



‘Preventive War’ and International Law After Iraq

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INTRODUCTION AND EXECUTIVE SUMMARY

The doctrine of ‘preventive war’ announced and practised by the United States, the attack on Iraq by the United States supported by a number of countries described as the ‘coalition of the willing’, and unilateral actions taken with respect to a number of international conventions such as the NPT, the ABM Treaty, the CTBT and the Kyoto Protocol have given rise to concern about the current state of international law and in particular whether the prohibitions against the use of force on which the United Nations Charter is founded are still respected by Member States and whether multilateralism and the rule of law is to be superseded by unilateralism and a return to reliance on the use of military and economic force instead of law and diplomacy.

This paper outlines the recent development of the prohibition of the use of force and proscriptions in the UN Charter, the legal position with respect to Iraq and developments following the attack on Iraq. It would be beneficial to ascertain the position of States which are described as being members of the ‘coalition of the willing’ in order to fully describe the current position of States with respect to the doctrine of ‘preventive war’.

The Kellogg-Briand Pact condemned recourse to war and renounced war as an instrument of national policy, and that the United Nations Charter, which was concluded “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”, requires that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. The new Bush doctrine of ‘preventive war’ which was published in the National Security Strategy in September 2002 contemplates attacking a state in the absence of specific evidence of a pending attack. This doctrine marks a departure from the prohibition of the use of force under international law, starting from the Kellogg-Briand pact, the establishment of the Nuremberg

Charter, the conclusion of the United Nations Charter and the establishment of the International Criminal Court, and marks a return to a readiness to use force in international relations.

Following the publication of that doctrine, the United States, together with United Kingdom, Australia and other States, launched an attack on Iraq, having failed to gain approval of the Security Council under Chapter VII. Many international lawyers believe that attack was illegal and amounted to a war of aggression.

A number of breaches of international law have already been reported following the occupation of Iraq, including failure to prevent looting and allowing breakdown of law and order to take place in Baghdad, failure to provide humanitarian assistance and shooting of civilians during protest. Members of the 'coalition of the willing' that go to Iraq under Security Council resolution 1483 (2003) would go as belligerent occupants and would be subject to the requirements of international law accordingly, and may themselves incur responsibility or individual liability for actions which have or which will place in Iraq.

This paper finds that any members of the "coalition of the willing" may be responsible for compensation, including direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations.

Under Security Council resolution 1483 (2003), no protection is given to Member States or their officials from liability under the Geneva Conventions, Hague Regulations or other provisions of international or national law including the Rome Statute of the International Criminal Court.

THE PROSCRIPTION OF THE USE OF FORCE

There are two aspects of international law dealing with the law of force: *jus ad bellum*, or the rules relating the use of force, and *jus in bello*, or the rules regulating the conduct of hostilities.¹ This paper primarily addresses the *jus ad bellum*, or the legality of the attack on Iraq, and the consequences of that, as well as aspects of *jus in bello*, in particular the obligations of belligerent occupants of attacked territories.

Following World War I, sixty-three nations renounced war as an instrument of foreign policy in the Kellogg-Briand Pact of 1928.² The United States, Australia, Great Britain, Italy and Japan were among the countries that signed that treaty, which provided that the Parties "solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." That Pact failed to prevent World War II, but in condemning recourse to war and renouncing war as an instrument of national policy it formed the basis for 'crimes against peace', which were described in the Charter of the Nuremberg tribunal as those crimes aimed at the planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.³ The Nuremberg Tribunal observed that "[w]ar is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression,⁴ therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."⁵

The crime against peace under international common law was recognised by the Nuremberg Tribunal following World War II, noting that the Pact was evidence of a sufficient crystallization of world opinion to authorise a judicial finding in favour of the existence of a 'crime against peace'.⁶ The International Criminal Court does potentially have

¹ See generally Christine Gray, *International Law and The Use of Force* (2000), I. Detter, *The Law of War* (2nd ed., 2000) and L. C. Green, *The Contemporary Law of Armed Conflict* (2nd ed., 2000).

