq (1991–2001) despite evidence of indiscriminate, severe harm to the Iraqi civilian population.

3. The UN did not censure the United States or the United Kingdom for repeated threats and uses of force that intruded upon the sovereign rights of Iraq in this same period.

4. SC Res. 1441 (Nov. 8, 2002) adopted the main premises of the American geopolitical norms relating to counter-proliferation and regime change, seemingly suggesting that if Washington had been more patient the endorsement of recourse to war would likely have been forthcoming.

In the background of the UN role with respect to the Iraq War are some important issues, though they are admittedly hypothetical. Suppose that the Security Council had authorized the Iraq War. Would that make it "legal"? Is the UN legally entitled to endorse what would be otherwise considered to be a war of aggression without such an endorsement? Who is authorized to make such a determination if there is no judicial review of Security Council decisions, as seems to be the implication of the World Court judgment in *Lockerbie?* It seems reasonable that only the General Assembly has residual responsibility to assess whether the Security Council has acted beyond the constitutional limits imposed by the UN Charter, but it lacks the power of decision, and its judgment would be only an expression of opinion.

3. Can the Iraq War be interpreted as an illegal but legitimate war of choice? No.

In my view, the illegality of recourse to war against Iraq in 2003 was clear. It was also clear before and after the war that there was no reasonable basis for invoking the "illegal but legitimate" formula used by the Independent International Commission for Kosovo to deal with an exceptional circumstance of humanitarian emergency. With respect to Iraq, the worst humanitarian abuses were associated with the campaign against the Kurds in the late 1980s and against the Kurds and Shi'ia in southern Iraq immediately after the Gulf War in 1991. Perhaps a case for humanitarian intervention could have been credibly made in these earlier settings, but the Kosovo exception was based on the *imminence* of the danger associated with the feared ethnic cleansing of the Albanian population, made credible by Serb behavior in Bosnia just a few years earlier and by the rising tide of atrocities in Kosovo in the months preceding recourse to war, under the NATO umbrella but without a Security Council mandate.

Given the failure to find weapons of mass destruction of any variety in Iraq and considering the intense resistance to the occupation, there is also no way to maintain convincingly that a condition of either defensive necessity or humanitarian emergency existed in Iraq as of 2003. If there was such an emergency it was not attributable to the Baghdad regime, however dictatorial its record, but was a result of UN sanctions and numerous uses of force against Iraq.

4. Should the legal norm of nonintervention in internal affairs of sovereign states be abandoned? No.

The Iraq War, along with other experience with interventionary diplomacy, suggests that respect for the norm of nonintervention, accompanied by respect for territorial

sovereignty, continues to represent a prudent guideline for statecraft. If the U.S. government had adhered to such a guideline over the course of the last several decades it would have avoided its two worst foreign policy disasters: The Vietnam War and the Iraq War. If it had refrained from regime-changing covert interventions in Iran (1953) and Guatemala (1954), it might have avoided the Iranian Revolution and the years of atrocity and brutality in Guatemala.

The Iraq War confirms the wisdom of avoiding interventionary diplomacy unless there is a genuine defensive necessity or humanitarian emergency, and even then caution is appropriate. As the Iraqi resistance confirms, interventionary wars are primarily political phenomena, not military; they are decided by the play of nationalist, ethnic, and religious passions. It is best to await the dynamics of self-determination to achieve transformative changes in dictatorial states. The experience with Eastern Europe, the Soviet Union, and South Africa is both instructive and encouraging.

5. Does the Iraq War suggest the need for adapting international law to the new conditions of international conflict in the aftermath of 9/11? No.

From the argument so far, the simple conclusion is that the Iraq War is an occasion for reaffirming the continuing viability and validity of the legal prohibition against non-defensive uses of force that is contained in the Charter. At the same time, the grave threats posed by the sort of mega-terrorist attacks of 9/11 do justify stretching the right of self-defense to validate uses of force, as necessary, to remove threats associated with non-state actors when the territorial government is unable or unwilling to address the situation decisively and with due urgency. The Afghanistan War, with qualifications, arguably fits within such an expanded conception of self-defense.

