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### *International Law After Iraq: An Ethical or Historical Approach to Justification of Self-Defence*

Cox, Noel

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# INTERNATIONAL LAW AFTER IRAQ: OR, GROTIUS REVISITED

## 1 INTRODUCTION

Arguably one of the seminal challenges of the twenty-first century will be the place of public international law, particularly in its manifestation in what may be termed the global security system. The importance of this has been shown by the controversial 2003 American-led invasion of Iraq. While the initial concerns about the legality of the invasion have largely receded, questions about the relationship of international law, state sovereignty, and the global security system, which the invasion raised, remain.

This paper will assess some of the possible implications for the global security system of the Iraq war, and possible post-war developments in the law of war. It will review the process of development of international law. It concludes with an evaluation of some of the lessons of the war for the international community. In essence it will ask what is the effect of the invasion on international law, and how might the global security system be revitalised.

## 2 HOW INTERNATIONAL LAW MAY BE AFFECTED BY THE IRAQ INVASION

Hugo Grotius, in his classic treatise on international law, *On the Law of War and Peace* (*De Jure Belli ac Pacis*), proposed an ideal that moral laws apply to both the individual and the state equally.

In particular this included what were known as the laws of law. Just war theory deals with the justification of how and why wars are fought. The justification can be either theoretical or historical. The theoretical aspect is concerned with ethically justifying war and forms of warfare. The historical aspect, or the “just war tradition” deals with the historical body of rules or agreements applied (or at least existing) in various wars across the ages. For instance international agreements such as the Geneva and Hague conventions are historical rules aimed at limiting certain kinds of warfare.

Historically, the just war tradition – a set of mutually agreed rules of combat – commonly evolves between two similar enemies. When enemies differ greatly because of different religious beliefs, race, or language, war conventions have rarely been applied. It is only when the enemy is seen to be a people with whom one will do business in the following peace that tacit or explicit rules are formed for how wars should be fought and who they should involve. In part the motivation is seen to be mutually beneficial – it is preferable to remove any underhand tactics or weapons that may provoke an indefinite series of vengeance acts. Nonetheless, it has been the concern of the majority of just war theorists that such asymmetrical morality should be denounced, and that the rules of war should apply to all equally.

Whilst parts of the *Bible* hint at ethical behaviour in war and concepts of just cause, the most systematic exposition is given by Saint Thomas Aquinas. In the *Summa Theologicae* Aquinas presents the general outline of what becomes the just war theory. He discusses not only the justification of war, but also the kinds of activity that are permissible in war. Aquinas’s thoughts become the model for later Scholastics and Jurists to expand.<sup>1</sup> In the twentieth century it underwent a revival mainly in response to the invention of nuclear

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<sup>1</sup> The most important of these are: Francisco de Vitoria (1548-1617), Francisco Suarez (1548-1617), Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1704), Christian Wolff (1679-1754), and Emerich de Vattel (1714-1767).

weaponry and other factors including American involvement in the Vietnam war.<sup>2</sup> It has now been revisited due to the Iraq war, but so far without a clear outcome. This raises two parallel questions: the first is what the basis of the law is? The second is what the proper means of regulating war is?

The strategic doctrine of the Bush administration, laid out in *The National Security Strategy of the United States of America*,<sup>3</sup> highlights a significant shift from beliefs that dominated Cold War strategic thought. The new doctrine goes beyond the Cold War strategy of deterrence,<sup>4</sup> to one which backs pre-emptive attacks against terrorists, and states which harbour them<sup>5</sup> and states with weapons of mass destruction.<sup>6</sup> This doctrine may have profound implications for the world security environment, and for international law, for it is contrary to the previously developed norms of international law, which stressed collective security and the maintenance of world peace through the United Nations system. The new doctrine was applied in full in March 2003, with the US-led attacks on Iraq.<sup>7</sup>

The war on Iraq may be central to the development of the “new world order” in the first half of the 21<sup>st</sup> century. For, despite its justification by the US and its allies as a police action to prevent the spread of weapons of mass destruction – or any of the other reasons given for attacking Iraq – the US acted largely outside the pre-existing international legal order.<sup>8</sup> This unilateralist attitude was illustrated by the US Defence Secretary Donald Rumsfeld, who wrote that defending the US required both prevention and, sometimes, pre-emptive action.<sup>9</sup> International law prescribes limited circumstances in which offensive military action may occur, and it is doubtful that the Iraqi situation qualified.<sup>10</sup> However, it may be that this approach to the law of war reflects a theoretical, rather than historical, justification. Given the changing strategic situation it may be that this is no less valid an approach and indeed it may be more appropriate in an era in which the primary opponents are ideologically-driven sub-state groups, rather than nation-states.

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<sup>2</sup> The most important contemporary texts include M. Walzer, *Just and Unjust Wars* (1977), B. Paskins & M. Dockrill, *The Ethics of War* (1979), R. Norman, *Ethics, Killing, and War* (1995), as well as seminal articles by Thomas Nagel, ‘War and Massacre’, Elizabeth Anscombe, ‘War and Murder’, and a number of others, commonly found in the journals *Ethics* or *The Journal of Philosophy and Public Affairs*.

<sup>3</sup> (17 September 2002) <<http://www.whitehouse.gov/nsc/nss.html>> (‘US National Security Strategy’).

<sup>4</sup> F. Boyle, *Nuclear Deterrence and International Law* (1999).

<sup>5</sup> Such as the operations against the al-Qaeda in Afghanistan; ‘Limited success in war on al-Qaeda’ <<http://news.bbc.co.uk/2/hi/americas/2638437.stm/>>.

<sup>6</sup> Such as Iraq, and possibly, for the future, North Korea.

<sup>7</sup> ‘US launches huge attack on Iraq’, 20 March 2003, <[http://news.bbc.co.uk/2/hi/middle\\_east/2869121.stm](http://news.bbc.co.uk/2/hi/middle_east/2869121.stm)> at 21 March 2003.

<sup>8</sup> For example, see the views of the French and German leaders (18 March 2003) <<http://news.bbc.co.uk/2/hi/europe/2860715.stm>>.

<sup>9</sup> ‘Transforming the Military’, *Foreign Affairs Magazine* (May-June 2002).

<sup>10</sup> C. Banham, ‘Experts at odds as PM releases legal advice’, 19 March 2003, <<http://www.smh.com.au/articles/2003/03/18/1047749774530.html>>; Public Issues Committee of the Auckland District Law Society, ‘International law, the United Nations and Iraq’, <<http://www.adls.org.nz/public/media/media6.asp>>; ‘New York City Bar Urges No US Military Action in Iraq Without UN Security Council Authorization’, 15 October 2002, <[http://www.abcny.org/currentarticle/abcny\\_%20Urges\\_No\\_US\\_Military.html](http://www.abcny.org/currentarticle/abcny_%20Urges_No_US_Military.html)>.

Ironically – but perhaps unsurprisingly – in the aftermath of the war, faced with scepticism at home and abroad over claims of weapons of mass destruction, and an increasingly costly occupation, the US had been compelled to back down from its previous pure principle, in favour of limited concession to multilateralism. This may offer an opportunity for the world security system to develop a theoretical response to a problem which has been dominated by an historical approach for over a century.

### 3 THE CONTEXT OF INTERNATIONAL LAW

It may be that the American position on Iraq in 2003 reflects international law, either as it stands now, or as it may be in the future. For this reason it is useful to briefly look at the context of international law. Public international law regulates relations between nations. That part which relates to military action is generally known as the Law of Armed Conflict, or anciently as the Laws of War. War is both a state of “armed, physical contest between nations”, and “a legal condition of armed hostility between states”.<sup>11</sup> In common with those aspects of international law which do not relate directly to the Law of Armed Conflict, the sources of international law include written and unwritten rules, treaties, agreements, and customary law. These principally relate to states, for states were for long the dominant – if not sole – participants in international diplomacy and law.

