

# IRAQ: THE PAX AMERICANA AND THE LAW

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## Introduction

In March this year the United States and our own country invaded the sovereign state of Iraq to secure regime change with the aim of eliminating weapons of mass destruction.<sup>1</sup> This novel action had been preceded by a notable political debate, despite the official opposition giving full support to the government. But the legal debate played a much lesser part. The Attorney-General gave his view, which chimed in with that of the Foreign Office, that the invasion was legal.<sup>2</sup> The great majority of those public international lawyers who expressed a view did not agree.<sup>3</sup> But the wider debate largely turned on conflicting views of the morality and wisdom of waging war. International law, if not exactly a sideshow, was pushed into the background. Nor has any court passed judgement on the legality of the war.<sup>4</sup> Courts in the U.S. and the U.K. have declined applications to date. In

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<sup>1</sup> "Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict commenced at a time of our choosing." President George W. Bush, Address to the Nation, 17 March 2003.

<sup>2</sup> The Attorney General Lord Goldsmith QC's Parliamentary written answer to Baroness Ramsay of Cartvale, H.L. Deb. 17 March 2003 cWA1. Foreign Office legal advice published to the Foreign Affairs Committee, 17 March 2003.

<sup>3</sup> Prof. Ulf Bernitz, Dr. Nicolas Espejo-Yaksic, Agnes Hurwitz, Prof. Vaughan Lowe, Dr. Ben Saul, Dr. Katja Ziegler (University of Oxford), Prof. James Crawford, Dr. Susan Marks, Dr. Roger O'Keefe (University of Cambridge), Prof. Christine Chinkin, Dr. Gerry Simpson, Deborah Cass (London School of Economics), Dr. Matthew Craven (School of Oriental and African Studies), Prof. Philippe Sands, Ralph Wilde (University College London), Prof. Pierre-Marie Dupuy (University of Paris), The Guardian, 7 March 2003. Leading academics who supported the war included Prof. Christopher Greenwood QC (London School of Economics), The Guardian, 28 March 2003, and Dr. Ruth Wedgewood (Yale Law School), Financial Times, 13 March 2003.

<sup>4</sup> In *R (CND) v. Prime Minister and Secretaries of State* [2002] EWHC 2759 the Campaign for Nuclear Disarmament (CND) brought an application in the High Court for an advisory declaration as to whether the U.K. Government would be acting in breach of international law if it went to war with Iraq on the basis of Resolution 1441 alone. The applicants argued that an advisory declaration was necessary to ensure that the defendants had not misdirected themselves in law on the question as to whether a further resolution was necessary. They reasoned that the prohibition on the use of force was a peremptory norm of customary international law and, as such, also a part of U.K. law and therefore within the common law jurisdiction of the court. They argued that, as the case raised a pure question of law and did not require a consideration of policy by the court, the matter was justiciable. The High Court expressly declined to adjudicate the matter. In the U.S. case of *Doe v. Bush* No 03-1266 (1<sup>st</sup> Cir. March 13 2003) a group of Plaintiffs, including four anonymous U.S. soldiers and six members of the House of Representatives, challenged the authority of the President and the Defence Secretary to

the United States the issue falls firmly within the “political question” exception to what is traditionally justiciable.<sup>5</sup> In this country the courts have also historically deferred to the government in its conduct under its prerogative powers of foreign policy.<sup>6</sup> Nor could there be any challenge to this act of war in the International Court of Justice.<sup>7</sup> Yet there has surely been no more important or far-reaching issue of law for many years.

The very importance of the issue makes the topic especially daunting. All the more so as I, as a common lawyer, do not pretend to any specialist expertise in international law. The issue is also clouded by the various and often shifting justifications which have been given for the armed invasion. This means that the legal analysis has to range widely, if it is to confront all the variously stated reasons for going to war.

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wage war on Iraq, absent a clear declaration of war by the United States Congress. The court dismissed the suit under the doctrine of ripeness, holding that it was too soon to consider the issue as the war had not yet commenced.

<sup>5</sup> *Colegrove v. Green* 66 S. Ct. 1198. Under the “political question doctrine” courts will not decide questions that have either been constitutionally committed to another branch of government, or that are inherently incapable of judicial resolution. Matters of foreign policy are almost always non-justiciable under this doctrine (*Baker v. Carr* 32 S. Ct. 691). However, the political question doctrine is notoriously difficult and courts have not always taken the same approach on the justiciability of war powers. Compare *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir. 1970) and *Dellums v. Bush*, 752 F. Supp. at 1150 with *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-11 (2nd Cir. 1973) and *Ange v. Bush*, 752 F. Supp. at 512.

<sup>6</sup> *Council of Civil Service Unions and Others v. Minister for Civil Service* [1985] AC 374. There are some traditionally non-justiciable areas that are now considered by the courts. These include the power to issue a passport (*R v. Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* [1989] 1 QB 811) and the prerogative of mercy (*R v. Secretary of States for the Home Department ex parte Bentley* [1994] QB 349). Furthermore, the development of the public law doctrine of legitimate expectations now permits a limited consideration of the exercise of a discretion to exercise a prerogative power, such as the provision of diplomatic and consular assistance to British nationals abroad (*R (Abbassi) v. Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76). However, the extent to which courts will consider matters of national security continues to be very limited and great weight is given to the views of the executive (*Home Office v. Rehman* [2001] 3 WLR 877, per Lord Steyn at 889). Foreign policy matters and the deployment of the armed forces are not justiciable at all (*R (Abbassi) v. Secretary of State for Foreign and Commonwealth Affairs; R (CND) v. Prime Minister and Secretaries of State*, *supra*, note 4).

<sup>7</sup> As the I.C.J. can only adjudicate cases in which the parties have a sufficient legal interest (*Ethiopia and Liberia v. South Africa (South West Africa Case)*, Second Phase, (1966) ICJ Reports 6), Iraq is the only state with *locus standi* to bring such a case. Iraq never signed the optional clause acceding to the compulsory jurisdiction of the I.C.J. and in any case has no independent government with sufficient standing to bring a case. Furthermore, the U.S. revoked their signature to the optional clause in 1986. The U.K. is the only relevant state which is a current signatory to the optional clause.

The principles underlying international law are not recognisably different to those which exist in all civilised legal systems. They seek to foster liberty, promote equality of participation, and to set boundaries to the pursuit of self-interest. As with any system of law there are restraints and sanctions to protect the community, including the use of force as a last resort.

In achieving these objectives in international law it is obviously necessary in particular to restrain the actions of the most powerful nations. The founding fathers of the United States knew, and indeed relied upon, their reading of Emer de Vattel, writing in the middle of the eighteenth century, that in international law:

“Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom”.<sup>8</sup>

Thus it is not surprising that the underlying purposes of international law are to ensure equal treatment and, where appropriate, to protect the weak against the strong just as our own national systems of law seek to do domestically. This was particularly significant in the case of the United Nations Charter which was negotiated against a background of the ruthless and unjustified invasion of smaller states by Germany, Japan and the Soviet Union. Not surprisingly respect for sovereignty and constraints on the unilateral use of armed force were uppermost in the minds of the founders.

May I just briefly touch on a threshold argument that some who describe themselves as practical realists would advance. What, they would say, is the point of traversing old ground? The war in Iraq, so bravely and searingly chronicled by brave journalists and able political commentators, now lies in the past. It may have inflicted heart-rending casualties but at least it was short. The Iraqis should

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<sup>8</sup> Emer de Vattel, *Le Droit des Gens* (Leiden, 1758) translated in *The Law of Nations* (Washington, Carnegie Institution Washington, 1916), p.7, as quoted in Gerald Stourzh *Alexander Hamilton and the Idea of Republican Government* (Stanford, Stanford University Press, 1970), p.134.

think themselves fortunate that the indisputably vile regime of Saddam Hussein was at last driven from power. In time there will be an Iraqi government to replace the outgoing regime and to introduce democracy to that country; the country may be unstable now, but we have to see it through. So what is the point of raking over the embers?

Such appeals to so-called reality command in my view a swift and simple riposte. International law, like the common law, is founded upon precedent. A bad precedent should not be allowed to stand. This U.S. led action was aimed at nullifying a rogue state. But the United States have identified other rogue states as being part of what they regard as “the axis of evil”. These states were identified as North Korea and Iran by President Bush in his “State of the Union” speech in 2002.<sup>9</sup> Moreover, the United States has since identified Syria, Cuba and Libya as being a threat.<sup>10</sup> So it becomes especially important to weigh up now whether the precedent is sound. In turn this engages the larger geo-political question of the extent to which the United Nations and other international institutions such as the European Union can act as a check on the hegemony of the United States.

### The U.S. and Multilateralism

I do not use the word “hegemony”, or as a former French Foreign Secretary would say “hyper-puissance”, in a perjorative sense.<sup>11</sup> We all owe a remarkable debt, which it is right in time of widespread criticism of the United States we should acknowledge, to the commitment of that remarkable country to a pursuit of world order and peace. This is particularly so since the end of the Second World War.

In marked contrast to the isolationism which followed the First World War, the United States played a visionary role in creating the institutions forged at the end

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<sup>9</sup> “States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world.” President George W. Bush, State of the Union speech before Congress, 29 January 2002.

