THE IRAQ CRISIS: WHAT NOW?

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Much ink has been spilled over the question of the legality of the invasion of Iraq and of the extraordinary claims to a right to override 'unreasonable' uses of veto in the Security Council. That invasion has taken place, and as the United States and the United Kingdom withdrew from the Security Council the draft resolution that would have expressly authorised that invasion, there was no occasion to override any veto that might have been cast against such a resolution had it been put to the Council. Writing while fighting in Iraq is still proceeding, it is both too late and too early to consider those questions of legality in great detail: too late to have any practical value; and perhaps too early for the measured appraisal of the situation that will be needed in due course. I want instead to address a slightly different question.

We are used to thinking of the law as a set of fixed rules, though we know that the rules are only a snapshot of the law as it stands at a given moment. Some of the most fundamental rules and principles of international law are now in a state of flux. There are four main areas relevant in the present context that seem to be under pressure: first, the basic conceptual framework of international law as a primarily inter-State matter, which is often said to have been shaken by the Twin Towers attack; secondly, the rules governing the use of force by States; thirdly, the legal regime of military occupation; and fourth, the law governing the treatment of combatants and detainees.

The question I want to address is, what is the role of international lawyers at such times of flux? It is dangerous in any legal system to apply rules without a sense of whether they run with or against the grain of current feelings of what is 'right'. The problem is greater in international law which, lacking a steady flow of cases through courts, cannot rely heavily on judges to steer the development of the law. It needs to find some other way of passing judgment upon claims to new rights and duties.

This is essentially a question of conferring legitimacy upon a claim to a new right or a putative rule of law; in international law that is, at present, the prerogative of States.

* This paper was originally delivered to the Spring Conference of the British Branch of the International Law Association, on 12 April 2003 at Reading University, as a curtain-raiser to a series of papers that dealt in greater detail with issues arising from the Iraq crisis. I have not changed its somewhat unscholarly style; but I have revised certain passages in response to helpful criticisms from two distinguished colleagues, whose kindness and perception I shall repay by preserving their anonymity

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States may pass judgment by acting internationally, for instance through the Security Council. This was done in Resolution 788, where the Council commended ECOWAS for its efforts to restore peace, security, and stability in Liberia after its intervention in that State; and some, less convincingly, argue that much the same happened when the Security Council, in Resolution 1244, retrospectively 'condoned' (or at least, did not condemn) the NATO action in Kosovo.

States may also act on the national plane. The close consideration by the British House of Commons Foreign Affairs Committee of the legality of the Kosovo action is an example. The Committee's Fourth Kosovo Report[1] is particularly interesting, not only because of the care with which it considered the legal arguments and came to its decision on the legal issues, but also because of the constitutional question that it raises as to who may definitively determine the United Kingdom view on questions of international law if the Executive and Parliament should happen to disagree.

In due course, when comparable questions arise in future, claims to new legal rights and duties will find their value in the market-place of State practice, which alone can confer upon them the status of formally binding law. But jurists also have a peculiarly important role in international law. They cannot create law, but their analyses can ease or impede the passage of new doctrines into legal rules. A reading of the Fourth Kosovo Report shows clearly the influence that scholarly analysis can have, lubricating the movement of the engine of State practice in cases where there is a consensus among writers that a particular development is in line with the logic and underlying policy of international law and, like grains of sand in the gears, impeding such movement where a development is opposed. And jurists can also move ahead of State practice, proposing ways in which the law should develop in order to bear the new burdens that are put upon it, even if States have not themselves advanced those ideas.

But *how* should lawyers decide whether novel legal claims or proposals are good or bad?

The first step must be to identify the claim with precision. Whatever other merits they might have, the endless discussions of the war on terrorism and the invasion of Iraq have not been distinguished by clarity of thought—or at least, not by clarity of explanation and reasoning.

To readers of newspapers, at least, it appeared that after 11 September 2001, the action in Afghanistan was presented first as an action against al Qaida but not against the Taliban; then as an action to compel the Taliban to hand over al Qaida personnel; then as an action to topple the Taliban government. In 2002, attention shifted to Iraq. Attempts to link Iraq to al Qaida failed, though there remained a tendency to conflate the problem of Iraqi non-compli-

[1] House of Commons Foreign Affairs Committee, Fourth Report, Kosovo, Session 1999–2000, HC 28–I, Stationery Office, 23 May 2000.