Traditionally the laws of war were concerned with the regulation of warfare,<sup>12</sup> usually, though not exclusively, state warfare.<sup>13</sup> Additionally, since the nineteenth century there has been significant growth in the laws of humanity, or human rights.<sup>14</sup> It has been said that these two strands have joined.<sup>15</sup> There has been much concentration on humanitarian law, and

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<sup>11</sup> Hugo Grotius, *De Jure Belli ac Pacis* (1625).

<sup>12</sup> G. Kewley, *International Law in Armed Conflicts* (1984).

<sup>13</sup> H. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988). Laws were allowed, in the view of St Thomas Aquinas in the thirteenth century, if it was by sovereign authority, accompanied by a just cause, and supported by the right intention of the belligerents; St Thomas Aquinas, ‘Summa theologiae’, Secunda secundae, Quaestio XL (de bello), quoted in J. Eppstein, *The Catholic Tradition of the Law of Nations* (1935) 83; V. Elbe, ‘The Evolution of the Concept of the Just War in International Law’ (1939) 33 *American Journal of International Law* 669.

<sup>14</sup> G. Best, *War and Law since 1945* (1994); L.C. Green, *The Contemporary Law of Armed Conflict* (1993); C. Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles* (1984); M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflict* (1982); J. Pictet, *Humanitarian Law and the Protection of War Victims* (1982); G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (1980); A. Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979); F. Karlshoven, *The Law of Warfare* (1973); G. Draper, ‘The Geneva Convention of 1949’, 114 *Recueil des Cours de l’Académie de droit international* 59; G. Draper, ‘Implementation and Enforcement of the Geneva Conventions and of the Two Additional Protocols’, 164 *Recueil des Cours de l’Académie de droit international* 1. Consideration of human rights obligations have become central to planning military operations; F. Rogers, ‘Australia’s Human Rights Obligations and ADF Operations’, (1988) 131 *Australian Defence Force Journal* 41-44.

<sup>15</sup> Lt-Col F. Thorogood, ‘War Crimes: How Do We Define Them and Punish the Criminals?’ (1996) 119 *Australian Defence Force Journal* 4-16.

especially the punishment of war criminals.<sup>16</sup> But the basic question of when it is lawful to start an offensive war has received less attention, if it has not been ignored altogether.<sup>17</sup>

It would be simplistic to assume that individual states alone determined what international law comprised, or that they were always equally significant. A look at history, however, tells us that conceptions of world order have by no means always been shaped by the model of sovereign co-equal actors with a territorial basis.

While it is possible for organisations and individuals to be subjects of international law, States remain the dominant agents in world politics and the dominant actors in international law. This dominance has led some theorists to distinguish “subjects” of the law from “objects” of the law, suggesting that although entities other than States may have rights and duties in international law, these rights are conferred upon them by States and, presumably, may be taken away by States.<sup>18</sup> It is possibly more correct now to regard international law as a body of rules that binds States and other agents in world politics in their relations with one another, and that is considered to have the status of law.<sup>19</sup> This is becoming increasingly irrelevant.

The 20<sup>th</sup> century, and particularly the second half of that century, saw the growth of international organisations and other bodies now accorded recognition as subjects in international law. With the growth in both the extent and the reach of international agreements, treaties, conventions and codes, the extent to which individual sovereign States retain the final control over their national policies may have diminished.<sup>20</sup> This tendency is becoming more noticeable in the modern commercial environment, and especially in respect of the internet. The principal of these international bodies was the United Nations, which, in succession to the League of Nations, took a leading role in the post-World War II global security system. It may be true that the Iraq war involved one state (or coalition of states) against another, but it was very much linked with the broader US war against terrorism – the historical justification was largely inapplicable.

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<sup>16</sup> Lt-Col F. Thorogood, ‘War Crimes: How Do We Define Them and Punish the Criminals?’ (1996) 119 *Australian Defence Force Journal* 4-16; G. Simpson, ‘Nuremberg Revisited? The United Nations War Crimes Tribunal for the Former Yugoslavia’, *International Law News* (February 1994). There is, however, no unified system of sanctions in international law; W. M. Reisman, ‘Sanctions and Enforcement’ in C. Black & R. A. Falk (eds), *The Future of the International Legal Order* (1971) 273; S. Schwebel (ed), *The Effectiveness of International Decisions* (1971); G. Fitzmaurice, ‘The Foundations of the Authority of International Law and the Problem of Enforcement’, (1956) 19 *Modern Law Review* 1; J. Brierly, ‘Sanctions’ (1932) 17 *Transactions of the Grotius Society* 68.

<sup>17</sup> C. af Jochnick & R. Normand, ‘The Legitimation of Violence: a Critical History of the Laws of War’ (1994) 35 *Harvard International Law Review* 72. See J. Gillingham and J. C. Holt (eds), *War and Government in the Middle Ages* (1984).

<sup>18</sup> G. Schwarzenberger & E.D. Brown, *A Manual of International Law* (6<sup>th</sup> ed., 1976) 42.

<sup>19</sup> H. Bull, *The Anarchical Society: A Study of Order in World Politics* (1977) 127; E. Lauterpacht, ‘The Subjects of the Law of Nations’ (1947) 63 *Law Quarterly Review* 444; R. Higgins, *The Development of International Law Through the Political Organs of the UN* (1963) 1; P. Jessup, *A Modern Law of Nations* (1968); J.G. Castel, *International Law: Chiefly as Interpreted and Applied in Canada* (3<sup>rd</sup> ed., 1976) 1.

<sup>20</sup> Though even in the heyday of State sovereignty, the late 19<sup>th</sup> century, the extent to which any State was truly independent depended much on non-legal factors, such as relative economic strength.

#### 4 US POLICY TOWARDS IRAQ AND THE INTERNATIONAL LEGAL ORDER

US policy towards Iraq was driven largely by the American perception of global security.<sup>21</sup> In accordance with the newly developing US world view, it was incumbent upon the US to take action, including military action where necessary, against any and every potential threat.<sup>22</sup> In classic laws of war terminology this might be thought of as theoretical rather than historical. The question of whether such action was legally justified in international law was one which was either disregarded, or left to others – particularly the UK – to annunciate.<sup>23</sup> That is not to say that international law *per se* was disregarded, or international organisations such as the UN ignored.<sup>24</sup> But it did mean that the settled norms of international law, to which many smaller countries attached primacy, was not determinative in US strategic thinking.<sup>25</sup> It was simply that a historic approach, based on technical rules and precedents, was deemed inapplicable to a new, highly fluid, environment.

Whatever the political, military or diplomatic reasons for taking aggressive military action against Iraq, there were (broadly speaking) four possible legal justifications. These were humanitarian grounds (as used in 1999 to authorise the Balkan operations);<sup>26</sup> Iraq's support for terrorism in the past and its (alleged) possession of weapons of mass destruction;<sup>27</sup> a

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<sup>21</sup> US National Security Strategy.

<sup>22</sup> 'Transforming the Military', *ibid*.

<sup>23</sup> Secretary of State Colin Powell, 'Briefing on Situation With Iraq', 17 March 2003, <<http://www.state.gov/secretary/rm/2003/18771.htm>>:

We believe and I think you've also heard an opinion from British legal authorities within the last 24 hours that there is sufficient authority in 1441, 678 and 687, earlier resolutions, for whatever military action might be required.

<sup>24</sup> A UN Security Council resolution to use force was being sought until the last several weeks, though the US Government denied that this was a legal necessity; White House Press Secretary Ari Fleischer, 'Bush to Address Nation on Iraq', <<http://usinfo.state.gov/topical/pol/terror/03031701.htm>>.