<sup>10</sup> “In addition to Libya and Syria, there is a threat coming... [from] Cuba.” U.S. Under Secretary of State John Bolton, *Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction*, Remarks to the Heritage Foundation, Washington DC, 6 May 2002.

of the Second World War. Let us recall some of their greatest contributions. The Bretton-Woods agreement with the creation of the International Monetary Fund and the World Bank, and above all the commitment of President Roosevelt to the creation of the United Nations. The drive with which his widow, Eleanor, as the first U.S. ambassador to the United Nations, shaped the Declaration of Human Rights, which in turn was the inspiration for our own great European Convention of Human Rights. The vision of General Marshall in financing the reconstruction of a Europe broken and bankrupted by war, so creating the framework from which far-sighted leaders of France and Germany could seek a historic reconciliation through binding economic ties. The preservation through NATO of the security of Europe against the ambitions of the former Soviet Union. Far flung conflicts to restrain perceived aggression, such as in Korea or, more misguidedly, in Vietnam. The retaking of Kuwait from the invasion by Saddam just over a decade ago.

In all this the United States was obviously acting out of enlightened self-interest, but laced with a strong element of idealism. Some of its views and actions were not always palatable to our country. It encouraged the dismantling of our remaining empire, and undermined our unlawful and disreputable Suez adventure. In all these actions it was, generally, a standard-bearer for democracy and the rule of law. These ideals have prevailed in countries as distant from each other as Spain, Portugal and the former Soviet Union and its satellites. Thomas Jefferson's "Empire of Liberty" stretches more widely than ever before.

It is perhaps no accident that in these sixty years of remarkable achievement the United States was committed to the principles of multilateralism. During the Cold War the concept of the preservation of "the West" against the Soviet Union demanded a close-knit engagement with Europe. But there were always currents of thought in the U.S. which instinctively shied away from an institutional approach and believed that the United States should pursue more closely defined

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<sup>11</sup> Robert Kagan, *Paradise and Power: America and Europe in the New World Order* (London, Atlantic, 2003), p.43.

national interest.<sup>12</sup> The end of the Cold War, and with it much of the justification for multilateralism, gave impetus to these views. The refusal to ratify the Kyoto Convention on the environment, or to participate in the International Criminal Court, and indeed the withdrawal from the Anti-Ballistic Missile Treaty are all illustrations.<sup>13</sup> The U.S. now feels freer of constraint to act in what it considers to be its own best interests regardless of the views of other countries. It sees itself, too, and rightly so, having in many ways wider responsibilities than any other countries for upholding order whether in Asia or in the Middle East. These are not responsibilities which Europe can fulfil. The U.S. has continued to commit more than 3% of its GDP to defence notwithstanding the end of the Cold War, whereas Europe in pursuing the peace dividend has allowed its defence spending to fall below 2%. The U.S. military budget is about double that of the other NATO countries put together.<sup>14</sup> On this basis the disparity of power will grow.

All this is brilliantly brought out in a short and remarkable book by Robert Kagan called "Paradise and Power".<sup>15</sup> He points out cogently that the differing perspectives of Europe and the United States reflect the military weakness of Europe as compared with the power of the United States. For the weaker Europe negotiation, diplomacy and international law are the only ways in which their aims can be achieved. As he puts it: "For Europeans the U.N. Security Council is a substitute for the power they lack".<sup>16</sup> By contrast for the United States it is a potential restraint on its clear ability to act alone to preserve its national interest.

This dichotomy, which the events leading up to the Iraq war so graphically highlighted, means that some wring their hands and ask whether anything can be done to build checks and restraints on the United States. But this seems far from

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<sup>12</sup> For example: "The U.N. has become a trap. Let's go it alone." U.S. Senator Robert Taft, quoted by Rep. James B. Utt, *Congressional Record House*, 15 January 1962.

<sup>13</sup> The United States is a signatory to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) but has never ratified it. The U.S. signature to the Rome Statute of the International Criminal Court (1998) was formally renounced on 6 May 2002, and the United States formally withdrew from the Anti-Ballistic Missile Treaty (1972) on 13 December 2001.

<sup>14</sup> "[The U.S.] spends 3% of its GDP on its armed forces, France and Britain around 2.5%, Germany just 1.6%." "Undermining NATO?" *The Economist*, 1 May 2003.

<sup>15</sup> Kagan, *supra*, n.11.

<sup>16</sup> *Ibid*, at p.40.

easy. The Economist has recently pointed out that the American population is growing faster and getting younger whilst the European population declines and steadily ages.<sup>17</sup> The economic consequences of this obviously favour the United States. The Economist has summarised it in these terms: “The long-term logic of demography seems likely to entrench America’s power and to widen existing transatlantic rifts”, providing a gloomy “contrast between youthful, exuberant, multi-coloured America and ageing, decrepit, inward-looking Europe”. All of which means that we have to rely on the acceptability of evolving international law together with the underlying liberal democratic values of the United States for a check on neo-conservative, supremacist tendencies. There is, too, a growing realisation within the U.S. that they cannot, and do not want to, undertake the task of policing the world alone. In practical terms, the difficulties inherent in the long-term occupation of a country highlights the need to engage other states and multilateral institutions. The cost of war is much higher if pursued unilaterally, as are the costs of reconstruction.<sup>18</sup> The need for wider participation in peace-keeping and the value of United Nations involvement is now belatedly being realised.

### The Basis for the Invasion of Iraq

How do the rival arguments for the invasion of Iraq stand up? This demands particularly close analysis. In part, as I have already mentioned, this is because different arguments were advanced at different times for the waging of war. At one time it appeared that reliance was placed on an imminent threat of the use of weapons of mass destruction by Saddam Hussein on the U.S. or its allies. Indeed, the now notorious government dossier of 24 September asserted: “his military planning allows for some of the W.M.D. to be ready within 45 minutes of an order to use them... Unless we face up to the threat...we place at risk the lives

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<sup>17</sup> “*Half a billion Americans?*” The Economist, 22 August 2002.

<sup>18</sup> The overall military cost of Iraq, on the assumption of a four-year occupation, has been estimated at \$150 billion. Reconstruction costs are more uncertain but could rise to the same figure. This cost would be more greatly shared if there were wider international support. In 1999 the coalition to liberate Kuwait orchestrated by President Bush funded 80% of the overall costs. See Leal Brainard and Michael O’Hanlon, Financial Times, 6 August 2003.

and prosperity of our own people.”<sup>19</sup> Later emphasis was placed on the importance of bringing humanitarian relief against dictatorship to the people of Iraq.<sup>20</sup> Jack Straw stated: “For over two decades, Saddam Hussein has caused a humanitarian crisis in Iraq and one which at least equals Milosevic’s worst excesses... Saddam has waged a war, but a hidden one, against the Iraqi people.”<sup>21</sup> Yet later, the focus became the desirability of liberating that country and giving it the opportunity of democratic government.<sup>22</sup> In a joint statement in April George Bush and Tony Blair stated: “After years of dictatorship, Iraq will soon be liberated. For the first time in decades, Iraqis will soon choose their own representative government... We will create an environment where Iraqis can determine their own fate democratically and peacefully.”<sup>23</sup>

What became totally clear was that the United Nations would not approve the invasion of Iraq, at any rate until the weapons inspectors had been given a significantly greater time to find out whether Iraq currently possessed such weapons of mass destruction. So in March the United States and its allies withdrew their proposed resolution seeking approval for the use of force, because they knew the majority of the Council would reject it, including Russia, Germany and France. They had to find some other way of justifying their action in

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<sup>19</sup> *Iraq’s Weapons of Mass Destruction: The Assessment of the British Government* (London, The Stationary Office Ltd, 2002), p.7: “The policy of the United Kingdom Government ... is related to the threat which the Saddam Hussein regime poses to the rest of the world. And that threat comes from its unlawful, unauthorised, wilful possession and development of weapons of mass destruction.” Jack Straw, interview on B.B.C. Radio 4, 13 September 2002.

<sup>20</sup> This was never wholly explicitly put forward as a legal justification. “The nature of Saddam’s regime is relevant... because Saddam has shown his willingness to use [weapons of mass destruction]... let us.... not forget the 4 million Iraqi exiles, and the thousands of children who die needlessly every year due to Saddam’s impoverishment of his country... [and the] tens of thousands imprisoned, tortured or executed by his barbarity every year.” Tony Blair, H.C. Deb. 25 February 2003 c130; “[This] is a war against Saddam because of the weapons of mass destruction that he has, and it is a war against Saddam because of what he has done to the Iraqi people.” Tony Blair, interview with the B.B.C. World Service, 4 April 2003.

<sup>21</sup> Jack Straw, Newspaper Society Annual Conference Speech, 1 April 2003.

<sup>22</sup> This was also not put forward explicitly as a legal justification. “We know that most Iraqis want to see political change in their country... The U.K. wants to help Iraq to achieve this. If we are obliged to take military action, our first objective will be to secure Iraq’s disarmament. But our next priority will be to work with the United Nations to help Iraqi people recover from years of oppression and tyranny, and allow their country to move towards one that is ruled by law, respects international obligations and provides effective and representative government.” Jack Straw, International Institute of Strategic Studies Speech, 11 February 2003.