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ance and the global war against terrorism. It was said first that the threat of force by 'coalition' military forces in the Middle East was intended to induce Iraqi cooperation with the UN inspections; then that the use of force was intended to compel Iraq to comply with its disarmament obligations; then that the aim was to topple the recognised government of Iraq.

Several explanations may be given for this shifting focus. Statements to the media are sometimes given without close attention to the wording, and may be intended to highlight nuances and current preoccupations rather than give a definitive account of the matter. Different officials, and different States, may have different concerns and focuses. The media themselves exercise a considerable discretion in choosing how to characterise action. Means, such as the toppling of governments, may become confused with ends, such as disarmament. And, of course, the primary actors may themselves have no clear and consistent view of why they are acting as they do throughout all the stages of an international crisis.

Whatever the explanation of the blurred focus in the public mind of the policies leading to the invasion and occupation of Iraq in the Spring of 2003, there remains a need to explain what was the reason for using force against Iraq. Not the elusive motive—oil, or whatever has been the motive for invading Iraq when other States in breach of their international arms obligations or threatening to use weapons of mass destruction against neighbours, or States in which massive suffering and human rights violations occur, continue without outside intervention—but the reason, which, if translated into a norm with legal force would become the justification which might be invoked in future by the US, the UK, or any other State in similar circumstances.

There may, in fact, be no claim that action taken by a government was legally justified. In 1967 the United Kingdom bombed the Liberian tanker, the *Torrey Canyon*, which had gone aground off the English coast and was spilling its cargo of oil, in an attempt to set fire to the ship and its cargo in order to minimise marine pollution. Though a right to take such action was subsequently set out in the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, no such right was clearly established in 1967. The United Kingdom position was explained as follows:

> The overriding concern of the Government throughout has been to preserve the coasts from oil pollution and to adopt the course most likely to achieve this end. Neither legal nor financial considerations inhibited Government action at any stage.[2]

The Government did what it thought necessary, and made no claim to a right to bomb the ship.

If there is a claim to legality we must be clear precisely what the claim is—

[2] Cmnd 3246, 3.

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as was done in Kosovo, in the carefully articulated and conditional claim to intervene with force in another State, in exceptional circumstances, in order to avert an overwhelming humanitarian catastrophe.[3] We must, as international lawyers, then decide whether the claim should be welcomed or resisted. Here, it seems to me, the primary question is the coherence of the claim with the existing law.

By 'coherence with the existing law' I do not mean that the claim should be *lawful*. If the claimed right is lawful, there is no problem. But international law develops unevenly, and developments in one area may lag behind those in others.

Take, for example, the question of entry into territorial sea solely in order to rescue ditched airmen. That is not an exercise of the right of innocent passage. On the other hand, it might be pointed out that, at least on the high seas there is not merely a right but a duty to render assistance to persons in distress; the ILC Articles on State Responsibility say that actions that would otherwise be in breach of international law are not wrongful if undertaken in order to rescue persons in distress; and, not least, that there is a clear, universally recognised moral case for the rescue. So, if a State asserts a right to enter territorial sea for that purpose, we may decide that such a right would be *coherent* with the mainstream of the law (and I accept that there are qualitative judgments made in deciding what the mainstream is)—that the rule of law concerning rescues in the territorial sea should come into line with the rule concerning rescues on the high seas, and with the law on State Responsibility, with universally held moral principles, and so on.

In contrast, cutting off water and electricity supplies to embassies as part of a sanctions package would plainly *not* be coherent with existing legal principles. Whereas we might decide, as individual jurists, to welcome the development in the 'rescue' case, we might decide that the development in the 'embassy' case is to be disapproved.