THE ROLE OF INTERNATIONAL LAW AND THE UN AFTER IRAQ

by Thomas M. Franck

"Voila le soleil d'Austerlitz!" Napoleon boasted, recalling his triumph seven years earlier over the Austrians, as his officers formed outside the gates of Moscow in 1812. This bit of over-the-top braggadocio symbolizes a larger truth: Emperors and empires, sooner or later, get things wrong. History is littered with the shards of their grandeur:

Two vast and trunkless legs of stone
Stand in the desert. . . .
My name is Ozymandias, king of kings:

Look on my works, ye Mighty, and despair. . . .
Nothing beside remains. Round the decay
Of that colossal wreck, boundless and bare
The lone and level sands stretch far away.[1]

In a sense, the imperial penchant for failure is a pity, for otherwise humanity might by now have emancipated itself from its narrow tribalism to achieve a form of the global unity so enthusiastically espoused by Alexander the Great, Claudius I, and Napoleon, not to mention prominent contemporary publicists of international law. But bad things always happen, even to relatively benign imperialists as well as (fortunately) to the really awful ones like Adolf Hitler. Invariably, at some point they or their minions make a fatal mistake.

This easily accessible lesson of history is worth another look as the United States, hot on the heels of Macedonia, Rome, et al., enters into what Andy Warhol might have characterized as its fifteen minutes of fame as the world's single superpower. The American president has already made clear that he intends to use those fifteen minutes to get them extended indefinitely. Still, history cautions against putting a bet on that lame cavalry horse.

A far more constructive way to spend the allotted span of imperium might be to plan for the time after it is inevitably over. Those fifteen minutes of disproportionate power afford a unique opportunity to influence the shape of the international system in ways that accord with the lone superpower's cherished social, political, and legal values.

Instead, Washington seems determined to do what all other empires did: lay down the rules by which everyone else, except it, is expected to play. This may work for a while but in the end it will fail, leaving nothing behind but its clay feet standing sentinel in the desert.

The Unilateralist Temptation

Despite the warnings of history, in Washington the unilateralists are still in triumphalist ascendance, buoyed by the illusion of easy "victories" in Afghanistan and Iraq. The carefully crafted postwar system of multilateral diplomacy that the UN represents is being debased.

After World War II, it was the United States that was singularly responsible for designing the post-war system of institutionalized governance and international law that is embodied in the UN Charter. Chief of its characteristics was the strict limitation on the discretion of individual states to resort to force.

Instead of building on that base, Washington has now boldly asserted a new policy

1. Percy Bysshe Shelley, *Ozymandias.*

that openly repudiates the restrictions on recourse to force of Charter Article 2(4). When it comes to defending our national security, President Bush again told Congress this year, "America will never seek a permission slip to defend the security of our people."[2]

It is not enough to reiterate that any effort to establish a thousand-year American empire is likely to meet the same fate as all prior essays in global grandiosity. Rather, we must understand that failure represents a supremely wasted opportunity. We will always be left to wonder what might have been, had we not squandered our brief moment at center stage.

It may be no more than human nature for the most powerful to be scofflaws. Our government may be saying no more than did Leona Helmsley when, reputedly, she told a servant that "only little people pay taxes."

Indeed, the United States has issued that sort of *defie* explicitly. The UN had emphatically *not* authorized it to invade Iraq. Security Council Resolution 1441 charged Iraq with violations of the disarmament regime imposed on it in 1991, but it addressed that failure exclusively by deciding "to set up an enhanced inspection regime" and providing that, if compliance was not satisfactory, the Council be convened immediately to consider the situation while warning Iraq of "serious consequences" if there were "continued violations of its obligations." The resolution concluded by emphasizing that the Council "will remain seized of the matter."[3]

How could Lord Goldsmith, the British Attorney General, conclude from this that, while there is an obligation to convene the Council "to consider the matter before any action is taken . . . further [military] action can be taken [by a member] without a new resolution of the Council" and, moreover, that "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."[4]

The problem, then, was that the United States and Britain were unwilling to subordinate their judgment to that of a Security Council jury.