<sup>23</sup> Tony Blair and George W. Bush, joint statement on Iraq, 8 April 2003.



international law. So they fell back on the 12-year-old Resolution 678 of 1990 passed for the purpose of authorising the expulsion of Saddam Hussein from Kuwait and the restoration of peace in the Middle East.<sup>24</sup> An old resolution passed for a more limited purpose was ingeniously used as a cloak for the very action which the United Nations would not currently countenance. To a common lawyer, taking such a tortuous route to avoid the clear, current wish of the United Nations seems, as Professor Robert Skidelsky has put it, “straining at a gnat”.<sup>25</sup> But it was seriously advanced and needs consideration in a little detail.

### The Facts

What are the facts on which the government relied? I shall not spend time on the so-called “dodgy” dossier of February 2003. It seems to have been conceived in desperation, based on an old PhD research paper generated from the Internet. It richly warranted Jack Straw’s frank admission that it was “Horlicks”. What I shall focus on is the government dossier of 24 September 2002 and the assessment by the two very experienced U.N. weapons inspectors, Dr. Hans Blix and Dr. Mohamed El Baradei. The dossier contained the 45 minutes claim. There is no doubt that this led to the widespread impression that our country could be attacked on 45 minutes notice.<sup>26</sup> We now know that this was simply wrong. The claim should have applied only to the deployment of battlefield munitions. Yet the government did nothing to dampen down the concern they created. Perhaps one

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<sup>24</sup> *Supra*, note 2. It was also suggested by the United States that they were acting under their inherent right to self-defence in international law. “Whereas Iraq’s demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself.” Preamble to the Authorisation for Use of Military Force Against Iraq Resolution of 2002 (H.J. Res. 114).

<sup>25</sup> Robert Skidelsky, “*The American Contract*”, Prospect Magazine, July 2003.

<sup>26</sup> “The dossier was for public consumption and not for experienced readers of intelligence material. The 45 minutes claim, included four times, was always likely to attract attention because it was arresting detail that the public had not seen before...The fact that it was assessed to refer to battlefield chemical and biological munitions and their movement on the battlefield and not to any other form of chemical or biological attack, should have been highlighted in the dossier. The omission of the context and assessment allowed speculation as to its exact meaning. This was unhelpful to understanding the issue.” Report of the Intelligence and Security Committee, “*Iraqi Weapons of Mass Destruction*”, September 2003, p.27.

day we will be told why they allowed it to start. In as far as the Parliamentary Intelligence and Security Committee has said: "Saddam Hussein was not considered a current or imminent threat to mainland U.K."<sup>27</sup>

The whole thrust and purpose of the dossier at the time was to persuade us that Saddam Hussein's continuous breaches of U.N. resolutions called for further action by the international community. It acknowledged the success of weapons inspections between 1991 and 1998 in identifying and destroying very large quantities of chemical weapons and associated production facilities. It claimed that there had been an increase in capabilities to produce such weapons since 1998, but also acknowledged that these facilities are capable of dual use for petrochemical and biotech industries. It did not suggest that a nuclear threat is less than a minimum of one or two years away.

What the dossier does not contend is also of some importance. It does not suggest that Iraq has current links with Al Qaeda nor with the terrible assault on the U.S. of the 11 September 2001. Nor does it suggest that Saddam has any present motive for launching an attack on any of his neighbours or any current intent to do so. It fails to tell us that the Joint Intelligence Committee had advised that an invasion of Iraq might increase the threat from Al Qaeda.

The dossier concludes with an account of the tyrannical behaviour, in breach of all human rights, of Saddam to his own people and highlights some of the grisly Stalinesque details. It is sickening reading but no suggestion is made that we have not known about this for years, nor any explanation offered as to why action was not taken before. So the dossier may make out a case for a new U.N. resolution such as 1441, but it nowhere argues that in the absence of such international action there are reasons for the U.S. and the U.K. to go it alone.

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<sup>27</sup> *Ibid*, p.31.

Nor did the information change between September and the fateful week in March when the inspectors were recalled and we launched the invasion. On the contrary the authoritative reports of the weapons inspectors confirmed the prior assessment. In February 2003 Dr. Hans Blix reported to the U.N. that there were now more than 250 inspectors in Iraq and that although Iraqi cooperation had been less than full, access to sites had been promptly given on demand. No weapons had yet been found and there was as yet no firm evidence that they did or did not exist. He in no way suggested that there was a continuing build up. He clearly saw his task in searching for chemical and biological weapons as unfinished.<sup>28</sup> On the same day Dr. Mohammad El Baradei repeated that by December 1998 the I.A.E.A. had neutralised Iraq's past nuclear programme and had to date found no evidence of ongoing prohibited nuclear or nuclear related activities in Iraq.<sup>29</sup>

In summary the dossier and the later reports of the inspectors made out a convincing case that the U.N. should insist on continuing with inspections. But none of these facts made any case for the dramatic breaking off of inspections, disregarding the United Nations and invading another sovereign state with all the loss of life, civilian as well as military, destruction of infrastructure and internal occupation which followed. No wonder Kofi Annan said ahead of such action that it could not be in conformity with the U.N. Charter.<sup>30</sup> Which brings us to the Charter itself.

### The Charter

The opening line of the preamble of the Charter, "[w]e the peoples of the United Nations, determined to save succeeding generations from the scourge of war...", reflects a central purpose of the treaty: to ensure international peace and security

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<sup>28</sup> Hans Blix, Report to the Security Council, 14 February 2003.

<sup>29</sup> Mohammad El Baradei, Report to the Security Council, 14 February 2003.

<sup>30</sup> "[If] action is taken without the authority of the Council, then the legitimacy and support for that action will be seriously impaired." Kofi Annan, Secretary-General's press conference, Brussels, 17 February 2003.

through collective action. The Charter seeks to achieve this by outlawing the unilateral use of force except in self-defence, resolving international disputes by peaceful means, promoting cooperation in solving international economic, social, cultural and humanitarian problems, and promoting respect for human rights.

The lynchpin of the Charter is Article 2(4) which prohibits the use or threat of force in international relations in the following terms: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations Charter." The Charter permits only two exceptions to the prohibition. The first is collective action authorised by, and only by, the Security Council acting under Chapter VII. The second is the inherent right to individual or collective self-defence as enshrined in Article 51 of the Charter. This strong protection against the invasion of one country by another reflects the understandable reaction against the horrors inflicted before, and during, the Second World War.

Thus Articles 41 and 42 in Chapter VII lay down both the non-forceful and, as a last resort, forceful measures that the Security Council may take to counter threats to international peace and security. If the Security Council decides that non-forceful measures under Article 41 are inadequate, Article 42 states that it may take "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security". Article 51 contains the sole, and limited provision, for one country or group of countries to go it alone without prior Security Council backing. It states that "Nothing in the ... Charter shall impair the inherent right to individual or collective self-defence if an armed attack occurs against a Member of the United Nations."

I suspect that there are a comparatively large number of people who are unclear as to the exact legal justification ultimately advanced by the government for invading Iraq. So it is worth stressing that when it came to the point the U.K. government based its case on, and only on, United Nations Resolution 678

passed as long ago as 1990, in conjunction with Resolution 1441 of 2002. There were other potential legal arguments which would have seemed to be more in harmony with the various political reasons advanced. In the end none of them would have stood up in law. But they are worth looking at to show why the government was driven to scrape the bottom of the legal barrel. These arguments, which merit brief consideration, are fivefold: self-defence, humanitarian intervention, implied authorisation, the unreasonable use of a Security Council veto, and a breach of Resolution 1441.

### Self-Defence

There was a suggestion during the run up to war that we were going to invoke our right to self-defence.<sup>31</sup> This was the impression created by the 45 minutes claim. The right to self-defence is protected by Article 51 of the Charter.<sup>32</sup> The use of the word "inherent" in that Article indicates that it is the customary international law right of self-defence that is preserved.<sup>33</sup> That doctrine was formulated in the

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<sup>31</sup> "It is right [to go to war] because weapons of mass destruction - the proliferation of chemical, biological, nuclear weapons and ballistic missile technology along with it - are a real threat to the security of the world and this country." Tony Blair, H.C. Deb. 15 January 2003 c682; "This resolution [1441] does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant U.N. resolutions and protect world peace and security." Ambassador Negroponte, statement to Security Council, 8 November 2002; Preamble to the Authorisation for Use of Military Force Against Iraq Resolution of 2002 (H.J. Res. 114), quoted *supra*, n.24. However, arguments of self-defence were not in the end seriously advanced in the U.K. Although much time has been spent scrutinising the quality of the government dossiers on Iraq, this is not an issue required to be analysed here. It seems to be common ground that parts of the second dossier, published 3 February 2003, were plagiarised from a PhD thesis. This implies that the government only presented information to the public that they thought would justify the course of action they had chosen to take. "[T]he significance of intelligence lies not only in the information, be it empiric or uncorroborated conjecture, which it is thought fit to put into this or that document, but more importantly what interpretation is placed upon it... on the basis of the way in which whatever was said or written was presented, the British people obtained the distinct impression that the threat from Iraq was more massive and imminent than has since proved to be the case, or indeed may ever have been. There were other tenable reasons which could have been used to justify military force, but none which would have satisfied Parliament and the country as regards the necessity and legality of such action." Field Marshall Lord Bramall, letter to The Times, 1 July 2003.