² Treaty Providing for the Renunciation of War as an Instrument of National Policy, (Kellogg-Briand Pact), Signed in Paris, August 27, 1928, entered into force 24 July 1929 Stat. 46, 2343, TS No. 796, 94 LNTS 57, copy at <http://www.yale.edu/lawweb/avalon/kbpact/kbpact.htm>.

³ Charter of the Nuremberg International Military Tribunal August 8, 1945, at <http://www.derechos.org/nizkor/nuremberg/judgment/ncharter.html> (accessed 6 May 2003), article 6.

⁴ A definition of aggression was "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression, Article I. Adopted by the U.N. General Assembly, December 14, 1974. U.N.G.A. Res. 3314 (XXIX), U.N. Doc. A/9631 (1975), in 13 I.L.M. 710 (1974). and at <http://jurist.law.pitt.edu/3314.htm> and at <http://www1.umn.edu/humanrts/instree/GAres3314.html>.

⁵ Nuremberg Trial Proceedings, volume 22, 217th day, 31 August 1946, at <http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm> (accessed 8 May 2003).

⁶ German High Command Trial: Trial of Wilhelm von Leeb and Thirteen Others, United States Military Tribunal, Nuremberg, 30th December. 1947 - 28th October, 1948. Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume XII, London, HMSO, 1949.

jurisdiction over crimes of aggression,⁷ and the Court can exercise jurisdiction over the crime of aggression once a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction.⁸ The legal position as stated by the Nuremberg Tribunal is that those who perpetrate crimes of aggression commit not only a crime under international law but commit the supreme international crime. The inability of the ICC to take jurisdiction at this stage does not negate the nature of the crime but merely the ICC's ability to hold perpetrators accountable.

The United Nations Charter was concluded "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind" and the United Nations was established with the purposes:

1. *To maintain international peace and security, and to that end: 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;*
2. *To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;*

Article 2(3) requires that all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered and Article 2(4) requires that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The ICJ in the *Nicaragua* case was in no doubt as to the status of the prohibition on the use of force:⁹

"The Court finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.... They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations...

The general rule prohibiting force established in customary law allows for certain exceptions... [Resolution 2625 (XXV)] demonstrates that the States represented in the General Assembly regard the exception to the prohibition of the use of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

The only stated exceptions in the Charter lie in article 51, which preserves 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," and collective actions under Chapter VII, and in particular article 42.

The often cited legal test for necessity and proportionality in self-defence relates to a dispute between Britain and the United States. In the winter of 1837, British and Canadian forces believed that an American flagged ship, the *Caroline*, was ferrying arms, recruits, and supplies from the American side of the border to anti-British rebels on the Canadian side of the border during an anti-British insurrection. While most of the crew slept, British and Canadian troops boarded the ship, attacked the crew and passengers, set her on fire, and towed her into the river toward Niagara Falls, killing two. In a formulation which has been widely cited as the standard test for necessity in self defence, American Secretary of State Daniel Webster responded to a British claim of self defence by saying that "[i]t will be for that [British] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."¹⁰ While the *Caroline* case concerned a case of anticipatory self-defence, it pre-dated the Kellogg-Briand Pact and the United Nations Charter prohibitions on the use of force and does not necessarily stand as a contemporary justification for pre-emptive force or anticipatory self-defence.¹¹ It is to be noted that even anticipatory

⁷ Rome Statute of the International Criminal Court UN Doc. A/CONF.183/9 (signed 1 July 1998, entered into force July 1, 2002) at <http://www.un.org/law/icc/statute/rome.htm> (accessed 8 May 2003), (ICC Statute) Article 5(1)(d).

⁸ ICC Statute Article 5(2)

⁹ Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*, 1986 ICJ Reports, paras 188-201. At http://www.icj-cij.org/icjwww/icasas/inus/inus_jjudgment/inus_jjudgment_19860627.pdf

¹⁰ See *The Caroline* (exchange of diplomatic notes between Great Britain and the United States, 1842), Moore, 2 *Digest of International Law* 409, 412 (1906) See below, note 31.