<sup>25</sup> In contrast to the position maintained by the New Zealand Government, and that of the US at time of the *Caroline* incident in 1837. Rt Hon Helen Clark, 'Statement to Parliament on the Iraq crisis', 18 March 2003, <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=16266>>: 'New Zealand's position on this crisis has at all times been based on its strong support for multilateralism and the rule of law, and for upholding the authority of the Security Council'.

<sup>26</sup> It is sometimes argued that there is a right to use armed force against a State without Security Council authorisation where moral imperatives demand intervention in order to prevent massive and grave violations of human rights: A. Roberts, 'Humanitarian War: Military Intervention and Human Rights' (1993) 69 *International Affairs* 429; E. Mooney, 'Presence *ergo* Protection? UNPROFOR, UNHCR and ICRC in former Yugoslavia' (1995) 7 *International Journal of Refugee Law* 436; M. Hutchinson, 'Restoring Hope: Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention' (1993) 34 *Harvard International Law Journal* 624; N. Cox, 'Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives' [2002] *NZAFLR* 13.

<sup>27</sup> 'President Says Saddam Hussein Must Leave Iraq Within 48 Hours', <<http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>>.

related argument based on anticipatory self-defence ('pre-emption');<sup>28</sup> and alleged material breach of UN Security Council resolution 1441, reviving resolution 678.<sup>29</sup> The US seems to have relied upon all four – and particularly the third.<sup>30</sup> The UK relied upon the last,<sup>31</sup> as being arguably the strongest. The specific details of these arguments – except for the last two – will not be examined in this paper. But the context in which they were placed – the world security system – will be.

## 5 *JUS AD BELLUM* AND IRAQ

As mentioned earlier, not every exercise of military force is lawful. Rules have developed over time to control and regulate war, and the tendency over the past few centuries has been to limit the freedom of sovereign states to levy war.<sup>32</sup> The UN Charter in particular, designed to promote peace, enshrined a growing tendency to prohibit all wars not waged in self-defence,<sup>33</sup> though it does allow collective self-defence,<sup>34</sup> and the restoration of international peace.<sup>35</sup> This left little room for the 'just war',<sup>36</sup> a concept which has nevertheless increasingly once again reared its head in the law on the use of force – the *jus ad bellum*.<sup>37</sup> Whether seen as historically or theoretically-based, this doctrine has been central to the laws of war, in particular as applied by sovereign states.

The US-led attack on Iraq could be justified within the framework of modern international law on the use of force. It might have been designed to force compliance with UN resolutions, but it was not expressly authorised by the UN.<sup>38</sup> Nor did it resemble traditional peacekeeping missions, or defensive military actions, such as the British action for the recovery of the

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<sup>28</sup> *Idem*. Antonio Cassese has observed that '[i]n the case of anticipatory self-defence, it is more judicious to consider such action as legally prohibited while admittedly knowing there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or meet out lenient condemnations'; (2001) *International Law* 307-311.

<sup>29</sup> D. Rothwell, 'US and its allies threaten rule of international law', *New Zealand Herald*, 17 March 2003.

<sup>30</sup> 'President Says Saddam Hussein Must Leave Iraq Within 48 Hours', *ibid*.

<sup>31</sup> 'War and law: Attorney General statement', *The Times* (London), 17 March 2003 ('*The Times* statement').

<sup>32</sup> See N. Cox, 'Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives' [2002] *NZAFLR* 13.

<sup>33</sup> *Ibid*.

<sup>34</sup> By states acting in accordance with Article 51.

<sup>35</sup> By the Security Council in accordance with Article 42.

<sup>36</sup> See discussion of this concept in N. Cox, 'Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives' [2002] *NZAFLR* 13.

<sup>37</sup> N. Cox, 'Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives' [2002] *NZAFLR* 13.

<sup>38</sup> The UN normally enforces its own resolutions; Michael Reisman, 'Sanctions and Enforcement' in C.E. Black & R. Falk (eds), *The Future of the International Legal Order* (1971) 273; S. Schwebel (ed), *The Effectiveness of International Decisions* (1971); G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19 *Modern Law Review* 1; J. Brierly, 'Sanctions' (1932) 17 *Transactions of the Grotius Society* 68.

Falkland Islands in 1982.<sup>39</sup> That is not to say, however, that the US necessarily acted unlawfully in attacking Iraq. But the legal basis for its action was at best uncertain.<sup>40</sup> This raises serious questions for the world security system. But it has not spelt the end of the existing system, despite some initial pessimistic assessments. If it cannot fit comfortably into an historical framework, merely describing it as illegal is unhelpful and possibly simplistic. We must turn to the second possible basis for legality of *jus ad bellum*. This could be for individual states to define, but we have an existing system which could be utilised.

## 6 ROLE OF THE UN

As the global security system is currently understood, the UN Security Council alone has the power to make a binding determination in international law that a situation constitutes a threat to international peace and security:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.<sup>41</sup>

Article 41 of the UN Charter provides for a range of non-military measures which the Security Council may authorise to deal with such a situation and, if they prove ineffective, article 42 permits more direct action:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the UN.

This is a predominantly historical basis for the laws of law. However, while the UN itself can take or authorise military action, the Charter does not necessarily exclude the possibility of unilateral action by individual states in certain circumstances. This is recognised by article 51:

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 UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

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<sup>39</sup> A. Coll & A. Arend (eds), *The Falklands War – Lessons for Strategy, Diplomacy and International Law* (1985).

<sup>40</sup> See A. Arend & R. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993); J. Gow, *Triumph of the Lack of Will: International Diplomacy and the Yugoslav War* (1997).

<sup>41</sup> UN Charter, article 39.



This article clearly limits the scope of self-defence to interim measures – any solution adopted is always subject to subsequent Security Council action. However, it does not cover situations where the Security Council has failed, for some reason, to reach agreement on taking action. Aggressive war is no longer a legitimate instrument of national policy, but the use of force is not necessarily limited or reserved to the UN alone. Thus, although the general rules for the conduct of international relations may be categorised as historical, there may be additional theoretical justifications available – particularly those based on ethical considerations.

Many international lawyers argued that, in the context of the UN Charter, the attack on Iraq was unlawful at international law given the circumstances in which it occurred.<sup>42</sup> It was argued that the action was neither based on a Security Council decision under Chapter VII (which will be considered below), nor taken in individual or collective self-defence under article 51, the only two justifications for the use of force that are currently clearly available under international law.<sup>43</sup>

Whether this view of international law is correct depends on whether the law of war has now accommodated, or is in the process of accommodating, wars conducted for humanitarian purposes or to reduce the risk of more widespread war.<sup>44</sup> The latter ground is particularly important as a possible justification for action, but runs counter to the general trend of legal developments over the past few centuries. In particular, it appears to be inconsistent with the UN Charter, though the principle protagonists in the 2003 Iraqi war relied upon Security Council resolutions to justify the use of force.<sup>45</sup>

However, it is also true that the post-World War II security system was in need of radical reform, with the end of the Cold War, and that in this new strategic environment theoretical justifications for war are more important than historical. The former may be immutable, the latter founded on strategic situations which may no longer be relevant. The UN could work on the theoretical basis of the law of war – because the focus is no longer on states, less relevant for states alone to develop principles of law. We could see signs of this developing in the ongoing diplomacy surrounding the US involvement in Iraq.

