
The Future for International Law after Iraq

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I. Introduction

I am not a futurologist and tend to suffer from the traditional academic disease of scepticism, albeit tempered by the meliorative syndrome of optimism. The latter tendency is nourished by a (possibly insufficiently educated) expectation that the institutional normative and cultural advances of civilisation cannot be turned back, despite occasional attempts to do this, such as the rise and spread of fascism in mid-20th century Europe. This volume is concerned with significant attempts by major players on the world stage to re-write the international rule book. Like other authors, I shall look at some of these. My conclusion, however, is that any setbacks are limited and probably temporary. Because those same players have wilfully conflated Iraq and the atrocities of 11 September 2001 and the transnational terrorism they symbolised,¹ I shall not try too hard to exclude developments stemming from the counter-terrorism campaign, rather than the Iraq conflict strictly understood.

I shall consider primarily the law relating to the legality of states' resort to force beyond their frontiers (*jus ad bellum*). This will be followed by briefer sections on the legality of the methods of applying force in a conflict situation (*jus in bello*) and a section on the human rights issues at stake. The less well-travelled terrain of the power of the Security Council to override treaty commitments will be touched upon.

¹ See, eg, 'President Bush Outlines Iraqi Threat' (White House Press Release) (7 October 2002) <<http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html>>; 'Blair defends al-Qaeda claim' *BBC News* (5 February 2003) Politics <http://news.bbc.co.uk/1/hi/uk_politics/2728535.stm>; cf 'Leaked report rejects Iraqi al-Qaeda link' *BBC News* (5 February 2003) <<http://news.bbc.co.uk/1/hi/uk/2727471.stm>>.

II. Resort to Force (*Jus Ad Bellum*)

The first and most obvious challenge to international law is the decision by the US/UK-led Coalition to invade Saddam Hussein's Iraq. There are two main grounds on which the use of armed force across international frontiers may be justified: one is self-defence; the other is authorisation by the United Nations Security Council responding, under chapter VII of the Charter of the UN, either to an act of aggression or to a threat to, or breach of, international peace and security. A third—decidedly controversial—ground would be intervention (not authorised by the Security Council) to protect human rights.

It is necessary to bear well in mind that the only legal justification for invading Iraq given by the UK officially, and I do not believe plausible spokespersons for the US have argued otherwise,² is that the invasion was indeed authorised by the Security Council. The argument boiled down to a view that the last resolution on Iraq before the war (UN Security Council Resolution 1441),³ by finding a material breach of the cease-fire resolution (687),⁴ revived the original authority to use force under resolution 678.⁵ The fact that the Council expressed itself to be waiting for reports from the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) in the case of possible non-compliance by Iraq, that both these agencies had urged that they be allowed to complete their investigations, that the Council had decided to convene immediately should either of them report non-compliance, that several Council members had explicitly stated at the time of the adoption of Resolution 1441 that any use of force would require further authorisation, and that the Council remained seized of the matter, was seemingly of no account in the Coalition's determination that the use of force was permissible. Nor was the fact that the British Foreign and Commonwealth Office's legal stance was at odds with the view of the Attorney-General of the UK, that 'resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended'.⁶ Indeed, according to then State Department Legal Adviser, William Howard Taft IV, earlier texts circulated had envisaged that the language contemplating convening the Council had included the words 'in order to decide any measure to ensure full compliance with all of its resolutions'.⁷ The absence of such language, it was suggested, must be read as excluding the

² See Attorney-General's Written Answer (Hansard 17 March 2003) para 9. Full text of parliamentary written answer available at <http://news.bbc.co.uk/1/hi/uk_politics/2857347.stm> accessed 12 Dec 2007; for guidance on the US position see, WH Taft IV and TF Buchwald, 'Pre-emption, Iraq, and International Law' (2003) 97 *AJIL* 557; Taft, the then State Department Legal Adviser, although seeing the need for pre-emption as part of the context, concentrates on Security Council resolution as the principal pillar of the argument.

³ United Nations Security Council (UNSC) Res 1441 (8 November 2002) UN Doc S/RES/1441.

⁴ UNSC Res 687 (3 April 1991) UN Doc S/RES/687.

⁵ UNSC Res 678 (29 November 1990) UN Doc S/RES/876.

⁶ UK Attorney-General n 2, para 9.

⁷ Taft and Buchwald, n 2, at 562.

necessity for further decision.⁸ Of course, there may have been many reasons for the exclusion, such as the need to ratchet up the pressure on Saddam Hussein.