¹¹ See Gray, note 1, at 106 citing Ian Brownlie in Butler (ed.), *The Non-Use of Force in International Law* (1989), and at 111-119, discussing the attack by the Israeli air force on Beirut airport in 1968, which was condemned by the Security Council in Resolution

self defence as a doubtful justification for the use of force. Christine Gray notes that the actual invocation of the right to anticipatory self-defence is rare and that states prefer to take a wide view of armed attack rather than openly claim anticipatory self-defence: "It is only where no conceivable case can be made for this that they resort to anticipatory self-defence. This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force."¹² This may be another reason the United States and United Kingdom sought to justify their use of force against Iraq by reference to resolutions 678 (1990) and 687 (1991) rather than attempt to justify them on a basis of anticipatory self-defence of the Bush doctrine of preventive war.¹³

THE BUSH DOCTRINE OF 'PREVENTIVE WAR'

President Bush declared in an introduction to the "National Security Strategy of the United States," published in September 2002,¹⁴ that the United States will act against "emerging threats before they are fully formed." The document states that:

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 preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

Thus the statement implied that the United States in this new posture is willing to act beyond the constraints of international law and even beyond limits it has observed in the past.¹⁵ The distinction between 'preventive war' and preemption in the new Bush doctrine was described in a Brookings Institute report as follows: "The concept is not limited to the traditional definition of preemption—striking an enemy as it prepares an attack—but also includes prevention—striking an enemy even in the absence of specific evidence of a coming attack. The idea principally appears to be directed at terrorist groups as well as extremist or "rogue" nation states; the two are linked, according to the strategy, by a combination of "radicalism and technology."¹⁶

262 (1968) as a premeditated military action in violations of its obligations under the Charter. At [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/262%20\(1968\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/262%20(1968)&Lang=E&Area=RESOLUTION).

Similarly the Security Council condemned the 1985 bombing of the PLO headquarters in Tunis as a flagrant violation of the Charter, in resolution 573 (1985). At <http://domino.un.org/UNISPAL.NSF/0/504b1c4724edee94852560df00628b87?OpenDocument>.

Gray also discussed the US attack on Tripoli in 1986, which the United States argued was justified under article 51 as self-defence as a response to past terrorist attacks on US nationals and to deter future attacks. The UK, US and France all vetoed a proposed Security Council resolution condemning the attack. As Gray noted, these attacks look more like reprisals because they were punitive rather than defensive, since the attacks had already taken place. However forcible reprisals are unlawful: SC resolution 188 (1964), which condemned reprisals as incompatible with the principles and purposes of the United Nations. At <http://www.un.org/documents/sc/res/1964/scres64.htm>. Also see the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, at <http://www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm>.

After the US fired missiles at the Iraqi Intelligence Headquarters in Baghdad in 1993 following a claimed assassination attempt on former President Bush by Iraqi agents the US claimed a justification of self defence in its report to the Security Council. However this is better seen as being a reprisal rather than true exercise of self-defence. Thus Gray concludes that "Failure to condemn the USA should be taken to indicate sympathy and understanding rather than acceptance of a legal doctrine which destroys the distinction between reprisals and self-defence and which the USA would never contemplate being used against itself." (page 119).

¹² Christine Gray, note 1, 112.

¹³ See discussion on page 7.

¹⁴ The National Security Strategy of the United States of America, at <http://www.whitehouse.gov/nsc/nss.html> (accessed 8 May 2003).

¹⁵ See discussion of examples of earlier United States use of force in footnote 11.

¹⁶ Policy Brief 113, "The New National Security Strategy and Preemption" by Michael E. O'Hanlon, Susan E. Rice, and James B. Steinberg, January 2003, at <http://www.brook.edu/comm/policybriefs/pb113.htm> (accessed 8 May 2003).