## **7 THE OPENING OF HOSTILITIES WITHOUT THE APPROVAL OF THE UN**

The post-World War II security system did allow some freedom of action for states. The exercise of independent action by the US and its allies was not necessarily contrary to the UN Charter. Article 1 of the Charter states that one of the purposes of the UN is:

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<sup>42</sup> For just two examples, see Foreign Policy In Focus Statement, ‘Lawyers Statement on UN Resolution’, 5 December 2002, <<http://fpif.org/commentary/2002/0212lawyers.html>>; ‘No legal justification’ 608 *Al-Ahram* (Cairo, Egypt), 17 – 23 October 2002, <<http://weekly.ahram.org.eg/2002/608/op12.htm>>.

<sup>43</sup> Humanitarian intervention not being recognised yet (and probably inapplicable in any case). See O. Bring, ‘Should NATO take the lead in formulating a doctrine on humanitarian intervention’ (1999) 3 *NATO Review* 24, 25.

<sup>44</sup> See N. Cox, ‘Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives’ [2002] *NZAFLR* 13.

<sup>45</sup> *The Times* statement; Press Briefing by Ari Fleischer, 13 March 2003, <<http://www.whitehouse.gov/news/releases/2003/03/20030313-13.html>>; C. Banham & M. Secombe, ‘PM says war legal, but won’t disclose advice’, *Sydney Morning Herald*, 18 March 2003.

to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

However, such police actions are only allowed to suppress a breach of international law. What had Iraq done? It had not invaded or threatened a neighbour. But it had defied, or at least obfuscated and obstructed, UN arms inspections designed to ensure Iraqi compliance with the resolutions of the Security Council which dealt with Iraq's invasion of and subsequent expulsion from Kuwait, particularly resolutions 678 and 687. This was seen by the US, and those states which supported it, as sufficient to justify war on the basis that Iraq had violated the 'ceasefire' at the conclusion of the 1991 Gulf War.

## 8 PRE-EMPTIVE SELF-DEFENCE?

The US-led coalition finally took action in March 2003, acting partly in reliance on article 51 of the UN Charter.<sup>46</sup> The international legal standard for whether a particular use of force is justified in self-defence comes from an 1837 incident where British subjects destroyed an American ship, the *Caroline*, in a US port, because the *Caroline* had been used in American raids into Canadian territory.<sup>47</sup> The British claimed the attack was in self-defence. Through an exchange of diplomatic notes, the dispute was resolved in favour of the Americans. US Secretary of State Daniel Webster urged the following definition of self-defence, which the British accepted:

There must be a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. [The means of self-defence must involve] 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>48</sup>

It is hard to see how the US action against Iraq in 2003 could satisfy this test, unless there was evidence that Iraq intended using weapons of mass destruction on its neighbours or the US itself. If that was the case, the UN arms inspectors did not uncover clear evidence of it.<sup>49</sup> Nor have subsequent US investigations disclosed clear evidence of the presence of these weapons in Iraq at the relevant time.<sup>50</sup> With the passage of time it seems increasingly probable that Iraq did indeed destroy any remaining stocks of banned weapons some years before the US-led invasion of 2003.

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<sup>46</sup> Press Briefing by Ari Fleischer, 13 March 2003, <<http://www.whitehouse.gov/news/releases/2003/03/20030313-13.html>>.

<sup>47</sup> *The Caroline Case*, 29 B.F.S.P. 1137-1138; 30 B.F.S.P. 195-196.

<sup>48</sup> Letter from Secretary of State Daniel Webster to Lord Ashburton, 6 August 1842, in J.B. Moore (ed), *A Digest of International Law* (1906) 409, 412.

<sup>49</sup> D. Ensor, 'Fake Iraq documents "embarrassing" for U.S.', CNN Washington Bureau, 14 March 2003, <<http://www.cnn.com/2003/US/03/14/sprj.irq.documents/index.html>>.

<sup>50</sup> 'Uproar after US admits Iraq's terror weapons may not exist', *New Zealand Herald*, 30 May 2003, A1; M. Steel, 'Prepare for more hallucinations from the Gulf War Syndrome', *New Zealand Herald*, 30 May 2003, A18.

Until the *Caroline* case,<sup>51</sup> self-defence was a political justification for what, from a legal perspective, were ordinary acts of war. The positivist international law of the 19<sup>th</sup> century rejected natural law distinctions between just and unjust wars. Military aggression was unregulated and conquest gave good title to territory.<sup>52</sup> The *Caroline* case did nothing to prevent aggression, but it did draw a legal distinction between aggressive war and military action in self-defence. As long as the act being defended against was not itself an act of war, peace would be maintained – a matter of considerable importance to relatively weak states, as the United States then was – and Iraq was in 2003.

However, the Bush doctrine makes no attempt to satisfy the criteria of the *Caroline* case; there is no suggestion of waiting for a ‘necessity of self-defence’ that is ‘instant, overwhelming, leaving no choice of means, and no moment of deliberation’. The US President is not ‘reserving a right’ to respond to imminent threats; he is seeking an extension of the right of self-defence to include action against potential future dangers. The distinction between a state of war, and a state of peace, is thereby blurred.

It has been argued that the right of self-defence should not be seen as having been restricted by the UN Charter:

The history of Article 51 suggests ... that the article should safeguard the right of self-defence, not restrict it... furthermore, it is a restriction [no right of anticipation] which bears no relation to the realities of a situation which may arise prior to an actual attack and call for self-defence immediately if it is to be of any avail at all. No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardise its very existence.<sup>53</sup>

However, it would seem that there must still be the elements of urgency, immediacy and the absence of credible alternatives to war.<sup>54</sup> A modern version of the *Caroline* approach is described in *Oppenheim’s International Law*:<sup>55</sup>

The development of the law, particularly in the light of more recent state practice, in the 150 years since the *Caroline* incident suggests that action, even if it involves the use of armed force and the violation of another state’s territory, can be justified as self defence under international law where:

an armed attack is launched, *or is immediately threatened*, against a state’s territory or forces (and probably its nationals);  
there is an *urgent necessity* for defensive action against that attack;  
there is *no practicable alternative* to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;

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<sup>51</sup> For more on this case see K. Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837 – 1842* (1989).

<sup>52</sup> See, for instance, *Lyons Corp v East India Co* (1836) 1 Moo PCC 175, 272, 274; 12 ER 782; *Freeman v Fairlie* (1828) 1 Moo Ind Ap 305, 324, 345; 18 ER 117; 1 Bl Com 104 (PC); *Campbell v Hall* (1774) 1 Cowp 204; 20 State Tr 239, 328-329 (KB).

<sup>53</sup> D.W. Bowett, *Self-Defence in International Law* (1958) 188-192.

<sup>54</sup> D.W. Greig, ‘Self-Defence and the Security Council: What does Article 51 require?’ (1991) 40 *ICLQ* 366; K.H. Kaikobad, ‘Self-Defence, Enforcement Action and the Gulf Wars, 1980-88 and 1990-91’ (1992) 63 *British Year Book of International Law* 299.

<sup>55</sup> Sir Robert Jennings & Sir Arthur Watts (eds) (9<sup>th</sup> ed, 1991) 412.

the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, *i.e.* to the needs of defence ... (Emphasis added.)

Iraq had not attacked any state, nor is there any evidence whatever that an attack by Iraq was imminent. Therefore self-defence did not justify the use of force against Iraq by the United States or any state. Potential capacity to attack the US, real or imagined, is an insufficient basis for action. Furthermore, article 51 requires that any exercise of self-defence is subject to the Security Council taking measures to maintain international peace and security, and indeed requires that any action in self-defence be reported to the Security Council.