<sup>32</sup> Article 51, Charter of the United Nations 1945. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>33</sup> *Nicaragua v. United States of America* ICJ Reports 1986 4, 94.

seminal case of *The Caroline* in 1841 when American Secretary of State Daniel Webster wrote that there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation".<sup>34</sup> The element of necessity is to be determined by the claiming state. But once force has been initiated its legality must be assessed by an impartial body and not by the parties to the conflict.<sup>35</sup> The use of force in self-defence must always be proportionate, that is, in the words of Webster, involving "nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it."<sup>36</sup>

Article 51 refers to the use of self-defence in the event of an "armed attack". This raises the question of when, if ever, a state may legally use self-defence in advance of an attack. There is a school of academic thought that considers that the wording of Article 51 precludes action in anticipation of an armed attack, or "anticipatory self-defence" as it is known.<sup>37</sup> Anticipatory self-defence was an accepted part of customary international law. But it maintained the high standard of necessity enunciated in *The Caroline*. It required a threat to be imminent before a defensive attack could be undertaken in anticipation of it.<sup>38</sup> So the question at

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<sup>34</sup> 29 BFSP 1137-38. During a Canadian rebellion against British rule in 1837 insurgents used an American ship to transport their supplies. In retaliation the British government sent a detachment of troops to capture the ship. The troops burned the ship and set it adrift causing the death of one man. It was during an exchange of conciliatory letters between the American Secretary of State Daniel Webster and Lord Ashburton in 1841 that the principles of self-defence were formulated.

<sup>35</sup> Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (London, New Haven Press, 1961), p.230; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon Press, 1933), pp. 177-182; DW Bowett, *Self Defence in International Law* (Manchester, Manchester University Press, 1958), p.193; Judgement of the International Military Tribunal at Nuremberg, 1946, 1 TRIAL OF GERMAN MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 208 (1947).

<sup>36</sup> *Supra*, n.33.

<sup>37</sup> Hans Kelsen, *The Law of the United Nations* (London, Stevens, 1950), pp.269, 787-789; Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1961), p.275; Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 1994), p.676. For the opposite view see Bowett, *Self-Defence in International Law*, *supra*, n.34, pp.187-193; Stephen Schwebel "Aggression, Intervention and Self-Defence in Modern International Law" (1972-II) 136 Hague Rec 411, 479; MacDougal and Feliciano, *supra*, n.34, p.231-241.

<sup>38</sup> *The Caroline Case*, *supra*, n.33, was itself an example of anticipatory self-defence. The International Military Tribunal for the Far East (1948) 994 found that the declaration of war on Japan by the Netherlands in 1941 was a legitimate act of self-defence in response to an imminent Japanese attack on the Dutch East Indies.

the heart of the debate is whether Article 51 qualifies or restricts the wide scope of the customary law doctrine of self-defence.<sup>39</sup>

Those who argue for a restrictive interpretation point out that anticipatory self-defence is contrary to the wording of Article 51 as well as to the objects and purposes of the Charter. The imminence of an attack cannot usually be easily assessed on objective criteria. So the decision whether to undertake such an attack would be left to the individual state's discretion and this contains a manifest risk of abuse.<sup>40</sup> Those who take the contrary view point out cogently that the relinquishment or restriction of a right in international law should not be presumed. So the mention of "armed attack" in Article 51 does not necessarily mean a state cannot act to forestall an imminent attack upon it.<sup>41</sup> The French text, too, may be slightly wider when it speaks of "agression armée".

The capacity of modern weaponry equips many states with the capability to strike almost without warning and with devastating consequences. So the better, and more realistic, view is that the Charter does not prohibit the use of anticipatory self-defence in all circumstances.<sup>42</sup> The requirements of necessity and proportionality in these cases are obviously even more stringent than when an attack has actually been launched.

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<sup>39</sup> The customary law doctrine of self-defence is very wide, arguably including more controversial rights such as the protection of nationals abroad, and the protection of certain vital economic interests. Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 2002), p.790.

<sup>40</sup> This interpretation of the effect of Article 51 was also adopted by the International Court of Justice in *Nicaragua v. United States of America*, *supra*, n.32, 103: "in the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack. Reliance on collective self defence of course does not remove the need for this."

<sup>41</sup> Schwebel, *supra*, n.36.

<sup>42</sup> Jennings and Watts (eds) *Oppenheim's International Law*, 9<sup>th</sup> ed, (Harlow, Longman, 1992), pp.421-2. See also Schwebel, *supra*, n.36, 481: "Perhaps the most compelling argument against reading Article 51 to debar anticipatory self-defence whatever the circumstances is that, in an age of missiles and nuclear weapons, it is an interpretation that does not comport with reality." Although this pragmatic approach is necessary in today's world, its dangers should not be forgotten. The Brezhnev doctrine was a derivative of self-defence and resulted in the annexations of Czechoslovakia in 1968 and Afghanistan in 1979. It is crucial that the boundaries of self-defence are fiercely drawn or there is an unacceptable potential for abuse.

A newer, and much more controversial, development in international law is the doctrine of pre-emptive self-defence, advocated by the Bush administration in their "National Security Strategy of the United States" in 2002.<sup>43</sup> This doctrine is broader than anticipatory self-defence and seeks to adapt the concept of "imminent threat" in order to counteract the dangers posed by rogue states and international terrorists.<sup>44</sup> This is a development that troubles many international lawyers as the removal of the "imminent threat" criterion lowers the threshold for the use of unilateral military action and may lead to the escalation of violence in already volatile situations.<sup>45</sup> In some circumstances regime change is a corollary of pre-emptive self-defence, and obtaining a new regime in Iraq has been an official part of U.S. foreign policy since 1998.<sup>46</sup> Most states strongly oppose these developments believing rightly that such policies pose too great a threat to state sovereignty. With such great international opposition the policy of one state is not sufficient to create a valid rule of international law. Neither regime change nor pre-emptive self-defence can provide a legal justification for the use of military force in Iraq. Nor, as I understand it, was it suggested in the end that it could.

### Humanitarian Intervention

The idea of humanitarian intervention has strong, understandable and emotional support. Humanitarian intervention has been a notoriously controversial doctrine

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<sup>43</sup> *National Security Strategy of the United States* (Washington DC, The White House, 2002).

<sup>44</sup> "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries", *ibid*, p.19. This is because "the nature of what [terrorists] do makes it difficult to apply the imminent threat criterion" meaning that for sake of security past practice and knowledge of a threat will suffice. (James Steinberg, quoted in *The Washington Lawyer*, January 2003).

<sup>45</sup> Rogue states, unlike terrorists, can be deterred from unwanted behaviour by other means, including economic and diplomatic pressure. *The Washington Lawyer*, January 2003, p.26.

<sup>46</sup> Iraq Liberation Act (Public Law 105-338, 1998); Authorization for the Use of Military Force Against Iraq (Public Law 107-243, 2002). W. Michael Reisman, "Assessing Claims to Revise the Laws of War" 97 AJIL 82. However, regime change has never been part of British foreign policy, nor was it submitted by the British government as a valid legal justification for war: "is the focus of this international coalition which we hope to put together regime change? Is that the objective of the United Nations Security Council resolution? No. The whole focus is on the disarmament of Saddam Hussein's weapons of mass destruction." Jack Straw, interview on B.B.C. Radio 4, 12 October 2002; "I have never put the justification for action as regime change. We have to act within the terms set out in resolution 1441 - that is our legal base." Tony Blair, statement to the House of Commons, 18 March 2003.



since it was first advocated by Grotius in the seventeenth century.<sup>47</sup> But the prohibition on the use of force in Article 2(4) makes it very unlikely that any customary international law right of unilateral humanitarian intervention survived the Charter.<sup>48</sup> By contrast under the auspices of the United Nations there have been several instances of multilateral intervention on humanitarian grounds. These operations were authorised by the Security Council exercising their powers under Chapter VII to counter threats to international peace and security. The relief of famine in Somalia in 1992, the intervention in the Rwandan genocide in 1994, and humanitarian operations in East Timor in 1999 are all examples of this.<sup>49</sup> Outside of the United Nations state practice reveals few clear-cut examples of humanitarian intervention before 1990. India's intervention in East Pakistan in 1971, Vietnam's overthrow of the Khmer Rouge in Kampuchea and Tanzania's ousting of the regime of Idi Amin in Uganda in 1979 all resulted, in fact, in humanitarian relief. All three states however, preferred to justify their action in terms of self-defence.<sup>50</sup> Likewise U.S. led interventions in Grenada in 1983 and in Panama in 1989 cited humanitarian concerns as reasons for action, although it was not suggested that these concerns were sufficient legal justifications.<sup>51</sup> Since 1990 there have been three occasions on which states have considered humanitarian considerations to be a justification for the use of force. These were the intervention of ECOWAS in the civil war in Liberia in 1990, the imposition of safe havens and no-fly zones by the U.S., the U.K. and France to protect Iraq's ethnic minorities in the aftermath of the first Gulf war; and NATO's bombing

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<sup>47</sup> Hugo Grotius, quoted in M.D.A. Freeman *Lloyd's Introduction to Jurisprudence* (London, Sweet & Maxwell, 1994), 6th ed, p.99.