The Australian government, however, accepted that this doctrine would require an amendment of the Charter. Australian Prime Minister John Howard said that "[w]hen the United Nations Charter was written, the idea of attack was defined by the history that had gone before and that is the idea of an army rolling across the border of a neighbouring country, or in the case of the Japanese in Pearl Harbour, bombing a base. Now that's different now, you don't get that now. What you're getting is this non-state terrorism which is just as devastating and potentially even more so and all I'm saying, I think many people are saying, is that maybe the body of international law has to catch up with that new reality."¹⁷ Australian Defence Minister Robert Hill similarly called for amendment of Article 51 of the Charter.¹⁸

It may be that the United States and United Kingdom governments were frustrated by an inability to obtain the necessary Security Council resolutions. The call by the Australian government for a change in international law to address terrorism may also be seen to be a product of frustration. However if change is to be effected, it must be carried out in way that promotes international peace and security through multilateral action and the rule of law. This may be time consuming and frustrating, but the alternative danger is a weakening or even abandonment of the rule of law and undermining the prohibition on the use of force which has been the product of not only the international consensus to avoid war following two world wars but decades of consensus. The danger of setting a precedent for the use of force by other states is self evident. As one scholar recently observed in a different context, "[i]f the principle of reciprocity ensures that any state claiming a right under general customary international law accords that same right to every other state, states will only claim rights which they are prepared to see generalized. This is because a generalized right subjects the state to corresponding obligations vis-à-vis all other states."¹⁹

In this context, Mr Howard's citation of the attack on Pearl Harbour was of interest since a claimed motivation for Japan's attack on Pearl Harbour was to prevent a feared military buildup by the United States.²⁰ In the following decade, in 1950, following a debate on a preemptive strike on the Soviet Union, the United States President Truman said that, "you don't 'prevent' anything by war...except peace." Already following the attack on Iraq, Indian officials have suggested there is a strong case for military action against Pakistan²¹ and United States officials and leaders have used threatening rhetoric against Syria²² and Iran.²³ If a 'preventive war' by the United States against North Korea is perceived to be avoided due to the possession by North Korea of nuclear weapons,²⁴ then that would be a powerful incentive for non-nuclear states to seek to acquire nuclear weapons to protect themselves against attack and would thus be a stimulus for nuclear proliferation rather than the rule of law.

The Bush doctrine is on the face of it far removed from 'preemptive' war, which is narrowly defined on the basis of self defence against an actual imminent attack. That the United States did not base its claimed justification for its attack on

¹⁷ ABC Online, 2 December 2003, "PM supports action through pre-emptive strikes", at <http://www.abc.net.au/am/s738657.htm> (accessed 8 May 2003).

¹⁸ Robert Hill stated that "In a world of spreading terrorism and weapons of mass destruction, the international community should review the limits of self-defense and the right of national governments to take pre-emptive action.... "Article 51 of the U.N. Charter permits the use of self-defense if a criminal attack occurs...But this has not settled the debate between those who adopt a literal interpretation and those who argue that contemporary reality demands a more liberal interpretation." See http://www.nti.org/d_newswire/issues/2002/12/5/2s.html (accessed 8 May 2003).

¹⁹ Michael Byers, "Reciprocity and the Making of International Environmental Law," at <http://www.law.duke.edu/news/papers/StrategyandPersuasion.pdf>

²⁰ "Dr D. Scott Bennett, press release 5 March 2003, saying that "[t]here were clear arguments in the Japanese government that, with the economic stranglehold that the United States was putting on Japan from the late 1930s, it would be better to fight a war against the United States sooner than later, because the military and economic balance would only worsen. That would be only the third case of preventive war out of the approximate 85 interstate wars since 1816." http://www.eurekalert.org/pub_releases/2003-03/ps-pwa030503.php (accessed 8 May 2003).

²¹ External Affairs Minister Yashwant Sinha cited in 'Pakistan more deserving of action than Iraq-India', Reuters, April 9.

²² See for instance Daily Telegraph, "Powell gives Syria 'final warning' over terrorism", 5 May 2003, <http://www.dailytelegraph.co.uk/news/main.jhtml?xml=/news/2003/05/05/WSYRI05.xml&sSheet=/news/2003/05/05/ixnewstop.html> (visited 10 May 2003).