In practice, of course, it is not coherence with moral principle or with policy that is the real driving force behind such changes. The fact that some legal rules may be discordant with other legal rules—as the rules governing rescue operations in the territorial sea and on the high seas may be thought to be discordant—is a curiosity; but that does not of itself compel change. It is the desire to save lives, not the desire to eliminate dissonance in the law, that would drive States to claim a right to enter the territorial sea. In other instances, it may be the desire to develop a stable regime for investments, or a more practical means for determining the outer limit of the continental shelf, or whatever. Customary international law develops in response to the needs of the real world, not as an abstract system.[4]

[3] The conditions were discussed in the Foreign Affairs Committee's Fourth Report on Kosovo, above, n 1, and in certain memoranda submitted to the Committee and reproduced in *ICLQ* (1999) 876–943.

[4] Treaty-making and codification exercises are somewhat different in this respect.

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Inevitably, the bigger States that are more active on the international plane will have a greater impact upon the development of customary international law than will others; and the development will in consequence often bear the stamp of their preoccupations and interests. There is nothing inherently objectionable in this. On the contrary, one might say that the result is that (to use the terminology of the International Court in the *North Sea Continental Shelf* cases) the 'States whose interests were specially affected' by any matter would have a particular influence upon the development of customary law in that area. What is important is that the law which develops is a law that applies to all, rather than a right[5] that is particular to the State or States initiating its development.

This point might be made slightly differently. As motive forces for the development of customary international law there is a distinction between arguments based on generally accepted principles of morality or policy, such as the saving of life or the facilitation of legitimate diplomatic activities, and arguments based explicitly or implicitly upon sectional or national political aims. There is a tendency in these days of hard-headed realism to conflate moral argument with political argument. It may be clearly in the interests of a State to have, say, Cuba ruled by a laissez-faire government, or the Suez Canal taken out of Egyptian control. But those are political, not moral arguments.

The difference is crucial. Moral arguments can be universalised. Political arguments cannot. Rooting the development of international law in the soil of common morality is necessary in order to sustain its claim to legitimacy: the rooting of international law in the exigencies of national political objectives, on the other hand, is one of the defining characteristic of imperialism. One of the central problems of the current Iraq crisis is, it seems to me, precisely this conflation of moral and political argument.

But the coherence of the *substance* of the rule with legal and moral principles is only half of the matter. Dealing in crack cocaine is a crime, and we applaud the police and courts for apprehending offenders and punishing them. But we do not applaud vigilantes, or rival drug dealers, when they do the same. Are the USA and the UK acting as the world's policemen in Iraq, or as vigilantes? How do we draw the line?

The answer, I think, lies in the notion of process, of procedural justice, and due process, and legitimacy. It is not enough that substantive rules of law be just. They must also be made and applied in a manner that is just. The Rule of Law is not simply a set of precepts. It is a way of living; a way of organizing society. Substantive rules are means to an end, tools to facilitate social life; the processes of law-making and law enforcement are essential elements

[5] States more often claim rights than they impose duties upon themselves through their practice.

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in the ordering of society and the curtailing of arbitrary and overbearing power.

That is the other cause of deep concern about the action in Iraq. Many of those who think that what is being achieved is right and worth the cost are troubled that it is done in disregard of settled international procedures and institutions.

The invasion and occupation of Iraq, and the various statements emanating from the British and American Governments that preceded it, imply a changing conception of a cluster of rules of customary international law relating to the use of force and the operations of the Security Council. International lawyers have an important role in testing these developments against the criteria of substantive and procedural coherence with the mainstream of international law, and in devising principled legal solutions to certain other novel and as yet unanswered problems that have arisen as a result of this crisis. In the short time available, let me return to the four issues that I mentioned earlier.

I. FUNDAMENTAL BASES: THE 9/11 QUESTION

The first is the 9/11 question. Did the 11 September attacks, as 'private', non-State acts of violence on a scale previously thought to be the preserve of States, break the bonds of traditional legal analysis? Do we need a radical revision of the conceptual foundations of international law?

As far as the situation in Iraq is concerned, this was a straightforward case of a State with a recognised government, in breach of its international obligations and acting in a manner considered prejudicial to international peace and security. It was an international dispute of the ordinary kind and there is nothing about it that I can see that suggests that we needed a new conceptual framework to deal with it.