I suggest that a simple thought experiment would be sufficient to expose the flimsiness of the case. Imagine that France and Russia, possibly suspecting that intervention might result in greater access to Iraqi oil, and anyway concerned that an unstable Iraq could affect their security, had decided to use force, while the USA, the UK and their allies were trying to keep the diplomatic and inspections routes open. Would authoritative legal opinion in the USA and the UK (especially that of the politically appointed lawyerdom seen to have been in the driving seat) have found the argument, now used against their interests, to have any merit? My traditional scepticism leads me to think not. Indeed, I cannot help supposing that there would have been some robust questioning of the good faith of those making the argument. In brief, it seems clear to me that the use of force was not authorised, directly or indirectly, by Security Council Resolution 1441. Unless, therefore, it can be justified on some other ground, then the conclusion drawn by Elizabeth Wilmshurst in her letter of resignation from the FCO Legal Adviser's office, of which she had been Deputy Legal Adviser, is inescapable: 'an unlawful use of force on such a scale amounts to the crime of aggression'.⁹

Before considering possible other grounds, it is important to recall that Resolution 1441 was the only ground officially advanced to justify the action. Regarding the possible impact on international law, the official line is narrowly drawn. It is a question of the interpretation of a resolution. It is not in its terms an assertion of new doctrine. Some comfort may be drawn from this.

On the other hand, whatever canons of interpretation of Security Council resolutions may apply,¹⁰ it is likely that one consequence of the interpretative flexibility shown by the US/UK-led Coalition in this instance will be to cause greater difficulty in drafting resolutions in any future case where it is feared that a state might seek the cover of a Security Council resolution to justify a resort to armed force or other coercive action that some Council members would wish to avoid.

Indeed, the difficulties of agreeing a resolution in response to the 9 October 2006 nuclear test announced by the Democratic People's Republic of Korea (DPRK), eventually adopted on 14 October 2006, illustrates the point. The text of UN Security Council Resolution 1718 (2006), which condemns the nuclear test and imposes sanctions on DPRK, contains novel language. The invocation of chapter VII of the UN Charter in its tenth preambular paragraph is qualified by the phrase 'and taking measures under Article 41'. Since Article 41 refers to 'measures not involving the use of armed force', this was clearly designed

⁸ See Taft and Buchwald, n 2, at 562.

⁹ Letter of resignation of Elizabeth Wilmshurst (Minute to Michael Wood of 18 March 2003) available at <http://news.bbc.co.uk/1/hi/uk_politics/4377605.stm> accessed 12 Dec 2007.

¹⁰ See, eg, R Sonnenfeld, *Resolutions of the United Nations Security Council* (Dordrecht, Nijhoff, 1988) 127–9 which suggests a rather open-textured 'contextual' approach; E Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) 56 *ICLQ* 83 posits a 'collective will' or 'intersubjectivity' approach that does not sustain the UK/US interpretation.

to assuage the fears of some, notably China and Russia, that the USA, which proposed the text, might use the resolution to justify resort to force. Even this language, first proposed in an earlier draft, was not sufficient to allay those fears. The US sponsor had to add a further new paragraph with yet more novel language, in which the Council '[u]nderlines that further decisions will be required should additional means be necessary'. 'Additional means' refers to those measures involving armed force, establishing that a further Council decision would be required for coercive measures beyond the sanctions authorised by the resolution. Despite all of these caveats, there remained serious doubts about the provision in paragraph 8(f) for inspection of cargo to and from the DPRK. The fear was that such inspections could metamorphose into an embargo, technically provided for under Article 42, with all the consequent possibilities for increasing tension. This explains, perhaps, why, despite the fact that the paragraph not only authorises but 'calls on all member states' to take action including inspections, China announced continuing concerns about the risks of such measures.

Returning to the invasion of Iraq in 2003, it is noteworthy that the doctrine of self-defence was not invoked as an official justification for military intervention. Under the doctrine as widely understood, not least by the International Court of Justice,¹¹ the notion of self-defence arises only, in the words of Article 5 of the UN Charter, 'if an armed attack occurs'.¹² Clearly, the Saddam Hussein government had not initiated an armed attack against anyone since the catastrophic invasion of Kuwait 13 years earlier. However, the doctrine of pre-emptive self-defence, sustained traditionally by some scholars and a few governments, had just been resuscitated by the United States. In its 2002 National Security Strategy document, the White House reaffirmed the doctrine of pre-emptive self-defence in the context of its concern about 'rogue states' that would not hesitate to use or threaten the use of weapons of mass destruction against the United States. It did so in the following terms:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

There is no reference here to the UN Charter and the need for an armed attack in Article 51. Imminent danger of such attack was enough. Yet, apparently the doctrine still represented too much of a straitjacket for the United States. It was

¹¹ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.