<sup>48</sup> Brownlie, *supra*, n.36, pp.338-342; Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Boston, Hingham, 1985), p.108; Lori Fisler Damrosch in Damrosch and Scheffer (eds), *Law and Force in the New International Order* (Oxford, Westview, 1991). Examples cited in academic works of a pre-Charter practice of humanitarian intervention include France, Russia and the U.K.'s intervention in the Ottoman Empire to protect the Greeks in 1827 and to protect the Christians in Lebanon in 1860. See Istvan Pogany (1986) 35 ICLQ 182.

<sup>49</sup> S/RES/794 (1992) (Somalia); S/RES/918 (1994) (Rwanda); S/RES/1264 (1999) (East Timor).

<sup>50</sup> India justified its action on the basis of self-defence following border incidents with East Pakistan and a massive influx of refugees. It also cited humanitarian reasons and the right to self-determination. Vietnam based its action on a tenuous argument of self-defence on the basis of border incidents. It also cited humanitarian intervention as a justification. Tanzania based its action on self-defence alone and did not use humanitarian justifications. Ronzitti, *supra*, n.47; Tom Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention" in Damrosch and Scheffer (eds) *supra*, n.47.

campaign in Serbia in 1999 to bring a halt to ethnic cleansing in Kosovo.<sup>52</sup> The international response to such initiatives has been mixed. Liberia's intervention was retrospectively approved of by the Security Council in Resolution 788 of 1992. The Coalition in Iraq received little outright condemnation, but there was also little international support for the legality of the action. NATO's action was hotly contested by several states, and caused the International Court of Justice to express concern.<sup>53</sup> In the United Kingdom, the Foreign Affairs Committee concluded that: "NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds."<sup>54</sup>

This examination of state practice reflects an evolving human rights culture in international law. This is reflected in the proliferation of treaties and international judicial forums designed to protect and enforce those rights. Some states, including the United Kingdom, are taking a more expansionist and interventionist

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<sup>51</sup> Ruth Wedgwood, "Unilateral Action in a Multilateral World" in Forman and Patrick (eds) *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (London, Lynne Rienner, 2002).

<sup>52</sup> ECOWAS cited four justifications for their actions: (i) the need to stop the large-scale killing of civilians; (ii) the need to protect foreign nationals; (iii) the need for a regional organisation to protect international peace and security in the region; (iv) the need to restore a measure of order to an anarchic state. Final Communiqué of the ECOWAS Standing Committee and the Committee of Five, paras 6-9, quoted in David Wippman, in Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York, Council of Foreign Relations Press, 1993). The coalition in Iraq justified its action in part on S/RES/688 (1991) condemning Iraqi repression of its civilian population, and also by reference to humanitarian considerations. "We operate under international law... International law recognises extreme humanitarian need... We are on strong legal as well as humanitarian ground in setting up this 'no-fly zone'". Foreign Secretary Douglas Hurd, B.B.C. Radio 4's *Today* programme, 19 August 1991. NATO expressly cited humanitarian intervention as a justification for its action. "Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe." Defence Secretary George Robertson, H.C. Deb. 25 March 1999 c616-617; "Belgium in particular, felt obliged to intervene to forestall an ongoing humanitarian catastrophe... The purpose of NATO's intervention is to rescue a people in peril, in deep distress." *Serbia and Montenegro v. Belgium*, Belgian Oral Pleading, Verbatim Record, 10 May 1999.

<sup>53</sup> Russia, China, The FRY, Namibia, Brazil, Cuba, Belarus, Ukraine, India and Mexico expressed their disapproval of NATO action in Kosovo as being unlawful. Furthermore, Slovenia, Malaysia, Argentina, Bahrain, Gabon, Gambia, Costa Rica, Iran and Albania emphasised the central role of the Security Council in authorising the use of force. 4011<sup>th</sup> Security Council Meeting, 10 June 1999. The International Court of Justice stated that: "the Court is profoundly concerned with the use of force in Yugoslavia... the Court deems it necessary to emphasise that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law." *Serbia and Montenegro v. Belgium*, Request for Indication of Provisional Measures, Order of 2 June 1999, paras.17, 19.

<sup>54</sup> Fourth Report from the Foreign Affairs Committee, *Kosovo*, Session 1999-2000, para.138. The Government responded that it: "is... satisfied that it [the war in Kosovo] was legally justified." Fourth Report from the Foreign Affairs Committee, Session 1999-2000, *Kosovo*, Response of the Secretary of State for Foreign and Commonwealth Affairs, August 2000, p.8.

approach to international law.<sup>55</sup> The F.C.O. has laid down guidelines in the hope of building an international consensus as to when a state should intervene in the affairs of another sovereign state on humanitarian grounds. One of these principles is that:

“When faced with an immediate and overwhelming humanitarian catastrophe and a government that has demonstrated itself unwilling or unable to prevent it, the international community should take action.”<sup>56</sup>

These developments suggest that a doctrine of humanitarian intervention may be developing. It is however clear that any such legal doctrine is still evolving. The growing sympathy for such a right should surely shape the actions of the U.N. rather than leaving individual states to apply their own judgement of when they should intervene.

The humanitarian situation in Iraq in March 2003, grim though it was for the Iraqis, was not claimed by the government to amount to an “overwhelming humanitarian catastrophe” as required by the F.C.O. criteria. Even if a right to humanitarian intervention had developed in international law, it would not have applied to Iraq any more than to any of the arbitrary tyrannies which sadly still exist. There are many who consider that, when it comes to removing Saddam Hussein, the end justified the means, indeed, would justify almost any means. This instinct is all too understandable. But surely it would be a most dangerous path to embark on. Careful criteria would need to be established to ensure that the oppressed are liberated in all cases of need, regardless of whether their state is rich in oil or diamonds. We must be careful when celebrating the demise of Saddam Hussein not to create a dangerous precedent in which any unilateral military action may be

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<sup>55</sup> Tony Blair, “*Doctrine of the International Community*”, Economic Club, Chicago, 24 April 1999: “We are all internationalists now, whether we like it or not... We cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure... We are witnessing the beginnings of a new doctrine of international community... the principle of non-interference must be qualified in important respects.”

<sup>56</sup> *Human Rights*, F.C.O. Annual Report 2001, (London, The Stationary Office Ltd, 2001), p.138.

condoned when one of its consequences happens to be humanitarian relief.<sup>57</sup> It is United Nations decisions and their implementation which should be the rock on which the international community sets its feet when it intervenes on humanitarian grounds.

### Implied Authorisation

It is sometimes argued that the existence of Security Council approval to use force can be implied from prior Security Council decisions without having to obtain explicit permission. Advocates of this approach argue that it is politically convenient because it enables states to act at times when minimum world order requires that action be taken, but there are geopolitical factors in play which prevent express Security Council authorisation.<sup>58</sup>

In practice, there have been several instances when states have relied on arguments of this kind. These include: India's seizure of Goa from Portugal in 1961;<sup>59</sup> the U.S. interdiction of ships on route to Cuba in 1962;<sup>60</sup> the protection of safe-havens and enforcement of no-fly zones by the U.S. led coalition in Iraq in 1991;<sup>61</sup> and most recently, NATO's campaign in Kosovo in 1999.<sup>62</sup> Most of these

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<sup>57</sup> Furthermore, as Lord Wright notes in his letter to The Times: "There is no doubt that these discoveries [of mass graves] apparently of Iraqis slaughtered by Saddam Hussein's regime shortly after the 1991 Gulf War, add further confirmation, if confirmation were needed, of the appalling nature of Saddam Hussein's tyranny, and might well be argued to be justification for taking action against Iraq at that time. But they do not, in my view, affect the repeated claims of the British Government that the sole aim of the present coalition against Iraq was to remove Iraq's weapons of mass destruction – none of which have been found." Patrick Wright, Head of HM Diplomatic Service 1986-1991, House of Lords.

<sup>58</sup> "There is a subtle interplay of politics that renders any demand for 'unambiguous authorisation' unrealistic." Anthony D'Amato, *"Israel's Airstrike on the Iraqi Nuclear Reactor"* 77 AJIL 584, 586.

<sup>59</sup> India argued that it was enforcing U.N. resolutions against colonialism. A draft resolution complaining of Indian aggression and demanding Indian withdrawal was vetoed by the Soviet Union, and another rejecting the Portuguese complaint failed to pass. "In these circumstances, Council silence suggests implied disapproval and not authorisation." Quincy Wright, *"The Goa Incident"* 56 AJIL 617, 629.

<sup>60</sup> The U.S. argued that it had implied Security Council authorisation to interdict ships on route to Cuba on the basis that the Council had not voted on a Soviet resolution disapproving the U.S. action and had encouraged a negotiated settlement. However, the Security Council also refrained from acting on a U.S. draft resolution that would have expressed approval of U.S. action.