It may be natural for a superpower to refuse to subordinate its appraisal of the facts and conditions relevant to its national security, but such hubris may ultimately betray its national interest. Thus, in the run-up to the Iraqi invasion it became clear that the overwhelming majority of states were of the view either that Iraq did not have weapons of mass destruction or that these could be found by augmented UN inspections. Vice President Cheney, to the contrary, said just before the war, "There is no doubt that Saddam Hussein now has weapons of mass destruction" and scoffed that the UN

2. State of the Union Address (Jan. 20, 2004), transcribed in *New York Times*, Jan. 21, 2004, at A1.
3. UN Doc. S/Res 1441 (2002).
4. Lord Goldsmith's Statement, *Times* (London), Mar. 18, 2003, at Home News 2.

weapons inspectors "provide no assurance whatsoever."[5] He was dead wrong, and we left more than five thousand dead in the wake of that misunderstanding.

The UN system sets up checks and balances that we destroy at our peril. As to Iraq, others were right, we were wrong, and thousands were killed because we would not listen. Listen to whom?

In a recent filmed interview, Robert McNamara, the Vietnam-era Secretary of Defense, discusses the nation's lack of empathy for dissenting views and sees in it a recurrent danger to the formulation of sensible policies. "What makes us so omniscient?" he asks.

> We are the strongest nation in the world today, and I do not believe that we should ever apply that economic, political, or military power unilaterally. If we'd followed that rule in Vietnam, we wouldn't have been there. None of our allies supported us. If we can't persuade nations with comparable values of the merit of our cause, we'd better re-examine our reasoning.[6]

Preening, draped in what Harold Koh calls "American exceptionalism,"[7] we fell on our face in Iraq, and the world sniggered. We have wasted the first seven of our fifteen minutes. But let us not underestimate our capacity to learn from this catastrophic essay and to make our way back to multilateralism.

Real realism, in place of the prevailing unilateralist fantasies, should now force a sober reconsideration of the national advantages to be gleaned, even for the sole superpower, of a return to the norms and institutions of multilateral diplomacy. This requires leadership, not bullying. In the words of Harvard's Joseph Nye, "If I can get you to *want* to do what I want, then I do not have to force you to do what you do *not* want to do."[8] In its remaining eight minutes of imperium, instead of pursuing a policy of boastful domination and heedlessness the United States could be nudging the world towards an effective cooperative approach to the three predominant global problems of the century: terrorism, failed states, and poverty. But, the only viable tactic for promoting its preferred solutions—aside from *having* solutions—would be for the United States to use its influence behind the scenes to make the nations of the world feel that it is *they* who are designing the common approach to these three related problems.

5. "In Cheney's Words: The Administration Case for Removing Saddam Hussein," *New York Times*, Aug. 27, 2002, at A8.
6. *The Fog Of War: Eleven Lessons of Robert S. McNamara* (Sony Pictures Classics 2003).
7. Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479 (2003).
8. Joseph S. Nye, Jr., *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* 9 (2002).

There is ample room for creativity and there are ideas aplenty, many of them originating with global networks of experts and emanating from fifty years of field experience by international organizations. Most of the components of reform are by now self-evident.

The veto needs to be rethought. First, when the Security Council has characterized a situation as a threat or breach of the peace in accordance with Article 39 of the Charter and laid down conditions with which the offending state must comply, that resolution should also stipulate that any decision to use collective measures in the event of noncompliance should be made by a majority of the Council, not subject to the veto.

Second, the world needs a standing, transnationally recruited, volunteer rapid reaction force; its deployment must be by multilateral decision but not subject to one-state veto; it must be under a centralized international command; its components must include police, intelligence experts, and personnel trained in reconstructing civil societies; it must be funded by a flat assessment against the gross national product of every state (or some comparable measure); and it must be configured administratively and authorized to act in close cooperation with the complementary capabilities of the world's major powers, with regional organizations and groupings as well as with the world's financial, monetary, and economic development institutions.

No small task, you say? Of course not. But what's the sole superpower's exalted status for, if not to tackle the world's really big tasks in a creative but subtle way; so that, when our fifteen minutes are up, we will all be living, appreciatively, in a better, safer, more civilized place?

THE END OF LEGITIMACY

by Mary Ellen O'Connell

Professor Falk tells us this is not a defining moment for international law. He believes that because the use of force in Iraq was so blatantly unlawful nothing has been defined or redefined as a result of it. I suggest, however, that it is a critical moment—a moment to end the erosion in legal rules that has brought us to the point where it was not so clear to many that using force in Iraq was blatantly unlawful.