The al Qaida issue is perhaps different. International sanctions normally work by throttling the economy of the target State, and that strategy is difficult to apply to international terrorists, as are the other, more subtle pressures that can be applied to States. But terrorist attacks are not new. In Africa, the Middle East, Latin America, Asia, even Europe, there have been countless cross-frontier terrorist raids. International law deals with them by requiring States not to allow their territory to be used as bases for terrorist operations, by allowing counter-measures against States that fail in that duty, and ultimately by allowing force to be used in self-defence or with the authorisation of the Security Council if the State hosting the terrorists appears unable or unwilling to control terrorists within their borders.

It is not clear to me that there is a *need* for any new conceptual framework to cope with 'the war on terrorism'; but if there is, the nature of that need must be clearly spelled out.

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II. THE LEGALITY OF THE INVASION

The second area where traditional international law is under pressure is in relation to the justification for the invasion of Iraq.

There is no arguable case that the United States and the United Kingdom were acting in self-defence in invading Iraq. Nor is there an arguable case that they were intervening to avert an overwhelming humanitarian catastrophe. The United States seems to be attempting to develop a (rather oxymoronic) right to exercise self-defence pre-emptively;[6] but that dangerous doctrine is so patently lacking in any basis in international law that it needs no further consideration here, much as it needs the most searching scrutiny elsewhere. The only possible basis for a legal justification for the invasion of Iraq is the supposed 'revival' of the authorisation to 'Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area.' That is said to have been 'revived' by the determination in Resolution 1441 that Iraq was in material breach of its disarmament obligations under Resolution 687. This was, indeed, the basis upon which the United Kingdom rested its claim that the action against Iraq was lawful.

The validity of the argument based on Resolution 678 has been extensively discussed and it is not my task to rehearse the arguments here in any detail. The main flaws in the 'revival' argument are well known. There is the fact that Resolution 1441, on its face, quite patently does not authorise the use of force against Iraq and does not indicate that the authorization to the 1991 States acting in coalition with Kuwait could possibly be revived. There is the fact that there is no known doctrine of the revival of authorisations in Security Council resolution, on which some implied revival could be based. There is the wording of later resolutions, such as the much-overlooked Resolution 686,[7] and Resolution 687,[8] which suggest that the authorisation to use force was given only for the duration of the military operation to expel Iraq from Kuwait and that it is for the Security Council to decide what, if any, further action is to be taken against Iraq. There is the fact that, far from having abandoned or lost interest in the matter the Security Council was itself actively seised of the

[6] See the *National Security Strategy of the United States of America*, Sept 2002, 6, 15 <http://www.comw.org/qdr/fulltext/nss2002.pdf>.

[7] See operative para 4, which states that the authorisation to use force will continue for the period required for Iraq to comply with certain cease-fire obligations not including disarmament.

[8] See operative para 4, which states that the Council decides to guarantee the inviolability of Kuwait's boundary with Iraq (surely a litmus test of the survival of the coalition's independent authority), and operative para 34, which states that the Council 'decides to remain seized of the matter and to take such further steps as may be required for the implementation of this resolution and to secure peace and security in the area', which again clearly indicates that it is for the Council to decide upon what, if any, further action is needed.

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matter at all critical times. And there are the express views of Security Council Members set out in the debate on Resolution 1441 which make it clear that, in contrast to the view of the United States, some Members required a second resolution explicitly granting an authorisation to use force, before force could be used against Iraq.[9]

Furthermore, for the 'revival' argument to succeed it would have to be explained what the limits were upon the 1991 authorisation to States acting in coalition with Kuwait (not, it will be noted, *all* Member States of the UN). It cannot be argued, and was not explicitly argued, that Resolution 678 gave each one of the States in the 1991 coalition, acting either alone or jointly with some or all of the others, the right to take any action, anytime, anywhere, that it considers it necessary or desirable in pursuit of the aim of restoring peace and security in the area (whatever the scope of 'the area' was). Equally, it surely cannot be argued that on 'revival' any 1991 coalition member could take whatever steps it thought expedient to 'restore international peace and security in the area', regardless of what other coalition members (such as France, Germany, and Syria), and the Security Council itself, thought. The United Kingdom was quite right to press hard for a second resolution from the Security Council explicitly authorising the use of force against Iraq; and having failed to secure one, the invasion lacked legal justification in my view.