<sup>61</sup> This action was based on S/RES/688 (1991), not passed under Chapter VII, calling on Iraq to end its repression of its civilian population. It was passed 10 votes to 3 (Cuba, Yemen, Zimbabwe) with 2 abstentions (China, India). The Secretary General criticised the coalition's action saying that Iraq's

instances have been strongly contested by other States.<sup>63</sup> The practice does not amount to a "constant and uniform usage practiced by the states in question" required to establish a customary norm in international law.<sup>64</sup>

A short examination of the implied authorisation argument reveals its fallacy. Firstly, it is inconsistent with the principles and purposes of the United Nations Charter. From reading Article 1 it is clear that the basic premise of the collective security system is that force should only be undertaken jointly and in the interests of the international community as a whole. A system that allows states to unilaterally decide when a use of force is or is not in the interests of the international community is dangerously vulnerable to abuse. The only way to ensure that military action is truly collective is if it is expressly authorised by the Security Council. But implicit authorisation would entail the interpretation of the words and actions of members of the Security Council said and done in a highly political context.<sup>65</sup> This is at best ambiguous, at worst a fig-leaf giving the powerful states *carte blanche* to act as they wish, justified by the creative interpretation of past Security Council practice.<sup>66</sup>

Secondly the Charter requires the Security Council to consider whether non-forceful measures would be an appropriate solution to the problem before authorising the use of force.<sup>67</sup> Force is a last resort. This requirement is

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consent was necessary for such consent to be legal (*Keesing's Record of World Events*, (1991), p.38126).

<sup>62</sup> This action was based the following resolutions, all taken under Chapter VII. S/RES/1160 (1998) noting a threat to international peace and security; S/RES/1199 (1998) expressing alarm "at the impending humanitarian catastrophe"; S/RES/1203 (1998) finding a threat to international peace and security arising from the situation in Kosovo. A draft resolution condemning NATO action was rejected 12 votes to 3 (Russian Federation, FRY, Namibia). Belgium stated before the International Court of Justice that: "as regards the intervention... Belgium takes the view that the Security Council's resolutions ... provide an unchallengeable basis for the armed intervention." *Serbia and Montenegro v. Belgium*, Request for Provisional Measures, Oral Pleadings, 2 June 1999.

<sup>63</sup> Jules Lobel and Micheal Ratner, "Bypassing the Security Council: Ambiguous Authorisations to Use Force: Cease-fires and the Iraqi Inspection Regime", 93 AJIL 124, 133.

<sup>64</sup> *Columbia v. Peru (Asylum Case)* (1950) ICJ Reports 266, 276-7.

<sup>65</sup> Lobel and Ratner, *supra*, n.62.

<sup>66</sup> Furthermore, as Christine Gray points out: "there is a serious risk that the Security Council will become reluctant to pass resolutions under Chapter VII condemning state action if there is a possibility that such resolutions might be claimed as implied justification for some regional or unilateral use of force." *International Law and the Use of Force* (Oxford, Oxford University Press, 2000), p.195.

<sup>67</sup> Articles 33, 41, 42 Charter of the United Nations (1945).

devalued, if not completely ignored, under the doctrine of implied authorisation. Some advocates of implied authorisation suggest that the failure of the Security Council to condemn an action is a tacit approval of it.<sup>68</sup> This is a similar argument to that advanced by the Attorney General that Resolution 1441 would have expressly stated if a further resolution was necessary for force to be authorised.<sup>69</sup> Given the veto power of the permanent five members this line of argument is unconvincing. It is also conceptually misconceived. It suggests that the Security Council must denounce an action in order to render it illegitimate. But this argument is an attempt to stand on its head the clear prohibition in Article 2(4) on the unilateral invasion of sovereignty.

### Unreasonable Security Council Veto

In the debates before the war the Prime Minister several times suggested that an unreasonable use of the veto in the Security Council would somehow allow members of the United Nations to act unilaterally without express authorisation.<sup>70</sup> This is a variation of a theory, expressed in academic literature, that the inability of the Security Council to fulfil its collective security role restores the right of each member state to act unilaterally.<sup>71</sup> This concept has no basis in international law.<sup>72</sup> The use of the veto is a legitimate exercise of Security Council procedure under

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<sup>68</sup> For example the U.S. used this argument to justify their blockade on Cuba. Abram Chayes, *Law and the Quarantine of Cuba*, 41 *Foreign Affairs* 550, 556. D'Amato takes the argument further and argues that implicit support can even be derived from a Security Council resolution condemning an action so long as it does not impose sanctions: "It is often politically expedient for the community to condemn a forceful initiative in explicit terms, yet approve of it in fact by stopping short of reprisals against the initiator." Anthony D'Amato, *International Law: Process and Prospect* (New York, Transnational Publishers, 1987), p.78.

<sup>69</sup> *Supra*, n.2.

<sup>70</sup> "Of course we want a second resolution and there is only one set of circumstances in which I've said that we would move without one... that is the circumstances where the U.N. inspectors say he's not cooperating and he's in breach of the resolution that was passed in November but the U.N., because someone, say, unreasonably exercises their veto and blocks a new resolution [sic]." Tony Blair, B.B.C. Breakfast with Frost, 26 January 2003.

<sup>71</sup> Julius Stone, *Aggression and World Order* (London, Stevens, 1958), p.96: "any implied prohibition on Members to use force seems conditioned on the assumption that effective collective measures can be taken under the Charter to bring about adjustment or settlement "in conformity with the principles of justice and international law." It is certainly not self-evident what obligations (if any) are imported where *no* such effective collective measures are available for the remedy of just grievances." For the opposite view, see Ian Brownlie, *Thoughts on Kind-Hearted Gunmen* in Lillich (ed) *Humanitarian Intervention and the United Nations* (Charlottesville, University Press of Virginia, 1973), p.139, 145.

Chapter V of the Charter. The United Kingdom has itself used its veto 32 times since 1945.<sup>73</sup> A doctrine that enables one member to bypass the requirement of Security Council authorisation by unilaterally deeming a use of the veto to be unreasonable is dangerously subjective, and poses an unacceptable risk that the Security Council's monopoly on the authorisation of the use of force will be undermined.

### Breach of Resolution 1441

Resolution 1441 was the freshest, and most immediate resolution in force at the time of the invasion. Yet there has been no suggestion that Resolution 1441 justified the invasion. Why? Because Resolution 1441 did not expressly authorise force.<sup>74</sup> The collective security system requires that the authority to use force, which is the most serious and deadly means of enforcement, can only be conferred by unambiguous means.<sup>75</sup> The graver the consequences, the clearer must be the words providing for them. No one has suggested that Resolution 1441 contains such clear language. Indeed a draft resolution containing the phrase "all necessary means", the diplomatic code for the authorisation of force, was rejected by members of the Security Council in early October 2002.<sup>76</sup> The parties to 1441 all recognised that there was no "automaticity" of consequences and that the issue would have to come back to the Council which was "to remain seized of the matter".<sup>77</sup> It was later suggested somewhat faintly that the "further consideration" mentioned in 1441 meant that there would simply be a report and a debate without the Security Council determining what the serious consequences should be. If that was so it is far from clear why the United States and our

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<sup>72</sup> "The Prime Minister's assertion that in certain circumstances a veto becomes "unreasonable" and may be disregarded has no basis in International Law." Bernitz *et al*, *supra*, n.3.

<sup>73</sup> Rabinder Singh, Legal Briefing Given to MPs, 12 March 2003.

<sup>74</sup> The Security Council diplomatic convention is to authorise force using one of the following phrases: "all necessary means" S/RES/678 (1990), S/RES/794 (1992), S/RES/940 (1994), S/RES/929 (1994); "all measures necessary" S/RES/770 (1993); and "all necessary measures" S/RES/1264 (1999).

<sup>75</sup> Lobel and Ratner, *supra*, n.62.

<sup>76</sup> U.S./U.K. Draft Security Council Resolution, leaked to the Financial Times, 2 October 2002. It was circulated to other Security Council permanent members but was never formally tabled.

<sup>77</sup> Ambassador John Negroponte, statement to Security Council, 8 November 2002; Ambassador Sir Jeremy Greenstock, statement to the Security Council, 8 November 2002; Joint statement by China, Russia and France, 8 November 2002.

government worked so hard to sponsor a second resolution to spell out the consequences of Iraq's failure to comply. It was only the realisation that a second resolution would not get through which led the U.S. and the U.K. to change tack and to look for some other basis in international law which allowed them to invade Iraq. They alighted upon Resolution 678. It was their only lifeline. For it is recognised that nothing short of a statement of the right to use "all necessary means" or "all necessary force" would be sufficiently unambiguous as to allow the extreme step of engaging in armed hostilities or invasion.<sup>78</sup> None of the subsequent resolutions, including 1441, gave such a mandate.

### Does Resolution 678 Justify the Invasion of Iraq in 2003?

There has been a long-standing tradition that our government rarely, if ever, discloses the advice of the Attorney-General or indeed, whether he has advised at all.<sup>79</sup> But on this occasion, in a Parliamentary Answer, Lord Goldsmith Q.C. published his advice in summary form. Because of its importance and its brevity it is convenient to set it out in full:

"Authority to use force against Iraq exists from the combined effect of Resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the U.N. Charter which allows the use of force for the express purpose of restoring international peace and security:

1. In Resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.
2. In Resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore

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<sup>78</sup> *Supra*, n.73.