The decision by four nations to use force in Iraq last year, with the positive support of about two dozen more, has created a crisis for international law on the use of force. It is a crisis out of which, however, I am confident we can forge a renewed international law. We must, as part of the renewal, end the erosion of law caused in part by the assertion that some uses of force are legitimate even if they are unlawful.

Last night during the presidential panel, one of the former legal advisers to the State Department said we really do not have rules on the use of force. It was no great surprise to hear a comment like that, but it should have been. Out of a renewal movement we should have the goal that no one disputes the existence of real, binding international law rules on the use of force. We should have the goal that when such a rule is violated, few remain in doubt.

An important step toward attaining widely accepted, real-law status for these rules is to reject the approach that some uses of force are still legitimate even if they are unlawful. I am in full agreement with Professor Franck about the danger of such thinking. It invites us to decide on personal moral grounds rather than community-based legal grounds the acceptability of a use of force. Instead of community-authorized decision-making bodies assessing uses of force on the basis of existing rules, national leaders can decide on the basis of their own personal moral views.

The abandonment of the legal approach in the Kosovo crisis created a strong precedent for the moral approach in Iraq. The individual moral decisions of coalition leaders were viewed by many as just as important as the views of authorized decision-makers on the Security Council.

We need to return to legal process and legal rules on use of force. Philip Allott described to me a few days ago what the goal should be: We international lawyers need to be able to insist to a leader that a rule really exists, that it cannot be ignored. It may still be violated, but no one will be confused that a real violation has occurred. In the words of James Hathaway: we will no longer provide "camouflage for the exercise of unilateral action in defiance of legal authority."[1]

While I am certain the "unlawful but legitimate" approach will not get us to real law, I also wonder whether Professor Franck's approach will. In his book, *Recourse to Force*, he raises some concerns for the rule of law that are posed by pronouncing actions legitimate even if unlawful. He warns against undermining the clarity of illegality. In a case like Kosovo, he advocates keeping the focus on the law violation but mitigating the "penalty" if circumstances indicate.

I worry, however, that thinking in mitigation terms can also undermine substantive rules. Mitigating a penalty before courts of law is a long way from what is possible in use-of-force cases. Courts have a range of well-defined penalties from which to choose. A judge can shape the penalty to meet individual circumstances and can consider the long-range impact of mitigating a sentence on all of society.

We have no such penalty system for violations of the international law on the use of force. As a result, thinking about mitigating the penalty for law violation creeps into thinking about the substantive rule. We end up at the same place as the legitimacy approach, doubting that the substantive rule is really binding.

1. James Hathaway, *America, Defender of Democratic Legitimacy?*, 11 Eur. J. Int. L. 121, 129 (2000).

Yet that is what Professor Franck so very much wants to avoid. His remarks today focus on the better approach. He advocates reaffirming real law by working to reform rules and processes within the formal sources and methods of international law. International law is a complete legal system, with means for law-making, application, and enforcement. The law provides defenses when the strict application of the law is not warranted. It has methods for change. We need not (and *may* not, in fidelity to law) rely on commentators to make exceptions for complying with law based on their personal opinion.

Recent cases underscore that the international law on the use of force and the institutional approach to applying it are basically sound. These cases underscore that the legal approach is far more appropriate than the personal moral approach. Both the Kosovo and Iraq cases vindicate Security Council and universal rules regulating the use of force. The Russians were right in the case of Kosovo to urge the continued use of economic sanctions, human rights monitors, and pressure on Milosevic as an alternative to seventy-plus days of high aerial bombardment. Eleven members of the Security Council were right to want more time for UN inspectors as an alternative to an invasion and occupation of Iraq.

The basic approach of the Security Council looks sound today and so do the bright line rules restricting the use of significant force to self-defense in the case of an armed attack. Lesser forms of force are permissible in the face of grave and imminent peril under the doctrine of necessity.[2] States may also resort to forceful countermeasures in the face of injury.[3] This is the range of forceful legal, and therefore legitimate, action, assessed on the basis of universally agreed principle.