Even if one puts article 51 aside, self-defence would appear to require, as a bare minimum, credible evidence of not merely capacity to strike, but also of an intention to do so, on the part of the government of the state to be attacked in pre-emptive self-defence. For, although a desire to rid the world of a tyrant may be a laudable intention, and ought perhaps to be allowed by international law, this was not the ground upon which the war was waged.<sup>56</sup>

It may however be possible to assert that the *Caroline* test is no longer relevant, particularly in situations where national authorities have to determine – perhaps on the basis of restricted intelligence – that a country is a threat to peace generally, or specifically to one's own nationals. This would be particularly valid in the case of weapons of mass destruction. The immediacy of the threat would not necessarily be as significant as the magnitude of the threat. This would, of course, be justified in theoretical terms rather than in reliance on a historical justification (such as the UN Charter).

This would be entirely appropriate given that the *Caroline* test for pre-emptive self-defence is itself largely a customary justification of self-defence and only partly enshrined in the UN Charter. If the UN Charter is inadequate in the provisions allowing self-defence then it may well be proper for countries to fall back upon customary law – provided the justification is the prevention of war and not its initiation.

## 9 THE 'WAR ON TERRORISM'

The invasion of Iraq must be seen in its wider context, both legal and political. This can be traced back to 1991. Perhaps more importantly, the 11 September 2001 attacks on US cities caused a psychological reaction in the US, which was echoed by the actions of its government. This reaction, the response of the UN, and the operations in Afghanistan which followed, were noted by the author in the New Zealand Armed Forces Law Review in 2002.<sup>57</sup>

It may be that the threat of terrorism does change the legal situation to some extent. What actually happened in the Security Council following the attacks of 11 September 2001 looks quite different from what was conceived in the UN Charter. It also represents a watershed in the Security Council's practice. The Council passed two resolutions on the matter within a

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<sup>56</sup> Though the US argued – as the invasion neared – that the exile of Saddam Hussein – something not required by any of the UN resolutions – would alone prevent a US attack on Iraq; Institute for International Law for Peace and Humanitarian Law of the Ruhr-University Bochum, Germany, 'Getting Saddam off the Island – The Legality of Regime Change', *BOFAXE* No 243E, 21 March 2003.

<sup>57</sup> See N. Cox, 'Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives' [2002] *NZAFLR* 13.

few days.<sup>58</sup> Resolution 1368 characterised the terrorist attacks on New York and Washington as a ‘threat to peace’, and recognised the right of individual and collective self-defence. It also declared the Council’s readiness to authorise military action. A second Security Council resolution adopted a few days later, resolution 1373, reaffirmed once again the right of individual self-defence and characterised ‘any future terrorist attack to come’ as a threat to international peace.<sup>59</sup>

The behaviour of the Security Council can itself perhaps be described as anomalous – if not contradictory. In the first place, it recognised the right of self-defence without having determined an act of aggression. Failing to fulfil this precondition, the resolutions jumped the formal link between this notion and aggression. The right of self-defence can only be lawfully invoked in response to an armed attack. However, the terrorist attacks were characterised as a ‘threat to peace’, which does not in itself necessarily justify self-defence as a matter of law (or logic).<sup>60</sup> A state is only empowered to act in self-defence after having been the victim of an armed attack, and not when it merely confronts ‘a threat to peace’.

More importantly, as explained above, a state or coalition of states can only invoke the right of self-defence for a limited period of time, normally ‘until the Security Council has taken the necessary measures’. Contrary to this provision, in resolution 1373 the Security Council took a set of measures while recognising the persistence of the United States’ right of self-defence. Although resolution 1368 had expressed the Security Council’s readiness to authorise military action, this authorisation never materialised. The Security Council could have easily authorised the victim of an armed attack, alone or in conjunction with other states, to use force against the aggressor. This is not only permitted,<sup>61</sup> but also usual practice. It was done before in the Korean War in 1950, and more recently in the 1991 Gulf War. In both instances, a coalition of states, led by the US, aided the state attacked acting in self-defence. However the Security Council did not issue any authorisation. This effectively left the operation entirely to the US to direct as it saw fit – with the tacit approval of the UN. In both situations the UN security system did not operate as it was designed to do. But the end result was the limitation of war.

The Security Council’s reaction to the 11 September 2001 events set a precedent allowing states to use forcible measures in response to terrorist attacks. This represents a breakthrough

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<sup>58</sup> Resolution 1368 was adopted on 12 September and Resolution 1373 on 28 September 2001.

<sup>59</sup> This second resolution also entails a comprehensive package of measures to combat international terrorism, all of them non-military in nature. The package is so far reaching that it is said to go beyond the competence of the Security Council. See L. Condorelli, ‘Les attentats du 11 Septembre et leurs suites: Où va le Droit International?’ (2001) 4 *Révue Générale de Droit International Public* 829-848.

<sup>60</sup> There is some consensus that the attacks are best characterised as crimes against humanity rather than as threats to peace. See A. Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12(5) *European Journal of International Law* 993-1002. However, it has been noted that both characterisations are not necessarily exclusive. See S. Murphy, ‘Terrorism and the Concept of ‘Armed Attack’ in article 51 of the UN Charter’ (2001) 43(1) *Harvard International Law Journal* 41.

<sup>61</sup> The Security Council is unable to enforce such a mandate itself. Article 43 of the Charter prescribes that: ‘Members of the United Nations ... undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities’. However, these agreements have never been signed. Consequently, Security Council resolutions have always been enforced by member states through an authorisation, which is equally lawful.

in the *jus ad bellum* in more than one sense. First, it accepted a broadening of the use of force in self-defence, since it can apparently now be invoked in cases of terrorist attacks. The notion of self-defence appears to have evolved to include the repulsion not only of attacks carried out by states, but also by terrorist organisations. The Security Council practice regarding international terrorism explained above gives an idea of the magnitude of this novelty.<sup>62</sup>

Second, a non-state actor – a terrorist network – has been accommodated in the regulation of this right. For the first time, it can lawfully be the object of actions conducted in the exercise of the right of self-defence.

Third, it also represents a certain modification of the understanding of state responsibility. To date, states had an international duty to ‘refrain from organising, instigating, assisting or participating in terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts’.<sup>63</sup> The refusal of some states to extradite indicted terrorists had also on occasion been subject to condemnation by the Security Council, which characterised it as a ‘threat to peace and security’.<sup>64</sup> The novelty is that it appears that the breach of this duty can now justify the use of force in the territory of the harbouring state. While the state of Afghanistan was not made directly responsible for the attacks emanating from the terrorist organisation al-Qaeda, the forcible measures carried out in response were inflicted on Afghan territory. The Council’s approach suggests that the fact that the harbouring state promoted or merely acquiesced in the existence of terrorists warrants the violation of its territory. For the purpose of legitimising the use of force, harbouring terrorist cells is apparently equated with an armed attack.

This rationale might be extended to the Iraqi regime. The difficulty with this is that there was no notion of immediacy, and little evidence that Iraq posed a threat to the US.<sup>65</sup> More importantly, the Security Council, far from authorising the US action, had already taken specific non-military action against Iraq, and was still deliberating the nature of the next steps to be taken when the US took unilateral action. However, customary law would arguably give the US the right to defend itself in the absence of specific authorisation, if faced with a genuine threat, if the UN failed to act in circumstances in which it should have done so.

## **10 IMPLICIT AUTHORISATION OF FORCE BY THE UN**

While there is no doubt that article 51 of the UN Charter directly authorises the use of force in certain circumstances (apparently now including attacks by terrorists), its target in this case was more problematic, for Iraq was not clearly linked to al-Qaeda (although many people in the US were led to believe that it was).

Even if Iraq was in material breach of Security Council resolution 1441,<sup>66</sup> that did not authorise unilateral US action,<sup>67</sup> though there were valiant efforts to show that it did, initially

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<sup>62</sup> In general, this matter has always been difficult to handle at UN level, given the lack of agreement as to how to define the term ‘terrorism’. Obviously, most Third World countries rejected any definition which would characterise as terrorism efforts by colonised peoples to resist foreign rule.