<sup>79</sup> Whether or not to disclose the opinions of the Law Officers is a matter of discretion on the part of the Government. There is no obligation to divulge such advice as to do so might inhibit the frankness and candour with which the advice was given, or cause a Law Officer to be criticised for a policy for which the Minister is rightly responsible (see John Ll. J. Edwards, *The Law Officers of the Crown: a study of the offices of the Attorney General and the Solicitor General, with an account of the office of the Director of Public Prosecutions in England* (London, Sweet & Maxwell, 1964).



international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under Resolution 678.

3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.

4. In Resolution 1441 the Security Council determined that Iraq has been and remains in material breach of Resolution 687, because it has not fully complied with its obligations to disarm under that resolution.

5. The Security Council in Resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.

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

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

8. Thus, the authority to use force under Resolution 678 has revived and so continues today.

9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force."<sup>80</sup>

The Foreign Secretary also provided to many parliamentarians a longer F.C.O. advice which was to the same effect.

What is not known is whether the Attorney General had given any fuller advice. In response to my request that he should disclose his full advice he retreated behind the arras and claimed that his Parliamentary Answer was an exception to the usual convention and so we were not entitled even to know whether he had

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<sup>80</sup> *Supra*, n.2.

advised more fully or, if so, in what terms.<sup>81</sup> This leaves us in doubt as to the extent to which he considered at all the cogent arguments which had been advanced against his view. Did he examine how, since there is no doctrine of implied authorisation, the quaint concept of the “revival” of Resolution 678 was possible? Did he deal with the issues of necessity and proportionality, given that the inspectors had reported nothing concrete and were asking for more time? Did he grapple with the persuasive arguments advanced against the war by the majority of distinguished international lawyers who expressed a view? Did he explain how the U.S. and this country could act on their own because of Iraq’s breach of resolutions rather than, as is normal, the U.N. authorising the appropriate action? Perhaps even more fundamentally, what were the facts he assumed for the purpose of his advice?

What does appear to be clear is that neither the F.C.O. opinion nor the Parliamentary answer set Resolution 678 in its context. This was the invasion in August 1990 of Kuwait by Iraq. The United Nations responded by passing Resolution 660 the very same day. This determined “that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait” and demanded the immediate and unconditional withdrawal of Iraqi forces. The nature of the issue was defined at the outset and was to be the expulsion of the Iraqi invaders from Kuwait. Four days later on the 6<sup>th</sup> August Resolution 661 stressed the determination “to bring the invasion and occupation of Kuwait by Iraq to an end” and affirmed the inherent right of individual or collective self-defence under Article 51 of the Charter. Sanctions were imposed on Iraq to achieve this clear but limited objective. This was reinforced by a decision “to keep this item on its agenda and to continue its efforts to put an early end to the invasion by Iraq”.

This was the background for Resolution 678 almost four months later on 29<sup>th</sup> November. This resolution authorised member states, unless Iraq withdrew by 15<sup>th</sup> January 1991, fully to implement those resolutions and “to use all necessary

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<sup>81</sup> Letter to the author from the Attorney General Lord Goldsmith QC, 21 May 2001.

means to uphold and implement Resolution 660 and all subsequent relevant resolutions, and to restore international peace and security in the area". So Resolution 678 was always firmly anchored to implementing Resolution 660 and so to driving Iraq from Kuwait.

By 2<sup>nd</sup> March the military action to end the invasion had been successful. Resolution 686 then confirmed all the previous resolutions on the issue and demanded essentially that Iraq should implement its withdrawal, provide appropriate compensation and return Kuwaiti property. There are two other interesting points which arise from this resolution. The first is that it affirms the commitment "of all member states to the independence, sovereignty and territorial integrity of Iraq and Kuwait." Resolution 686 also referred to the fact that allied forces were "present temporarily in some areas of Iraq". The resolution also recognised that "during the period required for Iraq to comply... the provisions of paragraph 2 of Resolution 678 remain valid". In other words it was a temporary provisional cease-fire. This resolution is a cogent further indication of the limited purpose of Resolution 678. I do not believe that any of the political leaders at that time contemplated that Resolution 678 would justify waging wholesale war on Iraq in order to secure a regime change. Indeed, the leading actors in that drama said so clearly. George Bush senior has written that: "Going in and occupying Iraq, thus unilaterally exceeding the United Nations' mandate, would have destroyed the precedent of international response to aggression that we hoped to establish".<sup>82</sup> General de la Billiere, Commander of the British Forces during the first Gulf War, wrote "We did not have a mandate to invade Iraq or take the country over...",<sup>83</sup> and John Major has said: "Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime".<sup>84</sup> Nothing could be plainer or more statesmanlike.

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<sup>82</sup> George Bush (Senior) and Lieutenant General Brent Snowcroft, *A World Transformed*, (New York, Knopf, 1998).

<sup>83</sup> General Sir Peter De La Billiere, *Storm Command* (London, Harper Collins, 1995), p.304.

<sup>84</sup> "Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime... We had gone to war to uphold international law. To go further than our mandate would have been, arguably, to break international law." John Major, speaking at Texas A&M University 10<sup>th</sup> Anniversary celebrations of the liberation of Kuwait, 23 February 2001. See also the testimony of Assistant Secretary of State John Kelley and Assistant Secretary of Defence Henry Rowen before the

So we come to Resolution 687 on 3<sup>rd</sup> April 1991. Again this resolution also affirms the “sovereignty, territorial integrity and political independence of... Iraq”. It also widens the obligations on Iraq because it requires Iraq in effect to accept the “destruction, removal or rendering harmless” of chemical and biological weapons and ballistic missiles with a range greater than 150 kilometres. It set up a regime for the provision of information and inspection. It provided for a formal or permanent cease-fire and that the United Nations could “take such further steps as may be required to implement the present resolution and to secure peace and security in the area.” There was the specific provision enabling “all necessary measures” which clearly would have included force, to guarantee the inviolability of the boundary between Kuwait and Iraq. But in sharp contrast there was no provision at all in this resolution for the use of force to enforce the disarmament obligations. Nor has there been any subsequent resolution that provided for the use of force against Iraq. Hence the government desperately trawled way back to Resolution 678 to find a flag of convenience, a flag disowned by Kofi Annan.<sup>85</sup> But the flag simply cannot fly.

The language of 660 was restrictive, clearly designed to achieve the end of the Iraqi invasion of Kuwait. Resolution 678 was backing this resolution by the potential use of force. Resolution 660 was complied with. Resolution 678 was contemplated as only remaining in force until the consequences of the Iraqi invasion of Kuwait had been dealt with. Resolution 687 introduced the wider and distinct issue of weapons of mass destruction. It gave no comfort to the use of force to achieve this aim and specifically contemplated that the United Nations,

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Europe and Middle East Sub-Committee of the House Comm. on Foreign Affairs, Federal News Service, June 26 1991, at 151, available in LEXIS news library, Fednew File, cited in Lobel and Ratner, *supra*, n.62, at n.61. This proposition has also been recognised by the current Foreign Secretary: “the reason the United States did not continue on to Baghdad was because the United States and the other coalition allies felt they did not have a legal mandate for this; the legal mandate they had was to free Kuwait and then to deal with WMD, not to take over the state of Iraq.” Jack Straw, evidence to the Foreign Affairs Committee, 4 March 2003.

<sup>85</sup> *Supra*, n.29. It is hard to see how a resolution passed 12 years ago can validate military action that was actively opposed and would have been vetoed by at least one, probably three, members of the permanent five in the Security Council, and whose legitimacy has been questioned by the Secretary General.

and not any member countries acting unilaterally, would remain in charge of the issue, as was cogently argued by Rabinder Singh QC and Charlotte Kilroy in one of their impressive opinions on the conflict. The suggestion that the authority to use force “revives” like spring flowers in the desert after rain, to be invoked by the U.S. and the U.K. contrary to the wishes of the Security Council, is risible.<sup>86</sup> Nor does it find any support in international law.

The suggestion that the violation of a ceasefire agreement authorises the other party to use force appears to be based on pre-charter customary law. Under the Hague Regulations 1907 a party was released from his obligations under an armistice agreement when the terms were violated by the other party.<sup>87</sup>

“Ceasefires”, the term being relatively modern, are not dealt with under these rules but are generally treated as being synonymous with armistices.<sup>88</sup> These rules are almost one hundred years old and have certainly been modified, if not completely supplanted, by the United Nations Charter. For it remains the case that all non-defensive uses of force must be authorised by the Security Council, even if the use of force is a reprisal for the violation of the terms of a ceasefire.<sup>89</sup> In 1948, in response to violations by both sides of the Israel/Egypt armistice, the Security Council passed a resolution stating that: “no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party.”<sup>90</sup> In 1955 and 1956 South Korea argued at the United Nations that North Korean and Chinese violations of the North Korea Armistice Agreement

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<sup>86</sup> “[The Security Council] decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area”, S/RES/687 (1991). Rabinder Singh and Charlotte Kilroy, *In the Matter of the Potential Use of Armed Force by the U.K. Against Iraq*, Further Opinion for the Campaign for Nuclear Disarmament, 23 January 2003.