²³ See Peoples Daily, 3 February, "Bush's Anti-Iran Rhetoric 'Impolite': Iranian Speaker" at http://fpeng.peopledaily.com.cn/200202/03/eng20020203_89823.shtml and Knight-Rider, 14 May 2003, "U.S. investigating whether Saudi Arabia bombings were planned in Iran", at <http://www.realcities.com/mld/kriwashington/5861897.htm>, and Guardian, 16 May 2003, "US accuses Iran of stockpiling chemical arms", at <http://www.guardian.co.uk/Print/0,3858,4670167,00.html>.

²⁴ See Reuters, 24 April 2003, "North Korea admits it has nuclear weapons – Sources," <http://reuters.com/newsArticle.jhtml?type=topNews&storyID=2626709> (accessed 8 May 2003). The Bush administration rebuffed a call by South Korean President Roh Moo-hyun to exempt North Korea from the U.S. doctrine of preventive attacks. Washington Times, May 13 2003.

Iraq on a claim of 'preventive war' but rather on a spurious reliance on the Security Council resolutions which were passed following the invasion of Kuwait, demonstrates that even the United States does not have confidence on its own doctrine. And this is not surprising. The doctrine departs from the development of international law prohibiting the use of force from the Kellogg-Briand pact, the establishment of the Nuremberg Charter, the conclusion of the United Nations Charter and the establishment of the International Criminal Court and marks a return to a readiness to use force in international relations.

STATE RESPONSIBILITY AND THE USE OF MILITARY FORCE AGAINST IRAQ

A number of international lawyers have written opinions stating that it would be a violation of international law if the United States, United Kingdom and other States were to use military force against Iraq without specific, new Security Council authorization. These arguments will not be repeated here and reference should be made to those opinions. Notable are the opinions by Rabinder Singh and Charlotte Kilroy of Matrix Chambers.²⁵

The International Commission of Jurists denounced the attack as an illegal invasion of Iraq which amounts to a war of aggression.²⁶ Sixteen senior teachers of international law from the United Kingdom and France²⁷ wrote a statement stating that "[o]n the basis of the information publicly available, there is no justification under international law for the use of military force against Iraq.... Before military action can lawfully be undertaken against Iraq, the security council must have indicated its clearly expressed assent. It has not yet done so. A decision to undertake military action in Iraq without proper security council authorisation will seriously undermine the international rule of law."³¹ Canadian law professors said that US attack "would be a fundamental breach of international law and would seriously threaten the integrity of the international legal order that has been in place since the end of the Second World War,"^{28 and 43} Australian legal experts said that the initiation of a war against Iraq by the self-styled 'coalition of the willing' would be a fundamental violation of international law and said that the United States doctrine or preemptive self defence contradicts the cardinal principle of the modern international legal order and the primary rationale for the founding of the UN after World War II - the prohibition of the unilateral use of force to settle disputes.²⁹ On March 11, United Nations Secretary-General Kofi Annan said that "[i]f the U.S. and others were to go outside the Council and take military action it would not be in conformity with the Charter."³⁰

Briefly stated, it is clear from Article 2(4), Article 42 and Article 51 of the UN Charter that Member States are to refrain from the threat or use of force against the territorial integrity or political independence of any State. Force may only be used if specifically approved by the Security Council or proportionate force may be used in self defence when a threat is imminent. In the latter case, in the words of the Nuremberg Tribunal, "preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation'."³¹

On Thursday 14 March, White House Press Spokesman Ari Fleischer read a formal statement setting out the administration's formal legal position:

MR. FLEISCHER: The United Nations Security Council Resolution 678 authorized use of all necessary means to uphold United Nations Security Council Resolution 660, and subsequent resolutions and to restore international peace and security in the area. That was the basis for the use of force against Iraq during the Gulf War. Thereafter, United Nations Security Council

²⁵ "The United Nations Charter and the Use of Force Against Iraq", October 2 2002, at <http://www.lcnp.org/global/iraqstatement3.htm> (accessed 8 May 2003); Rabinder Singh and Charlotte Kilroy, "In the Matter of the Potential" 15 November 2002, at <http://www.cnduk.org/briefing/opinion.htm> (accessed 8 May 2003); "An Appeal to Law - IALANA Statement on the Threat of War Against Iraq," November 24, 2002; at <http://www.lcnp.org/global/AppealtoLaw.htm> (accessed 8 May 2003), and "International Appeal by Lawyers and Jurists against the 'Preventive' Use of Force", February 2003, at <http://www.lcnp.org/global/LawyersandJuristsAppeal.htm> (accessed 8 May 2003).