<sup>63</sup> UN General Assembly Resolution 2625 (XXV) of 24 October 1970.

<sup>64</sup> See Security Council resolution 1267 (1999) concerning the demands on the Taliban regime to extradite terrorists.

<sup>65</sup> See Ensor.

<sup>66</sup> Which required compliance with resolutions 661, 678, 686, 687, 688, 707, 715, 986 and 1284.

by British<sup>68</sup> and then by Australian authorities.<sup>69</sup> This was perhaps more important for the latter two states, as their military commanders in the field, and even their political leadership, were potentially liable to prosecution before the new International Criminal Court for waging an unlawful war.<sup>70</sup>

The UK Government relied upon resolution 1441 to justify military action.<sup>71</sup> The reasoning for this position was as follows: Authority to use force against Iraq existed from the combined effect of resolutions 678, 687 and 1441, all of which were adopted for the express purpose of restoring international peace and security. In resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area. 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 international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under resolution 678. A material breach of resolution 687 revived the authority to use force under resolution 678.

According to the UK Attorney-General, resolution 1441 was worded in such a way that a further decision of the Security Council to sanction force was not required.<sup>72</sup> Thus, all that resolution 1441 required was reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.

The difficulty with the analysis which was offered was that it presupposed that an authorisation of force, once made, limited the role of the Security Council.<sup>73</sup> While Iraq

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<sup>67</sup> Powell:

There were some nations who insisted [during the Security Council debate prior to the passage of resolution 1441] that a second resolution would be required. And we insisted that a second resolution would not be required. And as we negotiated our way through that, we made it absolutely clear that we did not believe that the resolution as it finally passed would require a second resolution.

However, the resolution, in particular paragraph 13 (which recalls 'that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations') must be interpreted in good faith and in the light of the fact that enforcement action under Chapter VII of the UN Charter is an exception to the principle of the peaceful settlement of disputes and the prohibition of the use of force in international relations: N. Grief, 'On the legality of a military strike against Iraq', 19 December 2002, <[http://www.bbc.co.uk/radio4/today/reports/international/antistrike\\_argument.shtml](http://www.bbc.co.uk/radio4/today/reports/international/antistrike_argument.shtml)>.

<sup>68</sup> *The Times* statement. It seems that the legal advice backing this claim of legality was not unanimous: E. MacAskill, 'Adviser quits Foreign Office over legality of war', *Guardian* (London), 22 March 2003.

<sup>69</sup> 'Memorandum of Advice on the Use of Force Against Iraq, provided by the Attorney General's Department and the Department of Foreign Affairs and Trade, 18 March 2003', <<http://www.smh.com.au/articles/2003/03/19/1047749818043.html>>.

<sup>70</sup> The US and Iraq have not ratified the Rome Statute, which established the Court, but the UK and Australia have.

<sup>71</sup> *The Times* statement.

<sup>72</sup> *Idem*.

<sup>73</sup> The role of the UN Security Council does not cease merely because it has passed a resolution concerning a specific problem: V. Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 ICLQ 55; C. Gray, 'After

continued to respect the Iraq-Kuwait border, it had failed to disarm in the manner demanded of it. However, it is doubtful that this automatically authorised military intervention to enforce disarmament.<sup>74</sup> Only a serious breach of the ceasefire terms, such as an attack upon Kuwait, could automatically revive the operation of those Security Council resolutions authorising the use of all necessary means to expel Iraq from Kuwait and restore regional peace and security.<sup>75</sup> This would require the UN Security Council to consider the matter, and authorise action if appropriate. In the words of Professor Hilary Charlesworth:<sup>76</sup>

To trace original authority for the use of force in 1990 to current circumstances goes against the plain meaning of words and against the whole fabric of the UN charter.

Professor Charlesworth went further and accused the US, UK and Australian Governments' lawyers of selectively using phrases from UN resolutions to support their case.<sup>77</sup> The difficulty is that diplomatic, political, and military factors meant that the precise role of the UN, and by extension, of international law, was being publicly challenged and questioned. In such circumstances it is difficult to discern precise legal principles.

Associate Professor Don Rothwell said that resolution 1441 had expressly left it to the Security Council to determine whether there had been a breach by Iraq severe enough to justify the use of force.<sup>78</sup>

Nor was the American and allied legal position strengthened by the repeated assertions by US government figures in the last phase of pre-war diplomatic manoeuvring, that the exile of Saddam Hussein – something not required by any of the resolutions – would alone prevent a US attack on Iraq.<sup>79</sup>

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the Ceasefire: Iraq, the Security Council and the Use of Force' (1994) 65 *British Year Book of International Law* 135.

<sup>74</sup> Dominique de Villepin, Minister of Foreign Affairs, to French television stations (Paris, 13 March 2003), <<http://www.diplomatie.gouv.fr/actu/bulletin.gb.asp?liste=20030314.gb.html#Chapitre2>>:

We have said all along that this idea [of automatic authorisation of force] was dangerous. UNSCR 1441 is geared to the peaceful disarmament of Iraq, clearly saying that the use of force can be only a final resort.

See also Banham, 'Experts at odds as PM releases legal advice'.

<sup>75</sup> Rothwell, 'US and its allies threaten rule of international law'.

<sup>76</sup> Banham.

<sup>77</sup> *Idem*.

<sup>78</sup> C. Banham, 'Experts at odds as PM releases legal advice', 19 March 2003, <<http://www.smh.com.au/articles/2003/03/18/1047749774530.html>>; Public Issues Committee of the Auckland District Law Society, 'International law, the United Nations and Iraq', <<http://www.adls.org.nz/public/media/media6.asp>>; 'New York City Bar Urges No US Military Action in Iraq Without UN Security Council Authorization', 15 October 2002, <[http://www.abcny.org/currentarticle/abcny\\_%20Urges\\_No\\_US\\_Military.html](http://www.abcny.org/currentarticle/abcny_%20Urges_No_US_Military.html)>.

<sup>79</sup> Institute for International Law for Peace and Humanitarian Law of the Ruhr-University Bochum, Germany, 'Getting Saddam off the Island – The Legality of Regime Change', *BOFAXE* No 243E, 21 March 2003.



It was certainly arguable that it was US aggression which would – and indeed did – heighten regional tension.<sup>80</sup> Indeed, resolution 1441 was clearly written in a way which required the Security Council to consider any Iraqi breach, and consider the consequences (which were identified as potentially ‘serious’).<sup>81</sup> While the Security Council failed to authorise military force against Iraq, that did not mean the world security system had failed. It meant that the members of the Security Council could not agree that force was justified. In the absence of a Security Council authorisation of force, the use of force was contrary to established international law.

The Security Council had assumed responsibility regarding Iraq, and it was for the Security Council to decide, unambiguously and specifically, that force was required for enforcement of its requirements. Taking a contextual approach, past Security Council resolutions authorising use of force have employed language generally understood to do so. This was the case with Korea in 1950,<sup>82</sup> and Kuwait, Somalia, Haiti, Rwanda and Bosnia in the 1990s.<sup>83</sup> In all these instances, the Security Council responded to actual invasion, large-scale violence, or humanitarian emergency, not to potential threats.

Any claim that ‘material breach’ of ceasefire obligations by Iraq justifies the use of force by the United States is unconvincing. The 1991 Gulf War was an action authorised by the Security Council, not an interstate conflict; accordingly, it was for the Security Council to determine whether there had been a material breach and whether such a breach required the renewed use of force.