¹² Art 51 provides: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'.

now necessary to 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries'.¹³

A similar message suggesting the need for a 'pre-emptive and not simply reactive response' to international crises was echoed by British Prime Minister Tony Blair in a 2006 policy speech on how the 'rule book of international politics has been torn up'.¹⁴ What is more, such a response would have to be 'on the basis of prediction not certainty'. Of course, the speech is a political contribution focused on politics, not law, but it does talk of intervention in a context that is explicitly inspired partly by the precedent of Kosovo. The same speech is also much concerned with the continuing conflict in Iraq, and there may have been an innuendo of pre-emptive justification for the Iraq intervention. In an earlier speech (5 March 2004) the Prime Minister had made clear that in the case of 'an imminent direct threat to Britain we would have taken action in September 2002; we would not have gone to the UN'.¹⁵

While the 2006 speech may represent a bid to untrammel the hands of governments feeling under threat, there is in the end no formal new legal doctrine being asserted here. This is fortunate, as this 'Blair doctrine' would not seem to stop even at the need for an imminent attack against the intervening country or any other country. It is particularly troubling that the revived doctrine of pre-emptive or anticipatory¹⁶ self-defence does not give thought to the consequences of a mistaken basis for the 'defensive' use of force, namely that no armed attack was in the offing after all. Given the acknowledged absence of weapons of mass destruction, whose existence had been the main underpinning of the political and legal justification of the attack on Iraq, the concern is hardly hypothetical even if self-defence as such was not the legal basis for the intervention. Ironically, if a ship of one state stops a ship of another state on the high seas on suspicion of being engaged in piracy, the slave trade or unauthorised broadcasting, or of not having a nationality, or flying a false flag ('right of visit'), and it turns out that the suspicion, however reasonable, was unfounded, then the intercepting state is

¹³ 'The National Security Strategy of the United States of America' (September 2002) 15, available at <<http://www.whitehouse.gov/nsc/nss.pdf>> accessed 12 Dec 2007. The US Strategy document describes among the characteristics of rogue states that of displaying 'no regard for international law' (14.) The 2006 Strategy document (available at <<http://www.whitehouse.gov/nsc/nss/2006/>> accessed 12 Dec 2007) reaffirms the notion of pre-emption, but, as laconically pointed out by JR Crook, '[t]he document does not contain the words "international law."': JR Crook, 'Contemporary Practice of the United States Relating to International Law' (2006) 100 *AJIL* 690, 691.

¹⁴ Prime Minister's foreign policy speech, of 26 May 2006, available at <<http://www.number10.gov.uk/output/Page9549.asp>> para 6 (accessed 12 Dec 2007).

¹⁵ Prime Minister's speech of 5 March 2004, available at <<http://www.number10.gov.uk/output/Page5461.asp>> accessed 12 Dec 2007.

¹⁶ Like Professor Franck, I use the terms interchangeably, on the understanding that each requires the threat of attack to be imminent. If the proposed intervention is merely preventive, then no interpretation of self-defence will justify action not authorised by the Security Council: TM Franck, 'Collective Security and Non-Aggression: the Contemporary State of the Law', 30th FA Mann lecture, 6 November 2006, Lincoln's Inn, London.

obliged to pay compensation.¹⁷ No such obligation seems to be acknowledged by those who seek a right to invade another state on the basis of similarly mistaken suspicion.

The final justification for the invasion would have been humanitarian intervention. The position of the UK was clear in this respect. As Mr Blair put it in his 5 March 2004 speech, 'however abhorrent and foul the regime ... regime change alone could not be, and was not, our justification for war'.¹⁸ This distancing from the rhetoric of US President George W Bush is salutary, but on the other hand, he was equally clear that humanitarian grounds could under some circumstances justify intervention and that the law should be less rigid. Thus, he reaffirmed the legitimacy of the response in Kosovo to a 'humanitarian catastrophe'. According to him, 'the notion of intervening on humanitarian grounds has been gaining currency'. Of course, to the extent that such intervention may be authorised by the UN Security Council, his prediction was realised with the acknowledgement in the 2005 World Summit Outcome that the Council could act under chapter VII of the UN Charter (restoring international peace and security) in response to genocide, ethnic cleansing, war crimes and crimes against humanity.¹⁹ Given that only five years earlier a similar summit baulked at this very notion,²⁰ there has now been a major development in the world's understanding of what constitutes threats to, or breaches of, international peace and security, since the acts in question may and, typically do, occur without trans-frontier consequences.²¹

However, the major controversy relates to intervention not authorised by the Security Council. Not content with taking for granted the legitimacy of the Kosovo intervention (by contrast with Iraq, this was 'not a hard decision for most people') and despite the continuing doubts among the majority of scholars, the Prime Minister went on to argue in March 2004:

It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe (though the 300,000 remains in mass graves already found in Iraq might be thought by some to be something of a catastrophe). This may be the law, but should it be?

¹⁷ UN Convention on the Law of the Sea (1982) art 110.

¹⁸ See n 15.

¹⁹ UNGA 2005 World Summit Outcome Document (15 September 2005) UN Doc A/60/L.1 para 139.

²⁰ UN Millennium Declaration, UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2; the silence was despite the urging of the Secretary-General for the Security Council to consider 'humanitarian intervention' as a 'last resort': K Annan, 'We the Peoples; The Role of the United Nations in the 21st Century' ch IV, 'Freedom from Fear', section on the 'Dilemma of Intervention'.