²⁶ International Commission of Jurists, 18 March 2003, at http://www.icj.org/news.php3?id_article=2770&lang=en (accessed 8 May 2003).

²⁷ Guardian, March 7 2003, "War would be illegal", <http://www.guardian.co.uk/Iraq/Story/0,2763,909314,00.html> (accessed 8 May 2003).

²⁸ Sydney Morning Herald, 20 March 2003, "Attack illegal, experts say," <http://www.globeandmail.com/servlet/story/RTGAM.20030320.ulaww0320.BNStory/International> (accessed 8 May 2003).

²⁹ "Coalition of the willing? Make that war criminals," Sydney Morning Herald, February 26, 2003 <http://www.smh.com.au/articles/2003/02/25/1046064028608.html> (accessed 8 May 2003).

³⁰ See CNN, March 11 2003, "Annan targets U.S. stance", at <http://www.cnn.com/2003/WORLD/meast/03/11/sprj.irq.un> (accessed 8 May 2003).

³¹ See discussion of the *Caroline* incident in note 10 and on page 3.

Resolution 687 declared a cease-fire, but imposed several conditions, including extensive WMD related conditions. Those conditions provided the conditions essential to the restoration of peace and security in the area. A material breach of those conditions removes the basis for the cease-fire and provides a legal grounds [sic] for the use of force.³²

The United States administration thus relies on resolution 687 (1991), and before that resolution 678 (1990), to provide legal grounds for the use of force.³³

The second operative paragraph of the earlier resolution 678 (1990) states that the Security Council:³⁴

2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.

The final operative paragraph of resolution 687 (1991) reads that the Security Council

34. Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.

Even if Iraq had committed a material breach of the cease-fire resolution 687, it does not follow that a Member State such as the United States or United Kingdom was authorised to use force. The authorisation to use all necessary means was made in resolution 678 (1990), not 687 (1991). As has been noted by Professor Vaughan Lowe,³⁵ when resolution 687 was passed on 3 April 1991, the force that the Security Council had earlier authorised in resolution 678 in 1990 to restore the borders of Kuwait had effectively expired as the matter was back into the hands of the Council.

It is clear from resolution 687 (1991) that it is the Security Council, and not individual Member States, that were to take further steps as may be required. This is entirely consistent with the prohibition on the use of force under Article 2(4) of the UN Charter, and the provision that enforcement action is to be taken 'by the Security Council' under Article 42 of the Charter.

Of course, some eleven years later, resolution 1441(2002) was passed by the Security Council to address the issue of weapons of mass destruction, which was the principal justification for the invasion. The passage of that resolution and the fact that the United States sought and failed to gain Security Council authorization for the use of force in Iraq following resolution 1441 (2002) in fact imply that the United States implicitly accepted that further authorization of the Security Council was required for the use of force.

Resolution 1441 (2002) specifically decided (in operative paragraph 1) that Iraq was in material breach of its obligations under resolution 687 (1991), granted Iraq a final opportunity to comply and set up the enhanced inspection regime (in operative paragraph 2). It did not authorise the use of force by individual Member States. That is why the United States and United Kingdom sought a further resolution.

It is significant that the United States administration in its formal position statement did not refer to resolution 1441 (2002). In that resolution, the Security Council decided to remain seized of the matter and to take such further steps as may be required for the implementation of resolution 1441 (2002) and to secure peace and security in the area. The United States cannot ignore that resolution and return to the earlier resolutions 687, 678 and 660 to justify its own use of force against Iraq.