Strained interpretations of Security Council resolutions, especially when opposed, as in the case of Iraq, by a majority of other Security Council members, cannot overcome those fundamental principles. Rather, given the values embedded in the Charter, the burden is on those who claim the right to use force to show that it is authorised.<sup>84</sup>

## 11 DIPLOMATIC CONSEQUENCES OF THE WAR

The United States chose to take what was effectively unilateral action because it had decided that this was in the best interests of the US. Speaking of Iraq, President Bush said that:<sup>85</sup>

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<sup>80</sup> This is shown, for instance, by Turkey moving troops into northern Iraq; ‘Turkey opens airspace but invades northern Iraq’, *Straits Times* (Singapore), 22 March 2003.

<sup>81</sup> The representative of France welcomed the two-stage approach required by the resolution, saying that the concept of ‘automaticity’ for the use of force had been eliminated: ‘Security Council holds Iraq in ‘Material breach’ of disarmament obligations, offers final chance to comply, unanimously adopting resolution 1441 (2002)’, Press Release SC/7564, 8 November 2002.

<sup>82</sup> Prior to General Assembly action, Security Council resolution 83 recommended that UN member states provide ‘such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area’.

<sup>83</sup> ‘All necessary means’ or ‘all measures necessary’.

<sup>84</sup> For these and other reasons why existing Security Council resolutions did not authorize use of force against Iraq, see J. Lobel & M. Ratner, ‘Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime’ (1999) 93 *American Journal of International Law* 124-154; R. Singh & A. Macdonald, ‘Legality of use of force against Iraq: Opinion’, 10 September 2002, <[www.lcnp.org/global/IraqOpinion10.9.02.pdf](http://www.lcnp.org/global/IraqOpinion10.9.02.pdf)>.

<sup>85</sup> ‘President Says Saddam Hussein Must Leave Iraq Within 48 Hours’, *ibid*.

The regime has a history of reckless aggression in the Middle East. It has a deep hatred of America and our friends. And it has aided, trained and harboured terrorists, including operatives of al Qaeda.

Importantly, this last accusation – though important – remained unproven. The “deep hatred of America” is not a justification for military action. It is in his next sentences that the president provided what was the most significant justification for the war:

The United States of America has the sovereign authority to use force in assuring its own national security. That duty falls to me, as Commander-in-Chief, by the oath I have sworn, by the oath I will keep.

Recognizing the threat to our country, the United States Congress voted overwhelmingly last year to support the use of force against Iraq. America tried to work with the United Nations to address this threat because we wanted to resolve the issue peacefully.<sup>86</sup>

National security – as determined (not surprisingly) by the US, required military action against Iraq. Whether or not international law sanctioned it, or the international community approved, if US authorities determined that a country was a threat, the US was morally justified in taking action. This might be said to provide theoretical (rather than historical) justification for war. In a telling remark, the President continued:<sup>87</sup>

Under Resolutions 678 and 687 – both still in effect – the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction. This is not a question of authority; it is a question of will.

Many nations, however, do have the resolve and fortitude to act against this threat to peace, and a broad coalition is now gathering to enforce the just demands of the world. The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours.

This world view required pre-emptive action, even if the Security Council failed to authorise it; indeed, if the UN failed to act when action was justified, it was morally incumbent upon the US and like-minded countries to take action. However, it was questionable whether the action taken reflected the views of the majority of the international community.<sup>88</sup> Speaking just prior to the outbreak of war the French President Jacques Chirac said that:<sup>89</sup>

France’s action has been inspired by the primacy of international law, and guided by its understanding of the nature of relations between peoples and nations.

Faithful to the spirit of the UN charter, which is our common law, France considers the use of force is a last resort when all other options have been exhausted. France’s stance is shared by the great majority of the international community.

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<sup>86</sup> ‘President Says Saddam Hussein Must Leave Iraq Within 48 Hours’, *ibid.*

<sup>87</sup> *Idem.*

<sup>88</sup> For example, China maintained that the attacks occurred ‘in disregard for the opposition of the international community’, *The Times* (London), 20 March 2003.

<sup>89</sup> 18 March 2003 (translated by BBC Monitoring Service), <<http://news.bbc.co.uk/2/hi/europe/2860715.stm>>.

The latest discussions clearly showed that the Security Council was not disposed in the current circumstances to sanction a rush towards war.

Not only was the action of doubtful legality, it was also possibly not justified diplomatically:<sup>90</sup>

The United States has just given Iraq an ultimatum. Whether it is a question – I repeat – of the necessary disarming of Iraq or the desirable change of regime in that country, there is no justification here for a unilateral decision to resort to war.

However events develop in the near future, this ultimatum calls into question the notion that we have of international relations. It commits the future of a people, the future of a region, and the stability of the world.

It is a grave decision at a time when the disarmament of Iraq is under way and the inspections have proved they were a credible alternative for disarming that country.

It is also a decision which compromises – for the future – the methods for peacefully resolving crises linked to the proliferation of weapons of mass destruction. Iraq does not today represent an immediate threat such as to justify an immediate war.

To act without the legitimacy of the United Nations, to favour the use of force over law, is taking a serious responsibility.

A similar position was taken by the German Chancellor, Gerhard Schroeder:<sup>91</sup>

The world is on the eve of war.

My question has been and remains: does the scale of the threat from the Iraqi dictator justify the launch of a war that will certainly bring death to thousands of innocent men, women and children?

My answer in this case has been and remains: No.

Iraq today is a country that is under comprehensive UN supervision. The disarmament steps that the UN Security Council has demanded are being increasingly fulfilled.

Which perspective was correct? If the difference is merely one of interpretation of diplomatic realities, then the scope of international law is narrowed. Should it be the role of the international community – perhaps led by the UN – to determine what conduct constitutes a grave enough threat to security to justify war? The US would undoubtedly say no. Given that the threats to world security today come from terrorism, and smaller rouge states, rather than from superpower or great power rivalry, the UN may no longer be the appropriate agency. However, norms of international law do remain, and these do restrict the freedom of countries to levy war.

International law restricted the use of force – but the Security Council may have been too slow (certainly it was in American eyes) in dealing with Iraq. Should any state have the right to enforce justice, or its own perception of justice, irrespective of the view of the Security Council? This question has particular importance in an age without effective superpower rivalry or great power blocks, which served to balance one another during the Cold War. One nation alone has sufficient resources to act contrary to the wishes of the majority of the international community.

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<sup>90</sup>*Idem.*

<sup>91</sup>*Idem.*

## 12 THE ROLE OF THE UN AND INTERNATIONAL ORGANISATIONS IN THE 'NEW WORLD ORDER'

The US is the sole superpower, though this term is now perhaps meaningless. In terms of defence expenditure alone the US was far ahead of any of the other participants in the 2003 Iraq war, or of the great powers in general.<sup>92</sup> Any democratic state must be able to point to legal and moral justification for undertaking offensive action. The moral arguments for waging war on Iraq would have been stronger if convincing evidence had been available regarding Iraq's possession of weapons of mass destruction and/or links to terrorists groups.<sup>93</sup>

The legal arguments put forward did not bear close scrutiny. But the fact that the US sought, however reluctantly, to justify its action, gives some hope for the future. We cannot yet be sure what lessons can be learnt. In the longer term it would be desirable if this war were to be seen as an aberration, rather than as setting a precedent or developing customary international law. For it departs in too many particulars from pre-existing international law, and opens up too many possibilities for conflict. Unfortunately, such aberrations are becoming distressingly common and may in time create a custom which the world would be better without.

The Security Council may be imperfect, but it should be improved rather than discarded. The lesson must be that the Security Council, and the associated security system, remains our best option for preserving world peace, but that international law will, and indeed must, adapt to take into account political realities – including the economic, military, and political dominance of the US on the world stage. Whether the invasion of Iraq will ultimately be held to have been lawful may have profound repercussions for the future of international law and the UN.