The range of lawful action is practical and appropriate in today's circumstances. We need not throw it all over and resort to personal opinion. No international lawyer should

2. International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 25, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc>. The defense or excuse of necessity, however, does not apply to the use of force if the force is more than *de minimis*. That defense did apply to the 1967 British bombing of the Torrey Canyon on the high seas. The tanker threatened serious oil damage to the British coast. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*, 181 (2002). Uses of force above the *de minimis* threshold must be in self-defense or have Security Council authorization.
3. International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 22, 49–54, supra note 2.
4. Martti Koskenniemi, "The Lady Doth Protest Too Much," *Kosovo and the Turn to Ethics in International Law*, 65 Mod. L. Rev. 159 (2002).
5. Hathaway, supra note 1, at 128.

feel it is irrational to call on governments to conform to these rules. No international lawyer should treat this law as less than real law. Indeed, it is time for a real law movement within the international legal system. That is what Martti Koskeniemmi's new formalism is about[4] and James Hathaway's critical positivism.[5] They are both calling for a real law movement, a call not heard since Kelsen was prominent but long overdue.

THE PROBLEMS OF LEGITIMACY-SPEAK

by James Crawford

This panel is not, strictly speaking, about Iraq. Rather it is about the legal, moral, and political dialogue that the Iraq conflict has provoked among international lawyers and political commentators (two categories of persons who may seem more and more often to intersect).

At issue is the increasing use of "legitimacy" as a guide to assessing the propriety of state action. This did not, of course, begin with Iraq or even Kosovo. The *Shorter Oxford English Dictionary* dates to the mid-nineteenth century the use of "legitimacy" in the sense of "conformity to law, rule, or principle; lawfulness, conformity to sound reasoning, logicality,"[1] and the term has always had legal overtones. But in recent discourse there has been very little attempt to use it in a discriminating way, despite attempts at more rigorous analysis by Franck and others.[2] Instead it has been applied as a loose substitute for "legality," a way of glossing over difficulties presented by international action. It has given cover to the big battalions whose conduct has appeared to be morally driven but has nonetheless not been generally approved. Increasingly the fuzziness and indeterminacy of "legitimacy-speak" has seemed to allow us to break free from disciplinary constraints and to assert and impose our own moral intuitions, shared or unshared, on various target audiences.

It is revealing to ask in what contexts we would allow such uses of legitimacy arguments within a constitutional order, e.g., within a single state governed by the rule of law. A number of possibilities spring to mind. For example, we might praise conduct as not merely lawful but legitimate, as when a government takes strong but nonetheless lawful action to deal with a serious social problem. Conversely, we might accept conduct as lawful—the law allowing a considerable margin for error or appreciation on the part of government—but nonetheless criticize it as excessive or unwise. This is a perfectly

1 *Shorter Oxford English Dictionary* 1562 (4th ed. 1993).
2 Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990).

proper use of language. But I doubt that we would use the term "illegitimate" simply to indicate conduct with which we disagree. In this sense to say that conduct is illegitimate is to make a systemic point: the law may allow you to do that, but your conduct tends to undermine the foundations of the system as a whole.

A particular example of this use of the term arises in constitutional systems that depend significantly on practice or convention rather than law. The British Queen might refuse her consent to a law banning fox hunting because of a penchant for hounds—but if she did so, we might wonder how long the requirement of royal assent would last. Such a refusal would be lawful (the Queen has that legal power) but illegitimate.

Then there is the context in which the law is not clear, is perhaps evolving, and action is taken that presses up against previously imagined limits. Absent a clear ruling on the point, we might say that a use of power was legitimate, meaning that it was arguably reasonable in the circumstances given the lack of clearer guidance. In this sense, the use of the term implies a sort of provisional assessment. But this is a marginal usage. We would be more likely to refer to a legitimate attempt to address the problem, or, if the action was eventually upheld, to say that its legitimacy was vindicated.

Another possibility, of some sociological interest, could arise with respect to conduct within a subgroup that is accepted by that subgroup even though it contravenes general societal norms or laws. The practice of duelling in eighteenth century England may be an example; strictly, it was homicide, but there were apparently circumstances when gentlemen did it and believed correctly that they would not be punished. In such a context we could speak of a legitimate challenge to a duel—a legitimate challenge to commit murder or manslaughter!

These examples and others do not, however, dispense with law as a basic parameter of permissible conduct. Judgments of legitimacy are in one way or another expressed in relation to law, not autonomously. By contrast if a lawyer were to say, within a constitutional order, "Hereafter I dispense with considerations of law; for me all that matters is that the conduct should seem generally appropriate and fitting, regard being had especially to motives and eventual outcomes," we would be surprised. Would we consult such a lawyer? Would we allow her to become or remain a judge? Fidelity to law is not (except perhaps *in extremis*) the same as fidelity to one's own moral intuitions and preferences. It is in some sense external. It can be assessed by reference to external criteria.