Nowhere in the existing Security Council resolutions on Iraq is there an authorization of the use of force by Member States relating to weapons of mass destruction, or, for that matter, relating to regime change. The argument used by the

³² Press Briefing by Ari Fleischer, March 13 2003, at <http://www.whitehouse.gov/news/releases/2003/03/20030313-13.html> (accessed 8 May 2003).

³³ Mr Fleischer has implied that the authorisation to use 'all necessary means' in resolution 678 (1990) applies or extends to the later resolution 687 (1991). Clearly it is earlier in time and does not.

³⁴ Mr Fleischer quoted the latter part of this paragraph in the formal US legal position quoted above. Resolution 660 concerned the invasion of Kuwait and "authorises Member States to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area"

To quote as the formal US legal position did from resolution 678 (1990), rather than the later resolution 687 (1991), to justify the use of force is misleading, since the earlier resolution does not address weapons of mass destruction, but the invasion of Kuwait.

³⁵ See the judgment of Professor Vaughan Lowe following a hearing of legal arguments by Nicholas Grief, international law professor at Bournemouth University and Professor Tony Aust, Deputy Director of the British Institute of International and Comparative Law and visiting professor at University College London, arranged by BBC Radio 4, at http://www.bbc.co.uk/radio4/today/reports/international/iraq_judgement.shtml (accessed 8 May 2003).

United States administration does not stand and the attack on Iraq constituted an unlawful use of force under international law.

Members of the 'coalition of the willing' which aided or assisted in the invasion of Iraq could also be held responsible under international law.³⁶ Article 16 of the International Law Commission's Articles on State Responsibility³⁷ recognise that a state which aids or assist another State in the commission of an internationally wrongful act is internationally responsible for doing so if it does so with knowledge of the circumstances of the internationally wrongful act and the act would be internationally wrongful if committed by that State. The obligation not to use force may be breached by permitting another state to use its territory to carry out an armed attack against a third State such as Iraq.³⁸

Additionally, States aiding or assisting the United States and United Kingdom after the invasion may still be held responsible for their illegal acts in that the assisting State may be found to have adopted the acts of the invading States.³⁹

OBLIGATIONS ACCOMPANYING THE OCCUPATION OF IRAQ

States may send personnel to Iraq following the invasion and occupation following Security Council resolution 1483 (2003). Currently the United States and United Kingdom are the occupying powers and accordingly have obligations under international law. Penal laws must remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the Fourth Geneva Convention. Similarly, subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.⁴⁰

The resolution expressly recognizes the status of the two occupying powers in its preamble where it in states that

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

In operative paragraph 5 the Security Council

Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

³⁶ A list is published as at April 3 by the Whitehouse at <http://www.whitehouse.gov/infocus/iraq/news/20030327-10.html> includes Afghanistan, Albania, Angola, Australia Azerbaijan Bulgaria, Colombia, Costa Rica, Czech Republic Denmark, Dominican Republic El Salvador Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania Macedonia, Marshall Islands Micronesia Mongolia Netherlands Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands South Korea, Spain, Tonga, Turkey, Uganda, Ukraine, United Kingdom United States and Uzbekistan.

³⁷ *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (18 January 2002). At <http://www.un.org/documents> (accessed 8 May 2003).

See James Crawford, "The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries," 2002, 148 ff.

³⁸ Crawford, 151, citing the United States intervention in Lebanon, where Germany permitted US military aircraft to use its airfields, and bombing of Tripoli in 1986, where the United Kingdom permitted US military aircraft to use its airfields.

³⁹ See Crawford, 148, citing Article 11: Conduct acknowledged and adopted by a State as its own, at Crawford, 121 ff.

⁴⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949, entered into force 21 October 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287 article 55. At <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument> (accessed 8 May 2003) (Fourth Geneva Convention) article 64.