It is said 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. That raises a more basic point. It is simply unacceptable that a step as serious and important as a massive military attack upon a State should be launched on the basis of a legal argument dependent upon dubious inferences drawn from the silences in Resolution 1441 and the muffled echoes of earlier resolutions, unsupported by any contemporary authorisation to use force. No domestic court or authority in the United States or the United Kingdom would tolerate governmental action based upon such flimsy arguments.

I think the invasion lacked any legal justification. But I also accept that the episode revealed deep flaws in the workings of the UN. A major problem in the handling of the Iraq crisis was the failure of those States Members of the Council who opposed, and those who were unwilling to support, the USA and the UK to advance any other course of action. The Security Council has, under the Charter, the 'primary responsibility for the maintenance of international peace and security', acting on behalf of the Members of the United Nations. But if it reaches a stalemate, can no-one else act in its stead? Is there a right to act, even without Security Council authorisation and in circumstances where the self-defence would not provide a justification?

In Kosovo, the answer given was, 'yes'. Moral imperatives demand that States should be entitled to use force not merely to defend themselves, but to

[9] See UN Doc S/PV 4644, 8 Nov 2002.

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save the lives of other human beings when there is no other way of doing so. Is there a parallel case to be made out here?

The assumption that a 'stalemated' Security Council was 'unable to act' over Iraq is tendentious. From another perspective, what happened was that the States urging immediate armed action against Iraq were unable to persuade a majority in the Council that this was the best way of preserving international peace and security. The fact that the US and the UK were in the minority on this occasion does not necessarily indicate that the system is flawed. If this episode is properly to be characterised as a legitimate difference of opinion within the Security Council as to the best policy to pursue in respect of Iraq, it is difficult to see any reason why the normal processes of decision-making within the Council should not have been followed, leaving the United States and the United Kingdom with the choice of persisting in attempts to persuade the Council that their view was correct or of seeking to obtain the necessary majority in the Council for some other option.

Not all 'stalemates' are benign differences of policy regarding the best way to safeguard international peace and security. Council inaction may result from the stubborn pursuit of particular national interests, especially if practised by a veto-wielding permanent member, or from a simple lack of interest in the international situation in question. Indeed, lack of interest may prevent a situation from being inscribed upon the Council's agenda in the first place. In such cases the Council is plainly not operating satisfactorily, and it—or more precisely, its Members—may be failing to discharge the Council's 'primary responsibility for the maintenance of international peace and security'.[10] What is to be done in such situations?

One's immediate reaction is that if Member States of the Security Council do not give situations before the Council proper attention and decide upon their individual positions in good faith, they should not be on the Council. But one cannot ignore the possibility that Members of the Council will in fact behave less than ideally, and the Council operate dysfunctionally.

Now that the Cold War balance of power no longer constrains the actions of major military powers there is a pressing need to consider whether there are circumstances that would justify States in acting unilaterally rather than requiring them to continue efforts to build a consensus and act through the UN. It is tempting to regard a malfunctioning Council as a simple failure of one international mechanism among many, entitling the members of the international community to resort to some other means for securing, in such instances, international peace and security. The problem with this approach is

[10] One recalls the words of Bosnian President Izetbegović to the United Nations: 'If the international community is not ready to defend the principles which it has proclaimed as its foundations, let us say so openly, both to the people of Bosnia and to the people of the world. Let it proclaim a new code of behaviour in which force will be the first and the last argument', quoted in Jonathan Glover, *Humanity. A Moral History of the Twentieth Century* (London: Pimlico, 2001), 140.

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that the UN Charter is a binding treaty. Indeed, the priority given to Charter obligations over other obligations by Article 103 of the Charter signals that it has a particularly clear and strong binding quality. States cannot simply ignore it. The prohibition on the threat or use of force against other States in Article 2(4) of the Charter cannot be disregarded, if (as is the assumption here) action involving the threat or use of force is in question. Nor is it easy to see how any of the doctrines that are recognized in the Vienna Convention on the Law of Treaties as permitting the suspension of treaty obligations—material breach, *rebus sic stantibus*, and so on—could be applied to release States from their Charter obligations in such situations.