²¹ See, eg, NS Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: the Legal Framework', in Rodley (ed), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (London, Brassey's, 1992), also S Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, Oxford University Press, 2002).

So, even in the absence of such a humanitarian catastrophe, it is implied that brutal regimes ought to be able to be changed by force.²² It may be that this part of the speech was aiming at a more robust United Nations, since it went on to advocate 'reforming the United Nations so its Security Council represents 21st century reality'. If so, perhaps his thirst will have been quenched by the World Summit Outcome document. If, on the other hand, the implication is that, absent Security Council authorisation, freedom-loving, human-rights-respecting democracies can feel entitled to deploy armed force to liberate peoples from the yoke of regimes they consider brutal and oppressive, then there will be little left of the prohibition of the unilateral use of force that was the cornerstone of the United Nations. This is especially so if the democratic peace theory holds true.²³

III. International Law of Armed Conflict (*Jus In Bello*)

The 9/11 attacks and the Iraq conflict put adherence to the Geneva Conventions and customary international humanitarian law under severe strain. The United States Administration took the position that neither Al-Qaeda (and 'its affiliates and supporters'—a troublingly elastic category—anywhere in the world, including, of course, Iraq), nor the Taliban who had wielded power in Afghanistan, were protected by the Geneva Conventions.²⁴ They were not 'protected persons' under the Geneva Conventions either because they did not belong to a Contracting Party (Al-Qaeda) or because they did not comport themselves according to the international rules of armed conflict (Taliban and Al-Qaeda). Moreover, they were not protected by the bedrock rules, covering all those in the hands of a party to a conflict, of common Article 3 of the Conventions, applicable in non-international armed conflict, as this was an international armed conflict. The fact that those rules have been universally understood as reflecting customary international law was ignored, as was the argument that Article 75 of Additional Protocol I (to which

²² The language is reminiscent of Lord Palmerston's justification for non-forcible intervention to protect British nationals abroad: 'We shall be told, perhaps, ... that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives. ... We may be told this, but this is not my opinion, nor do I believe it is the opinion of any reasonable man' (HC Debs, 3rd Series, CXII, col 387; 6 BDIL 290; taken from DJ Harris, *Cases and Materials on International Law* (London, 4th edn, Sweet & Maxwell, 1991) 498.

²³ The democratic peace theory, holds that democracies never (or seldom) go to war; see, eg, J Bohman, 'Beyond the Democratic Peace: An Instrumental Justification of Transnational Democracy' (2006) 37 *Journal of Social Philosophy* 127. Amartya Sen also upholds the value of democracy in averting famine and other disasters: eg A Sen, 'Democracy as a Universal Value' (1999) *Journal of Democracy* 6.

²⁴ The Bybee Memorandum of 22 January 2002, 'Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees', in KJ Greenberg and JL Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge, Cambridge University Press, 2005) 81.

the USA was not a party) contained similar rules.²⁵ Presumably, this could be ignored because, while the Geneva Conventions were incorporated into US law²⁶ and their violation could therefore lead to criminal and other legal proceedings in US courts, customary international law provided no such right or cause of action. The Supreme Court in *Hamdan* brought the USA back into the legal community by asserting that, not only were common Article 3 and (in the view of a plurality of the bench) Additional Protocol I Article 75 customary international law, but that common Article 3 applied not just to internal conflicts but to any conflict that was not governed by the rules relating to international armed conflict.²⁷

Just as *Rasul*²⁸ and *Hamdi*²⁹ had pulled Guantánamo and other detainees out of the ‘black hole’ of US law, despite Administration arguments that *habeas corpus* did not apply outside the United States proper (eg to Guantánamo or to ‘unlawful combatants’ even in the United States) *Hamdi* rescued them at least temporarily from the ‘black hole’ of international law that the Administration had invented. The case may also have been instrumental in the Administration’s decision to produce, if only to Guantánamo, the 14 ‘high-value’ detainees that they had seen fit to subject to enforced disappearance³⁰ for up to three years. The fact that the Administration maintained its right to do the same again in appropriate circumstances takes little away from the retreat it now had to beat. It is also true that it was the judicial branch of the US government that was able to force the retreat, rather than the weight of legal, political and moral international opinion, although that opinion may well have affected the willingness of the Court to reach its decision.

Meanwhile, there have been some backward steps. Under strong pressure from the US Administration, in the lead-up to highly charged mid-term congressional elections, Congress agreed to legislation that purports to end *habeas corpus* for people detained in connection with the ‘war on terror’ (that is, the very recourse that led to the various Supreme Court decisions); to deny any legal remedy to

²⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, 1125 UNTS 3, reprinted in 16 ILM 1391.

²⁶ War Crimes Act of 1996, HR 3680 EH; Uniform Code of Military Justice, UCMJ, 64 Stat 109, 10 USC Ch 47.