<sup>87</sup> Hague Regulations 1907, Article 40. “Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.”

<sup>88</sup> Ceasefire is a term used by the United Nations. It is used interchangeably with armistice. Sydney D Bailey, *How Wars End*, Vol. 1 (Oxford, Clarendon Press, 1982); Yoram Dinstein, *War, Aggression and Self Defence*, (Cambridge, Grotius, 1988), p.48.

<sup>89</sup> Richard R. Baxter, “Armistices and Other Forms of Suspension of Hostilities”, *Rec. des Cours*, 149 (1976-10) 355, 382; David Morris, “From War to Peace: A Study of Ceasefire Agreements and the Evolving Role of the United Nations” 36 *VJIL* 802, 822-3 (1996); Christine Gray, “After the Ceasefire: Iraq, the Security Council and the Use of Force”, 65 *BYIL* 135, 143; Lobel and Ratner, *supra*, n.62, 142.

<sup>90</sup> S/RES 56 (1948).

(1953) warranted a termination of the armistice and the resumption of hostilities. This was a position that no other state adopted.<sup>91</sup> Once a ceasefire is in place it is the Security Council alone that must determine whether its terms have been complied with and, if they have not, whether the use of force is an appropriate response.<sup>92</sup> This chimes in with the underlying purpose of the Charter that force must be used in the interests of the community as a whole and with U.N. authority. The unreality of the reliance on Resolution 678 was summed up by Michael P. Scharf, the former Attorney Advisor for the United Nations Affairs at the U.S. Department of State: "It is ... significant that the administration of Bush the elder did not view Resolution 678 as a broad enough grant of authority to invade Baghdad and topple Saddam Hussein. It is ironic... that the current Bush administration would now argue that this Resolution could be used ten years later to justify a forcible regime change."<sup>93</sup>

## Conclusion

The last time this country waged a war of aggression was almost fifty years ago during the brief Suez adventure. It was my first term as an undergraduate. Sir Anthony Eden, as is the case with Tony Blair, was not by temperament a war-monger. He had only shortly before refused the request of John Foster Dulles, the U.S. secretary of state, that our countries should together intervene militarily in Indo-China and instead had brought that dispute to a temporary settlement at Geneva. In the first months of the Suez crisis he sought to act through the United Nations and with wide international support. Similarly Tony Blair insisted for months that we should act through the United Nations, subject only to the novel suggestion that we could ignore an "unreasonable" veto.

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<sup>91</sup> Unified Command Report on the Neutral Nations Supervisory Commission in Korea, U.N. Doc. A/3167 (1956) UNYB 129, 130.

<sup>92</sup> It seems self-evident that a ceasefire that is negotiated, drafted and signed under the aegis of the United Nations will also be policed and enforced by the United Nations. This is consistent with the clear and consistent philosophy of the U.N. Charter that only the Security Council may authorise non-defence uses of force.

<sup>93</sup> International Bar News, March 2003.

Then in 1956, just as in the build up to Iraq, there was a dramatic change of gear. We invaded Egypt with the nation, including undergraduates who like me were naïve enough to trust our government, blissfully unaware of the infamous Sèvres agreement providing secretly that Israel should invade and France and we should then intervene to stop them. In the case of Iraq I shall never forget being in the U.S. in March this year and watching with dismay as events unfolded. We learnt that the proposed further resolution was to be withdrawn because of lack of support. The inspectors had their work in Iraq summarily terminated. The leaders of the U.S. and the U.K. travelled to the bizarre location of the Azores and delivered their ultimatum for regime change, and three days later launched the invasion. All this change of approach in a single week. We can only speculate why they did so in so much haste. The most probable reason is that the troops were there and were to be deployed before the summer heat of the Middle East. We will not know for a very long time whether there was any substance in Clare Short's assertion that the Prime Minister had committed himself way back last year to supporting the U.S. even if the U.N. declined its backing. If so, there would be another deeply dark parallel with Suez.

There is undoubtedly one more parallel. The strength of the U.S. was in each case decisive. At Suez, influenced by presidential electoral considerations, the U.S. declined their support and we had to withdraw. In Iraq it was the U.S. who similarly called the shots, but this time as the promoters of war.

What are the lessons for the future? The first is positive. Our government apparently accept that they must act in accordance with international law, even although their arguments were flawed and most experts doubt the lawfulness of what they did in our name. The second too is positive. The U.S. is, for the future, the only world power which can act unilaterally and their values and commitment to democracy make them the least undesirable supreme power. But while we are thankful for this, we should also be wary. The bi-polar world, in which the Soviet Union had an effective veto on U.S. action when it threatened the balance of world power, has collapsed. To create a new multilateralism is not easy. It would,

or so it seems to me, not require change to the U.N. Charter to allow U.N. sanctioned intervention to prevent genocide and humanitarian disaster. Nor would it require any change to allow the U.N. to act to prevent the proliferation of weapons of mass destruction.

For this country I would only offer two suggestions. The first is practical, which is that we should seek to influence the U.S. through Europe, which was at all times supportive of Resolution 1441. It seems to me that the Prime Minister followed the long-standing Atlanticist view succinctly expressed by Sir Winston Churchill in the last week of his premiership: “We must never get out of step with the Americans – never!”<sup>94</sup> With our wider role in Europe this seems no longer wise. After all it was Eden himself who fifty years ago during his quest for peace in Indo-China wrote: “Americans may think the time past when they need consider the feelings or difficulties of their allies”.<sup>95</sup>

There should be time now for reflection. Our government has a massive job to rebuild trust before they could again lead us into war. And to rebuild resources before again fighting a war of choice as Admiral Sir Michael Boyce stressed on retirement this summer.

The second suggestion more directly relates to the part the law should play. As we have seen it played a markedly subordinate role in the debate. I have for some time been unconvinced by the argument that the Attorney General’s advice is not normally disclosed.<sup>96</sup> It is given for the public good and the public should generally be entitled to know what is the government’s view of the law, just as we receive the opinion of ministers on whether bills presented to Parliament conform with the Human Rights Act. While it was welcome that the Attorney General allowed a peep through the curtains in his Parliamentary Answer I find it almost

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<sup>94</sup> D.R. Thorpe, *Eden: The Life and Times of Anthony Eden First Earl of Avon 1897-1977* (London, Chatto & Windus, 2003), p.541.

<sup>95</sup> *Ibid*, p.402. Echoes of this sentiment can be heard in the words of Peter Riddell: “Yes, Britain should be a candid friend of America. But candour should not require the suppression of British interests when, occasionally, these clash with American interests.” *The Times*, 24 April 2003.

<sup>96</sup> See the author’s Denning Society Lecture 2001.



incomprehensible that he then declined even to tell us whether he has given any advice apart from the published summary. The result is, and the F.C.O. advice is but a fuller version of the same Answer, that the government's view of the law was never exposed to the spot-light of reasoned argument or scholarship. How can this be avoided, as I think it should, in the future?

I believe the time has arrived when the courts should not be so diffident where an important aspect of the legality of foreign policy is challenged. There can clearly be no challenge to the policy itself. This is obviously for the government to decide. But it is well recognised that international law is part of our domestic law. As Lord Philips MR has said: "[The] court... is free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."<sup>97</sup> Where public law has evolved so far and now considers on a daily basis wide-ranging issues of varying importance, it seems strange for the courts not to be able to give rulings on the legality of an act as fundamental as the invasion of another sovereign state by an act of war. The knowledge that the courts might be willing to do so would surely promote greater responsibility and thoroughness in the giving of advice. Law cannot just be the handmaiden of real politik. The outcome of a legal decision would, I believe, be the firm conclusion that, except in self defence against actual or imminent attack, we can only use force to invade another country under the authority of a current U.N. resolution passed to cover the specific situation. And that would seem to mean an end to Suez or Iraqi adventures.

Finally, it seems to me that the most important lesson to be learnt is the one that sadly has so often been ignored since time immemorial. In the words of General Sherman, and he was victorious: "War is hell". We abandoned diplomacy too fast in March. With it we abandoned the fragile international consensus on the way in which to handle the issue of the weapons in Iraq. The emphasis of the Charter is right. And that is because those who crafted it knew at first hand that the one reason that force is a last resort is that the human cost of war is too high for it to

be used for any other reason. Nations need to respect the international institutions rather than to give effect to their own beliefs as to how the law should be applied. It was President Dwight Eisenhower, who was also seared by war, who stated in his farewell address to the nation: “The weakest must come to the conference table with the same confidence as do we, protected as we are by our moral, economic, and military strength. That table, though scarred by many past frustrations, cannot be abandoned for the certain agony of the battlefield.”<sup>98</sup> A timeless, eloquent statement and one which I hope may once again come to underpin the long-term policies of a nation whose passionate commitment to freedom and self-determination has given the world so much.

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<sup>97</sup> R(Abbasi) v. SSFCA, *supra*, n.6 at 97.

<sup>98</sup> President Dwight Eisenhower, Farewell Address to the Nation, 17 January 1961.