If States are to be permitted to use armed force without Security Council authorization, and outside the scope of the right of self-defence, the permission must take the form of a constitutional development *within* the Charter framework. Such developments are not unknown. The 'interpretation' of the Article 27 requirement for 'affirmative votes'of Permanent Members for Security Council Resolutions as being satisfied by an abstention is one example; and the assertion of the competence of the General Assembly in respect of international peace and security in the Uniting for Peace resolution[11] is another. Some argue that the retrospective condonation (or at least, non-condemnation) of the NATO operation in Kosovo by Security Council Resolution 1244 is a third kind of *de facto* development of the Charter system. But what would be the justification for such a development here?

The Charter allows unilateral action involving the use of force in self-defence. No stalemate in the Security Council can obstruct that. The Kosovo episode may signal the growth of a right unilaterally to use force in order to avert an imminent humanitarian catastrophe that cannot be averted in any other way. In both cases the moral imperatives are plain: the safeguarding of the lives of a State's own residents, or of the residents of other States where there are massive and grave threats to their lives. Is there another imperative that would warrant overriding the Charter limitations on the use of force in international relations? I cannot see it. If Iraq had continued in material breach of its obligations and in defiance of the Security Council, there were two possible courses of action open. The Security Council, as the UN organ acting on behalf of UN Member States under Article 24 of the Charter, could decide upon measures to be taken against Iraq. If any State considered that the steps taken by the Council were inadequate and that it was faced with an armed attack (within the flexible meaning now given to that term) by Iraq, it could use force in self-defence under Article 51 of the Charter. In the absence of authorisation by the Council, there were no other bases upon which a claim to a right to use force against Iraq could rest.

It may appear profoundly unsatisfactory that a State such as Iraq may, as it has been put, flout the will of the international community by continuing in

[11] UN GA Resolution 377 (V), 3 Nov 1950.

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breach of its obligations. But this misrepresents the situation. The will of the international community is expressed in this context by the Security Council. It is for the Council to decide, on behalf of the international community, what steps should be taken: that is not a determination which individual States may make. In particular, any suggestion that 'unreasonable' uses of the veto or unreasonably withheld authorisations of the use of force could be ignored cannot be accepted, if the Security Council is to survive. The discounting of votes cast or withheld in 'bad faith' is incompatible with the Charter, and with the very idea of representative bodies upon whom legal powers are conferred, whether they exercise executive, legislative or judicial functions.

If States wish to release themselves from the discipline of the Charter procedures, they could modify the Charter, or withdraw from it. Neither step seems a practical or proportionate response to the problem. A less radical alternative would be for the Council expressly to 'recuse' itself, as it were—to release a situation from its seisin and allow it to be dealt with through other mechanisms. But these are complex issues, which cannot be pursued further here.

If there is a claim to legality for the invasion of Iraq, it must be more subtle than a generalised claim to rely upon the authorisation to the 1991 coalition to use force in the Middle East. A credible claim would have to address difficulties such as those that I have outlined. It would, no doubt, bring in as necessary elements the determination in 1441 of the threat to international peace and security; the finding of material breach of its obligations by Iraq; the stalemate in the Security Council, and so on. It may be that there is disagreement over the extent to which the criteria articulated were actually fulfilled in respect of Iraq, but a good test badly applied is better than a bad test. A justification that preserves the authority of the United Nations would be preferable to one that rests on the corrosive doctrine of pre-emptive self-defence. But those who wish to defend the legality of the invasion must in due course make out the case, and in more convincing terms than have been put forward so far.

IV. THE LEGAL BASIS OF THE OCCUPATION

The third issue is the legal basis of the rights of the coalition forces in Iraq. No doubt they may rely upon the rights of belligerent occupants, under the 1907 Hague Conventions. But those rights do not extend to the reform of governmental structures, or to the commercial exploitation of the occupied State's natural resources, for example.

On the other hand, the principles set out in the *Loizidou* and *Bankovic* cases suggest that the UK may in principle incur liability under the European Convention on Human Rights in respect of its conduct in areas where it is in military occupation and exercising governmental powers. UK forces could not, for example, hand over Iraqis to the USA if they faced the death penalty at the hands of the Americans.