²⁷ *Hamdan v Rumsfeld*, Supreme Court of the United States [2006] 126 US 2749.

²⁸ *Rasul v Bush*, Supreme Court of the United States [2004] 542 US 466.

²⁹ *Hamdi v Rumsfeld*, Supreme Court of the United States [2004] 542 US 507.

³⁰ On secret detention, see Human Rights Watch, ‘Ghost Prisoner: Two Years in Secret CIA Detention’ (Report) (February 2007) vol 19.1 at 31 <<http://hrw.org/reports/2007/us0207/us0207web.pdf>>; Art 7.2(i) of the Rome Statute of the International Criminal Court defines the ‘enforced disappearance of persons’ as meaning ‘the arrest, detention or abduction of persons by, or with the authorization, support, or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time’; and the International Convention for the Protection of All Persons from Enforced Disappearance, (adopted, not yet entered into force), provides in Art 1.2 that ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance’.

victims of violations of the Geneva Conventions; to immunise prior violators; and to shackle the courts to a purely US interpretation of the Conventions. These restrictions were designed not so much to protect the military, the horror of professional military lawyers had contributed to the world's awareness of the legal jiggery-pokery that was being used to permit practices traditionally considered unlawful, as it was to protect non-military security and intelligence services which continued to engage in such practices. The military have, in fact, been brought back into the fold of relatively humanitarian-law-compliant behaviour.³¹ Whether an enemy holding a US military prisoner and considering how to treat him or her would distinguish between how the military behaves, as opposed to how the CIA does, is doubtful. On the other hand, it is also doubtful that the US Supreme Court will necessarily accept the restrictions or the Administration's reading of them.³²

IV. International Human Rights Law

Inevitably, in the light of post-9/11 counter-terrorist activity, as well as Iraq-centred counter-insurgency, both of which put a high premium on intelligence gathering, states have bridled under the restrictions imposed by various categories of human rights, especially the prohibition of arbitrary detention (the right to liberty and security of person), the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and the right to privacy.

The United States has reaffirmed its traditional view that the International Covenant on Civil and Political Rights does not apply outside the territory of states parties,³³ despite a long history of contrary interpretation by many states, by the Human Rights Committee³⁴ and by the International Court of Justice.³⁵ The USA appears to have been joined in this by the United Kingdom, which has also sought, with less textual justification, to take the same view of the European Convention on Human Rights.³⁶ However, for the moment the UK courts and the European Court of Human Rights seem set to continue to consider the ECHR applicable wherever the state party in question exercises 'effective control'.³⁷ Only the United States and

³¹ The US Detainee Treatment Act of 2005, HR 2863, restricts interrogation techniques to those authorised in the Army Field Manual.

³² On 12 June 2008, the Supreme Court in *Boumediene et al v Bush et al*, No 06-1195 (Slip Opinion) decided that the provisions of the Detainee Treatment Act and Military Commissions Act purporting to deprive detainees at Guantanamo access to habeas corpus was unconstitutional.

³³ Combined Second and Third Periodic Reports of the United States under the ICCPR, CCPR/C/USA/3 (2005) Annex 1.

³⁴ The practice preceded US ratification of the ICCPR.

³⁵ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] 4.3 ILM 1009 ('ICJ Wall Case').

³⁶ See, for instance, *Al-Skeini and Ors v Secretary of State for Defence* [2007] UKHL 26; see generally F Coomans and M Kamminga, *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2004).

³⁷ *Ibid.*

Israel seem to take the further view that human rights law does not apply in armed conflict situations.³⁸ This unsubstantial assertion is also at odds with a plethora of evidence including the case law of the International Court of Justice.³⁹

One aspect of this area of international law under which states have chafed is that prohibiting the return of people to countries where they face a real risk of being subjected to torture or other prohibited ill-treatment. The US system of 'extraordinary renditions' appears to fall foul of this prohibition. Nonetheless, the US strategy is to maintain that its only obligation in this field is under the UN Convention against Torture (UNCAT), which confines itself to prohibiting such transfers in the case of a risk of torture but not in the case of other prohibited ill-treatment. The US also points to its 'understanding' of Article 3 UNCAT, according to which the risk threshold has to be 'more likely than not'. It denies that it sends people back to such situations, if necessary by seeking (unspecified) satisfactory assurances of appropriate treatment.

The UK, by contrast, accepts the validity of the rule, as applied by the European Court of Human Rights in *Chahal v United Kingdom*,⁴⁰ that there can be no transfers to a situation where there is the risk of torture or other ill-treatment, even in cases involving threats to national security. Nor can such threats be taken to raise the threshold of risk. On the other hand, the UK is seeking a reconsideration of the rule in the European Court of Human Rights. In *Saadi v Italy* the Court resoundingly rebuffed this unfortunate strategem, vigorously reaffirming the rule of *Chahal*.⁴¹

The UK is also seeking to establish a system of obtaining satisfactory assurances (that returned persons would not be tortured or otherwise ill treated) that would consist of more than mere verbal expressions of commitment to comply with what is already an obligation of international law. The notion is that, by a combination of framework agreement and *ad hoc* arrangements on a case-by-case basis, measures of external monitoring and scrutiny would be put in place to remove the real risk of torture or ill-treatment. However, as suggested by the Human Rights Committee, the more systematic the practice of torture or ill-treatment, the less likely it will be that any measures of scrutiny will be sufficient to eliminate the risk.⁴² It would therefore be unthinkable that the UK

³⁸ See US periodic reports, n 33, at para 130.