The invasion was initially seen by many as a grave threat to international law. The sole superpower was ignoring established customary law and utilising a strained interpretation of the UN Charter to justify action. Subsequent developments – particularly the increasing evidence that Iraq did not have weapons of mass destruction, and the difficulties facing the occupation forces – could have been cited as proof that the US acted improperly. Yet calls for the US – or the UK and Australia – to be penalised for their actions have failed to materialise. The reasons for this may not be hard to find.

Four years ago, Joseph Lorenz, a retired senior US foreign service officer, with extensive experience centred on the United Nations and the Middle East, published a study entitled *Peace, Power and the United Nations – A Security System for the Twenty-first Century*.<sup>94</sup> This book was a serious discussion, in the context of post-Cold War international politics, of alternative collective security systems and means of policing wars within states. It was an analysis of modern collective security operations, and outlines a practical design for reviving the United Nation's battered capacity to deter aggression and nurture wider peace.

In light of subsequent American action, it may be instructive to look at Lorenz' thesis. He begins with an outline of the history of collective security and the related concept of balance of power. This involves a discussion of the failure of the League of Nations. But this book is not concerned with history, it proposes a new approach. As Lorenz reads the situation, the

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<sup>92</sup> The US spends \$343 billion, as compared with the UK's \$34.5 billion and pre-war Iraq's \$1.4 billion. Other major powers spend as follows: Russia \$56 billion, China \$39.5 billion, Germany \$33.3 billion, France \$27 billion, India \$15.9 billion: 'Balance of power: US and Iraqi forces', BBC, 19 March 2003, <[http://news.bbc.co.uk/2/hi/middle\\_east/2839761.stm](http://news.bbc.co.uk/2/hi/middle_east/2839761.stm)>.

<sup>93</sup> J. Diamond, 'Connection sought between Iraq, al-Qaeda', *USA Today*, 29 July 2002.

<sup>94</sup> J.P. Lorenz, *Peace, Power and the United Nations – A Security System for the Twenty-first Century* (1999).

United Nations approach to crisis management is built on an out-dated premise. The collapse of the Soviet Union, regional challenges to the economic and political interests of the major powers, the increase in membership of the UN, all open the way for a smaller, cheaper, more realistic UN force, more realistic in expectation, and more credible in deterrence than the first fifty years of the organisation.

The reason for this, in Lorenz' view, is simple. The UN was designed to prevent global war. There is not now the same fear of this as there was in 1945-46 when the UN Charter was written. This is reflected in the grey area between collective security and traditional peacekeeping which has been apparent in the most sensitive UN missions since the Gulf War.

What Lorenz calls for is nothing less than the structural adjustment of the international security system, to recognise that great power rivalry is no longer the single greatest threat to the people of this planet. Unfortunately Lorenz offers little by way of suggestions for the form of this "new order". But he is not one to advocate unilateralism.

It may be that this particular war was unjustified – and even illegal – but the principle that a sovereign state may sometimes breach the laws of war and not be punished, seems to have developing. Traditionally the laws of war were concerned with the regulation of warfare,<sup>95</sup> usually, though not exclusively, state warfare.<sup>96</sup> Additionally, since the nineteenth century there has been significant growth in the laws of humanity, or human rights.<sup>97</sup> It may be that the Iraq war is further evidence that these two strands have joined.<sup>98</sup> There has been much concentration on humanitarian law, and especially the punishment of war criminals.<sup>99</sup>

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<sup>95</sup> G. Kewley, *International Law in Armed Conflicts* (1984).

<sup>96</sup> H. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988). Laws were allowed, in the view of St Thomas Aquinas in the thirteenth century, if it was by sovereign authority, accompanied by a just cause, and supported by the right intention of the belligerents; St Thomas Aquinas, 'Summa theologiae', Secunda secundae, Quaestio XL (de bello), quoted in J. Eppstein, *The Catholic Tradition of the Law of Nations* (1935) 83; V. Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33 *American Journal of International Law* 669.

<sup>97</sup> G. Best, *War and Law since 1945* (1994); L.C. Green, *The Contemporary Law of Armed Conflict* (1993); C. Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles* (1984); M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflict* (1982); J. Pictet, *Humanitarian Law and the Protection of War Victims* (1982); G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (1980); A. Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979); F. Karshoven, *The Law of Warfare* (1973); G. Draper, 'The Geneva Convention of 1949', 114 *Recueil des Cours de l'Académie de droit international* 59; G. Draper, 'Implementation and Enforcement of the Geneva Conventions and of the Two Additional Protocols', 164 *Recueil des Cours de l'Académie de droit international* 1. Consideration of human rights obligations have become central to planning military operations; F. Rogers, 'Australia's Human Rights Obligations and ADF Operations' (1988) 131 *Australian Defence Force Journal* 41-44.

<sup>98</sup> Lt-Col F. Thorogood, 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16.

<sup>99</sup> Lt-Col F. Thorogood, 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16; Gerry Simpson, 'Nuremberg Revisited? The United Nations War Crimes Tribunal for the Former Yugoslavia', *International Law News* (February 1994). There is, however, no unified system of sanctions in international law; W.M. Reisman, 'Sanctions and Enforcement' in C. Black & R.A. Falk (eds), *The Future of the International Legal Order* (1971) 273; S. Schwebel (ed), *The Effectiveness of*

Few had sympathy for Saddam Hussein or his regime. Whatever the weakness of the legal justification for the invasion, relatively few (at least outside the Middle East, where American motives are often misdoubted) doubted that the allies were motivated by a desire to rid the region and the world of a particularly unpleasant dictator. The UN was perhaps not the best organ to oversee such a project, given the variable human rights records of many UN member states. But the UN itself may be seen as more significant than the sum of its members. The difficulty is the US was openly opposed to the UN – and the US was by far the largest financial contributor to the UN, and the dominant world power.

### 13 CONCLUSION

It is too early to be sure what effect, if any, the US-led invasion and occupation of Iraq will have on international law. However, it has served to remind us that international law is evolutionary, and is not primarily legalistic. It is applied theory and primarily practice-driven. But it is not without a moral context.

The theoretical aspect of the laws of war is concerned with ethically justifying war. The historical aspect, or the “just war tradition” deals with the historical body of rules or agreements applied in various wars. It is this latter aspect which has been dealt a blow by US action in Iraq. The task now for governments, and international lawyers, is to attempt to revitalise global security system while bearing in mind the new strategic realities. This will require some measure of consensus as to the proper balance of national sovereign autonomy, and international collectivity. It may be seen that post-war US difficulties in Iraq has already compelled the US to largely abandon unilateralism in favour of multilateralism. It may be expected that the global security system will evolve in much the manner as hitherto – occasional false moves, but a general tendency towards the control of warfare and the globalisation of security. Once again it may be an opportune time for a new Grotius to review the state of public international law, and assist us to clarify the nature of the law by which we are governed.

The historical basis of law may have swung back in favour of 19<sup>th</sup> century statism. As in many 19<sup>th</sup> century cases self-interest is the ostensible basis of action – the world-view of self-defence is predominant.

But the effect of law is to force legalism to the forefront of public awareness, unlike during WW2 or even the Korean War. Thus the solution may be to emphasise the importance of the role of the legal system, whether based on the UN, or regional security. But at the same time it will not exclude the possibility of the single-state approach, but may render unilateral action less likely. This could be a gradual de-emphasising of the process (based on the historic approach) in favour of principle (based on the theoretical approach), allowing states greater flexibility. The danger then would be that principle may be readily accepted (though even this is doubtful) but how this works in practice is uncertain.

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*International Decisions* (1971); G Fitzmaurice, ‘The Foundations of the Authority of International Law and the Problem of Enforcement’, (1956) 19 *Modern Law Review* 1; J. Brierly, ‘Sanctions’ (1932) 17 *Transactions of the Grotius Society* 68.