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There are many other problems. Do European Convention safeguards on the conduct of trials and the terms of punishments apply? And can the answer really depend upon whether the people in question are located in an area under British military control or American military control (and if so, should someone not draw the attention of the Iraqi population to this important fact)? Would the taking of Iraqi oil revenues for payment of reconstruction costs, or of damages awards made by the UNCC, be permissible? Does the coalition have title to sell the oil, and if not, may the 'true' owners bring actions in foreign courts to seize oil cargoes?

Evidently, there is a need for some very careful thinking to be done in this field. Should there be a new status? A '*non*-belligerent' occupation? And if so, who else may claim it? Israel in Palestine, for example? Whatever answers may be given to these questions, and to the question of the legality of the initial invasion of Iraq, one can only hope that there is a central role for the United Nations in the restoration of the battered Iraqi State. There is no reason why different views on the legality of what has past should impede agreement on the best way to proceed from the present onwards.

V. THE STATUS OF DETAINEES

The fourth issue concerns the treatment of detainees. The invasion of Iraq has been described as part of the war against terrorism, but the conduct of war has in the past been regulated by rules different from the ordinary rules of criminal law which States have applied in dealing with terrorists.

The 1949 Geneva Conventions require that 'prisoners of war shall be released and repatriated without delay after the cessation of active hostilities'.[12] They also provide that prisoners of war are bound only to give their name, rank, date of birth, and serial number when interrogated, and that 'no . . . form of coercion . . . may be inflicted on prisoners of war to secure from them information of any kind whatever'.[13] The USA has chosen to characterise the actions against terrorism as a 'war', but is unwilling to observe such obligations under the laws of war in relation to those still held at Guantanamo Bay. Nor is it willing to treat them as criminals, entitled to the protections of due process and other fundamental rights under US law. They are, as the Court of Appeal put it in the *Abassi* case,[14] 'arbitrarily detained in a "legal black-hole" '.

I do not know what the justification for their treatment is thought to be, but the focus by the US Government on a restrictive reading of the Geneva Conventions seems to lose sight of the fact that detainees are entitled to what

[12] 1949 Geneva Convention III, Art 118.
[13] Ibid, Art 17.
[14] [2002] EWCA Civ 1598.

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Article 75 of Additional Protocol II refers to as 'fundamental guarantees' not because they are, technically, prisoners of war but simply because they are human beings.[15]

The war against terrorism can never be 'won': it can only be given up. Many of us are concerned that some of the exceptional powers now claimed by governments and justified by the rhetoric of the 'war' against terrorism carry the risk of a serious and indefinite erosion of fundamental legal rights, and indeed erosion of the Rule of Law itself. If that risk is to be avoided, it is important that lawyers develop a coherent framework within which the rights of those who are caught in this twilight zone between serious crime and traditional war can be protected.

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In his influential essay, 'Ruthlessness in Public Life',[16] Thomas Nagel wrote that 'the great modern crimes are public crimes'. He observed that officials do things in the name of the State that they would not dream of doing in their private lives.[17] There is a divorce between private morality and public morality; and it is the duty of lawyers to ensure that the gap does not open so far that the law becomes detached from its roots in common morality, or that governments become regarded, in the conduct of foreign affairs, as being above the law.

[15] It is a matter of some concern that the United States appears to be retreating from its international obligations regarding prisoners of war. In the *Operational Law Handbook* (JA 422) issued by the Judge Advocate General's School, United States Army, Charlottesville, Virginia, in 1997, it is stated that 'the US views [among others, Art 45 of Additional Protocol I] as customary international law' (18-2). The *Handbook* summarises Article 45 in the following terms: 'prisoner of war presumption for those who participate in the hostilities.' In the 2002 edition of *Operational Law Handbook*, however, this view has changed: it is said that the United States views Art 45 as 'customary international law or acceptable practice though not legally binding' (ch 2, 11).

[16] Reprinted in Thomas Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979, 1991), 75.

[17] The recent development of this phenomenon is analysed in the fine book by Glover, op cit.

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