³⁹ *ICJ Wall Case*, n 34, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ <<http://www.icj-cij.org>> accessed 12 Dec 2007 ('*ICJ Armed Activities*').

⁴⁰ *Chahal v United Kingdom* [1996] 23 EHRR 413.

⁴¹ *Saadi v Italy* Application No 37201/06, Grand Chamber Judgment, 28 February 2005.

⁴² Concluding observations of the Human Rights Committee: United States of America (15 Sep 2006) UN Doc CCPR/C/USA/CO/3, para 16; the UN High Commissioner for Human Rights, the current UN Special Rapporteur on Torture and major NGOs would go further, ruling out the acceptability of assurances in any situation in which it might be thought they would be needed; 'Press Conference on Torture by High Commissioner for Human Rights' (7 December 2005) <http://www.un.org/News/briefings/docs/2005/051207_Arbour.doc.htm>; 'Press Conference by Special Rapporteur on Torture' (26 October 2005) <http://www.un.org/News/briefings/docs/2005/051026_Torture_PC.doc.htm>; Human Rights Watch, 'Still at Risk: Diplomatic Assurances No Safeguard Against Torture' (Report) (April 2005) Vol 17.3 <<http://hrw.org/reports/2005/eca0405/>>, all accessed 12 December 2007.

might negotiate an agreement of this sort with a country such as Egypt, where resort to torture, especially in security cases, is as systematic as anywhere on the globe and where, moreover, previous (inadequately monitored) assurances given to Sweden seem to have been ignored.⁴³

A related issue has been the matter of the admissibility, in deportation proceedings concerning suspected terrorists, of evidence that may have been obtained by torture abroad. The UK Home Office claimed a right to be able to use any evidence, however obtained, but the House of Lords ruled against this view, relying on the Human Rights Act, UNCAT and British constitutional principles. Nevertheless, a majority of the panel was unwilling to impose on the government the burden of proving that the evidence in question was not obtained by the prohibited means, even if it did not require the subject of the proceedings to prove that it was so obtained.⁴⁴

The UK became restive under the inhibitions of the ECHR as understood by the UK courts in application of the Human Rights Act 1998 (HRA). This was partly due to the issues just mentioned, partly to other issues, especially *A and Ors v Secretary of State for the Home Department* which ruled that prolonged administrative internment of the very people it wanted to send abroad, but could not precisely because of fears about their treatment, was incompatible with the ECHR.⁴⁵ Accordingly, two studies were undertaken to consider the possibility of amending the HRA, one by the Home Office, one by the Department of Constitutional Affairs.⁴⁶ Both reviews concluded that amendment was not to be recommended.⁴⁷ The problem, seemingly, was the judges' interpretation of the law, not the law itself. Politicians usually handle this problem by changing the law. However, the ECHR was not for changing, denunciation was politically unthinkable and, whatever restrictions could be imposed on British judges, they could not bring the judges of the European Court of Human Rights into line once cases from the British courts were reviewed there.

So far, we have been addressing the issue of ill-treatment that may be or has been inflicted by others outside the jurisdiction where the persons are detained. In the United States there has been a move, as already noted in the section on

⁴³ *Agiza v Sweden*, Decision of the UN Committee Against Torture [24 May 2005] Communication No 233/2003; *Al-Zery v Sweden*, Decision of the UN Human Rights Committee [10 November 2006] Communication No 1416/2005.

⁴⁴ *A and others v Secretary of State for the Home Department* [2005] UKHL 71.

⁴⁵ *Ibid.*

⁴⁶ *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, July 2006; see also 'The Human Rights Act: the DCA and Home Office Reviews: Government Response to the Joint Committee on Human Rights' Thirty-second Report of Session 2005-06' (January 2007) <http://www.dca.gov.uk/publications/reports_reviews/human_rights_act_reviews.pdf> accessed 12 December 2007.