No doubt there may be marginal cases where individual considerations intervene. But imagine a legal system, one that prohibits all forms of deliberate killing of humans, in which the practice of euthanasia is widespread and in which the health professionals effectively exercise the power to dispose of individuals whose life is judged not, or no longer, to be worth living. There would be a rule-of-law problem in a society in which

legitimacy and legality were in such fundamental opposition. One would hope for a readjustment of one to the other.

Of course, it may be said that in relation to external affairs—to the province of international law—all this is beside the point. The rule of law does not obtain in the international sphere and attempts to introduce it are quixotic. The major powers—the United States (with steadfast support from the United Kingdom), China, even Russia—are each determined on a form of unilateralism within their spheres of influence, the difference being only the scope of those spheres. So the language of legitimacy is necessarily based on particular values and on unilateral or partial appreciations. There are no external constraints other than those imposed by the situations in which action is to be taken, power employed, or military force used; there are certainly no ultimate rule-governed constraints.

There are responses to such a position, but for present purposes and for the purposes of argument I propose to accept it. On this basis we are part of a "system" (a "set" would be a better term) of states whose ignorant armies clash by night—the clashes perhaps intermittent but in principle continuous, the ignorance extending even to the one army not knowing whether the other has deployable weapons of mass destruction. This is not a happy situation, given the fragility of international institutions and our massive and diverse capacity to do harm, including perhaps ultimate harm, to life and to the planet. But if that is in truth our situation, it is as well to know it.

Even on this hypothesis, I do not believe that lawyers should abandon the tools of their trade and set themselves up as general philosophers or as the custodians of legitimacy. Indeed, it is probably the case that they should be more circumspect, as lawyers, in the brave world that this vision imagines for us. The values of consent and form that have underpinned classical international law do not seem any less useful or necessary in such a world. No doubt as citizens we may be repelled by the spectacle of everyday military action—of targeted assassination, reprisals, extrajudicial custody, etc. But by definition we are only citizens of specific polities; we vote nowhere else.

Lawyering is not the same as voting. As lawyers, we probably have *less* right to impose our own values, that is, values not in some way endorsed by or immanent in the law we profess, than we would have in a more coherent system. I know good lawyering when I see it, including good international lawyering, and I could give an account of why it is good that others (including my opponents) could understand and even accept. I am not at all sure that I know good legitimizing, and I am very doubtful that I could offer any such account. Moreover, so much of legitimacy depends on the long term and comes out only in the wash. Lawyering, to be useful, must occur at the time of the event, or at least that is the standard form. Contingent advice—advice contingent on outcomes—is not much use.

This is not, of course, to suggest that we turn away to some self-contained world of international law, a world by definition nonexistent. It *is* to suggest that we use the instruments at our disposal, the treaty-making system, the canons of interpretation, the modalities of dispute settlement, the hermeneutics of qualified consent, in all the particular instances that face us in our professional lives. Of legitimacy it is for others to judge.

Downing Street Memo, 23 July 2002

SECRET AND STRICTLY PERSONAL–UK EYES ONLY

DAVID MANNING
From: Matthew Rycroft
Date: 23 July 2002
S 195 /02

cc: Defence Secretary, Foreign Secretary, Attorney-General, Sir Richard Wilson, John Scarlett, Francis Richards, CDS, C, Jonathan Powell, Sally Morgan, Alastair Campbell

IRAQ: PRIME MINISTER'S MEETING, 23 JULY

Copy addressees and you met the Prime Minister on 23 July to discuss Iraq.

THIS RECORD IS EXTREMELY SENSITIVE. NO FURTHER COPIES SHOULD BE MADE. IT SHOULD BE SHOWN ONLY TO THOSE WITH A GENUINE NEED TO KNOW ITS CONTENTS.

John Scarlett summarised the intelligence and latest JIC assessment. Saddam's regime was tough and based on extreme fear. The only way to overthrow it was likely to be by massive military action. Saddam was worried and expected an attack, probably by air and land, but he was not convinced that it would be immediate or overwhelming. His regime expected their neighbours to line up with the U.S. Saddam knew that regular army morale was poor. Real support for Saddam among the public was probably narrowly based.