⁴⁷ See 'The Human Rights Act: the DCA and Home Office Reviews: Government Response to the Joint Committee on Human Rights' Thirty-second Report of Session 2005-06' (January 2007) <http://www.dca.gov.uk/publications/reports_reviews/human_rights_act_reviews.pdf> accessed 12 December 2007.

humanitarian law, to find ways of engaging in 'coercive' interrogation. Since the only treaty obligations that the US acknowledges as applying in respect of extra-territorial acts are those contained in UNCAT, the strategy has been to interpret the definition of torture to exclude, in its opinion, anything that the USA has done (including 'water-boarding', or mock drowning) that all international authorities have no difficulty in considering as torture. It has also defined other 'cruel, inhuman or degrading treatment' in terms of its own constitutional standards under the Fifth, Eighth and Fourteenth Amendments, but not those of the more generously interpreted Fourth Amendment.⁴⁸ In any event, the UNCAT provisions on cruel, inhuman or degrading treatment do not give rise to criminal liability in US law, so the perpetrators could be held immune from liability for such treatment not amounting to torture.

On occasion, states invoke their obligations under the UN Charter to give effect to Security Council resolutions as a justification for possible non-compliance with their human rights obligations. In particular they cite Article 103, which requires Member States to accept that their Charter obligations trump their obligations under any other international agreement.⁴⁹ The UK and the EU courts seem to have taken the view that the effect of this article, read together with Article 25 (obligation to carry out the decisions of the Council) is to permit Security Council decisions to override all states' human rights obligations, whether in an international agreement or otherwise, except perhaps their *jus cogens* obligations.⁵⁰ In other words, the 15 members of the Security Council or indeed any nine of them, as long as no permanent member dissents, can throw out all the political, constitutional and rule of law underpinnings of all states, established after however many decades or centuries of struggle. This can apparently be done by the executive branch of government exercising a vote on a text whose language may have been hastily concocted and negotiated (in secret) without any domestic or international accountability. This bootstrap, or rather gimcrack, argument manages blithely to ignore the fact that the Council itself is obliged by Article 24 to act in accordance with the purposes and principles of the UN, including the purpose of promoting respect for human rights and fundamental freedoms.

So far, the courts have not had the nerve to resist this theory, even if it could put them all out of business. Perhaps, their timidity in an area in which they have previously shown vigour and courage is attributable to the narrow problems they have been called upon to adjudicate, problems in which the executive actions in question, based on Security Council resolutions, have been manifestly reasonable

⁴⁸ Second United States Periodic Report under UN CAT, CAT/C/48/Add.3/Rev.1 (2006) para 21.

⁴⁹ Art 103 of the UN Charter provides that in the 'event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

⁵⁰ *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Court of First Instance (Judgment) (21 September 2005), and *The Queen (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

to the point of being dictated by necessity.⁵¹ It is nevertheless urgent for the courts to narrow the legal basis on which they made their decisions in such cases, otherwise a world constitutional coup could be in the offing.

V. Conclusion

Despite sustained assaults on basic principles of relatively settled international law—an achievement of the last half or so of the 20th century—it may cautiously be hazarded that the worst is over. I offer this untypical hostage to fortune, despite official expectations of more terrorist atrocities to come, on the basis of some evidence.

To start with, the assault was more oblique than was sometimes perceived. There was no wholly novel assertion of a right to effect ‘regime change’ (as preposterous a claim as could be imagined that would leave the international legal system in tatters). Rather a resolution was parsed in a way that, having undermined a post-Cold-War developing trust among the five permanent members of the Security Council, will make more difficult the adoption of Security Council responses to future crises. It is clear, however, that the notion of anticipatory self-defence has received a boost, but may be it was something of a pipe dream of those of us who argued that an armed attack had to have manifested itself before the right to self-defence was triggered. In any event, it cannot be expected that potential target states must, before reacting with force, await major armed attacks to be launched, not by governments, but by ruthless clandestine organisations, operating in failed states or states too weak to control the organisations’ activities.

Certainly, Iraq has done nothing to consolidate the precedential value, whatever it may have been,⁵² of the Kosovo action by NATO as support for a right of humanitarian intervention not authorised by the Security Council. The notion of overwhelming humanitarian necessity was clearly not relevant at the time of the intervention, however much it may have been in the earlier years of Saddam Hussein’s reign of blood.

As far as international humanitarian law is concerned, it has arguably been strengthened. The US Supreme Court in *Hamdan* accepted the better, but not incontrovertible, view that any conflict not falling within the Geneva Conventions’ understanding of an international armed conflict, constitutes a non-international armed conflict within the meaning of common Article 3, regardless of whether it occurs in the territory of the concerned state party. There is no protection gap.

⁵¹ For example, the need to prolong military or administrative detention in a post-war counter-insurgency situation.

⁵² See N Rodley and B Çali, ‘Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law,’ (2007) 7 *Human Rights Law Review* 275, and literature cited at n 7–9 therein.

As to the disreputable legislation aimed at securing immunity in the US courts for some violators, this can only be seen as a very bad example even if done in a context that reaffirms the law as stated in *Hamdan*. This is something, insofar as the challenge is more to encourage US compliance with the law, rather than to amend or re-codify the law.