C reported on his recent talks in Washington. There was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy. The NSC had no patience with the UN route, and no enthusiasm for publishing material on the Iraqi regime's record. There was little discussion in Washington of the aftermath after military action.

CDS said that military planners would brief CENTCOM on 1-2 August, Rumsfeld on 3 August and Bush on 4 August.

The two broad U.S. options were:

(a) Generated Start. A slow build-up of 250,000 US troops, a short (72 hour) air campaign, then a move up to Baghdad from the south. Lead time of 90 days (30 days preparation plus 60 days deployment to Kuwait).
(b) Running Start. Use forces already in theatre (3 x 6,000), continuous air campaign, initiated by an Iraqi casus belli. Total lead time of 60 days with the air campaign beginning even earlier. A hazardous option.

The U.S. saw the UK (and Kuwait) as essential, with basing in Diego Garcia and Cyprus critical for either option. Turkey and other Gulf states were also important, but less vital. The three main options for UK involvement were:

(i) Basing in Diego Garcia and Cyprus, plus three SF squadrons.
(ii) As above, with maritime and air assets in addition.
(iii) As above, plus a land contribution of up to 40,000, perhaps with a discrete role in Northern Iraq entering from Turkey, tying down two Iraqi divisions.

The Defence Secretary said that the U.S. had already begun "spikes of activity" to put pressure on the regime. No decisions had been taken, but he thought the most likely timing in U.S. minds for military action to begin was January, with the timeline beginning 30 days before the U.S. Congressional elections.

The Foreign Secretary said he would discuss this with Colin Powell this week. It seemed clear that Bush had made up his mind to take military action, even if the timing was not yet decided. But the case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran. We should work up a plan for an ultimatum to Saddam to allow back in the UN weapons inspectors. This would also help with the legal justification for the use of force.

The Attorney-General said that the desire for regime change was not a legal base for military action. There were three possible legal bases: self-defence, humanitarian intervention, or UNSC authorisation. The first and second could not be the base in this

case. Relying on UNSCR 1205 of three years ago would be difficult. The situation might of course change.

The Prime Minister said that it would make a big difference politically and legally if Saddam refused to allow in the UN inspectors. Regime change and WMD were linked in the sense that it was the regime that was producing the WMD. There were different strategies for dealing with Libya and Iran. If the political context were right, people would support regime change. The two key issues were whether the military plan worked and whether we had the political strategy to give the military plan the space to work.

On the first, CDS said that we did not know yet if the US battle plan was workable. The military were continuing to ask lots of questions.

For instance, what were the consequences if Saddam used WMD on day one, or if Baghdad did not collapse and urban warfighting began? You said that Saddam could also use his WMD on Kuwait. Or on Israel, added the Defence Secretary.

The Foreign Secretary thought the U.S. would not go ahead with a military plan unless convinced that it was a winning strategy. On this, U.S. and UK interests converged. But on the political strategy, there could be U.S./UK differences. Despite US resistance, we should explore discreetly the ultimatum. Saddam would continue to play hard-ball with the UN.

John Scarlett assessed that Saddam would allow the inspectors back in only when he thought the threat of military action was real.

The Defence Secretary said that if the Prime Minister wanted UK military involvement, he would need to decide this early. He cautioned that many in the US did not think it worth going down the ultimatum route. It would be important for the Prime Minister to set out the political context to Bush.

CONCLUSIONS:

(a) We should work on the assumption that the UK would take part in any military action. But we needed a fuller picture of U.S. planning before we could take any firm decisions. CDS should tell the US military that we were considering a range of options.

(b) The Prime Minister would revert on the question of whether funds could be spent in preparation for this operation.

(c) CDS would send the Prime Minister full details of the proposed military campaign and possible UK contributions by the end of the week.

(d) The Foreign Secretary would send the Prime Minister the background on the UN inspectors, and discreetly work up the ultimatum to Saddam.

He would also send the Prime Minister advice on the positions of countries in the region, especially Turkey, and of the key EU member states.

(e) John Scarlett would send the Prime Minister a full intelligence update.

(f) We must not ignore the legal issues: the Attorney-General would consider legal advice with FCO/MOD legal advisers.

(I have written separately to commission this follow-up work.)

—MATTHEW RYCROFT