The international human rights law picture is more mixed. The attempt to take all armed conflict out of the purview of the international legal regime for protecting human rights has been unsuccessful. There has, however, been some traction in the attempt to deny extra-territorial effect to the ICCPR, but this was a traditional (and still not widely shared) view of the United States.

Perhaps the potentially most damaging assault on the human rights construct has been that on the integrity of the prohibition of torture and cruel inhuman or degrading treatment or punishment, as regards both the interrogation methods used or contemplated for use and the willingness to expose persons (by removal) to methods incontrovertibly within the prohibition. Yet even here there has been a counter-attack, albeit through the vehicle of international humanitarian law that has only left uncertain how far, if at all, the secret services of the United States may be able to violate the prohibition with impunity. The uncertainty lies in the secrecy surrounding the methods that are or have been authorised.

My sense that the bottle may only have lost a few drops, rather than having its contents drained away, is not just based on the limited nature of the damage so far inflicted. It takes account of a number of factors that seem to have been in play.

First, there was the appalling overreaching of the Bush Administration, followed either complaisantly or with insufficient protest by the Blair government. The exorbitance of the claims to rewrite 'the rulebook' genuinely shocked all who thought that the book broadly reflected the values our societies were seeking to defend.

Second, the same two governments came to be seen to be exploiting the 9/11 and, to a lesser extent, 7/7 mass murders for partisan political purposes. They were playing politics with the greatest threat their societies had faced since the Cold War and, unlike in that 'war', they were discarding bipartisanship for blatant electoral goals.

Third, the policies were being seen to fail. Instead of consolidating constitutional government in Afghanistan (an intervention barely challenged by the 'invisible college of international lawyers'⁵³), that country was left to deteriorate, since Iraq had to be tamed after the original intervention had brought it to virtual failed state status. What is more, the basis for the original intervention had not even withstood subsequent scrutiny. And then there was Abu Ghraib, a name once associated with the barbarity of Saddam Hussein's regime. Instead of it being decommissioned as the first act of liberation, it was became the scene of the lurid

⁵³ Phrase coined by Oscar Schachter: O Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern Uni L Rev* 217.

scandal of US torture on video, the stigma of the name now squarely transferred to the would-be liberators.

These, then, were the elements that provided a context for other forces to assert themselves. Leaders of intergovernmental organisations had already spoken out against falling into the trap of fear that would allow trading human rights for perceived counter-terrorist efficiency.⁵⁴ International and national human rights NGOs eventually managed to react and gain traction for their work. They brought test cases to the courts, invoked international human rights machinery and in general gradually, with the crucial assistance of distinguished sections of the Press, helped mobilise public opinion against the impugned practices and policies.

The judiciary played an important role. Stung by claims by the executive to wage this 'global war on terror' with unfettered freedom from traditional checks and balances, while invoking 'national security' in language similar to that of the most brutal Latin American military dictatorships, the US courts began to address the legal no-go area that the executive had attempted to create. Unprecedented language was used by fraternal judiciaries to encourage US judicial resistance to the 'black hole' policies.⁵⁵

Politicians too became less mesmerised by the White House. Indeed, once internal legal memoranda were leaked making it clear that an attempt was being made, despite firm opposition from professional military lawyers, to create a space for torture, politicians of integrity realised that the coalition was doing more harm to itself and the world community than Al-Qaeda would ever have dared hope.⁵⁶

Much of this was facilitated by a national and international public opinion that, touched by scandal, misrepresentation and incompetence, became disaffected with a project that had played on their fears, but been unable to relieve them. Of course, it can only be speculated whether, had the policies been more successful, public opinion might have evolved differently and what difference that would have made.

In the end, it seems not too over-optimistic to believe that the law has for the most part been strengthened. For any failed attempt to destroy a human achievement tends to leave that achievement more embedded than before. Nevertheless, there must remain concern for the hidden landmine of expansive claims for Security Council powers, based on a virtually unrestricted interpretation of UN Charter Article 103. On this, it is time for our invisible college to bestir itself and be vigilant.

⁵⁴ See 'Kofi Annan Warns of Risks to Civil Liberties from the War on Terrorism' *Civil Liberties* (25 November 2002) <<http://archive.democrats.com/preview.cfm?term=Civil%20liberties>>; Council of Europe SG, valedictory statement of NSR to GA, November 2001.

⁵⁵ L Steyn, 'Guantanamo Bay: the Legal Black Hole' (27th FA Mann Lecture 25 November 2004) <<http://www.statewatch.org/news/2003/nov/guantanamo.pdf>> accessed 12 December 2007.

⁵⁶ See, eg, Greenberg and Dratel, n 24, M Danner contributions in *Abu Ghraib: The Politics of Torture* (New York, New York Review Books, 2004); N Rodley, 'The Prohibition of Torture: absolute means absolute' (2006) 34 *Denver J Int'l L and Policy* 145; and see the writings of ME O'Connell, eg 'Affirming the Ban on Coercive Interrogation' (2005) 66 *Ohio State Law Journal* 1231.