It must be understood that the 'Authority' is not the United Nations but is the United States and United Kingdom as occupying powers. Thus the resolution provides that states which go to Iraq expressly work under the United States and United Kingdom, not under the United Nations. Funds in the Development Fund for Iraq are disbursed at the direction of the Authority (paragraph 13), in consultation with the Iraqi interim administration. The Development Fund shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations (paragraph 22) and petroleum, petroleum products and natural gas enjoy immunities, but this gives no protection to Member States or their officials from liability under the Geneva Conventions, Hague Regulations or other provisions of international or national law including the Rome Statute of the International Criminal Court and the NPT.⁴¹

Looting, Maintenance of Order and Cultural Property

In failing to prevent the looting that has occurred of the Baghdad museum, the occupying powers breached the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which requires that the Parties undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.⁴² The Hague Regulations⁴³ provide that the occupying power shall take all the measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. In contrast, the United States forces did protect the oil ministry and oil fields.

Ensuring Food and Medical Supplies

Article 55 of the Fourth Geneva Convention⁴⁴ provides that "[t]o the fullest extent of the means available to it the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate." Article 56 requires that "to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties."

Protocol I,⁴⁵ many of the provisions of which represent customary international law,⁴⁶ supplements the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies. The Occupying Powers are required, to the fullest extent of the means available to them and without any adverse distinction, to also ensure the provision of

⁴¹ See discussion of the NPT on page 13.

⁴² Convention for the Protection of Cultural Property in the Event of an Armed Conflict, concluded 14 May 1954, entered into force 7 August 1956, 249 UNTS 240, at http://www.unesco.org/culture/laws/hague/html_eng/page1.shtml (accessed 8 May 2003) article 4(3). See also Hague Regulations, article 56 which provides that seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

Australia is party to the convention. The United States and United Kingdom are not, but the relevant provisions are considered part of customary international law. http://www.unesco.org/culture/laws/hague/html_eng/page9.shtml (accessed 8 May 2003). The United States has signed, but has not yet ratified, the Hague Convention and in 1999 the President stated that "United States military policy and the conduct of operations are entirely consistent with the Convention's provisions." See Resolution of the Art Libraries Society of North America Concerning the Impact of the War in Iraq, April 2003, at <http://www.arlisna.org/resolution.html> (accessed 8 May 2003).

⁴³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 63: Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, article 43. At <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aacc125641e0038bfd6?OpenDocument> (accessed 8 May 2003).

⁴⁴ Fourth Geneva Convention Article 55.

⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (PI) Article 85(3). The United Kingdom ratified Protocol I on 28 January 1998, and Australia on 21 June 1991, but neither the United States nor Iraq has ratified it.

⁴⁶ In its Advisory Opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice noted that "[i]n particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I." Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports (1996), at http://www.icj-cij.org/icjwww/icasess/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_ijudgment_19960708_Advisory%20Opinion.htm, paragraph 84.

clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

There are indications that the applicable obligations are not being met.

- The President of the International Committee of the Red Cross (ICRC), Jakob Kellenberger, said recently that the United States as occupying power has very clear rights and duties under international law, and called on the United States to fulfil its duty to ensure security.⁴⁷
- It has been reported that in urban centers throughout southern and central Iraq, millions of civilians are facing disease, including cholera, and possible death due to inadequate access to water as a result of the US-British invasion.⁴⁸
- The President of *Medicins Sans Frontieres*, Morten Rostrup, said that the coalition has failed to meet its responsibility under international humanitarian law to ensure that the health and well being of the Iraqi people is being provided for.⁴⁹
- Amnesty International called on the US/UK coalition forces to urgently address the situation of refugees, asylum-seekers and third country nationals in Iraq, saying that "As the occupying powers the US and UK are responsible under international humanitarian law to protect all civilians from human rights abuses, and particular attention must be paid to the situation of vulnerable groups such as refugees and other foreign nationals."⁵⁰
- A number of NGOs made a joint statement on 2 May calling on the United Nations to have a central role, saying the situation is critical, saying that "Already under severe strain and under-resourced before the war began, hospitals, water plants and sewage systems have been crippled by the conflict and looting. Hospitals are overwhelmed, diarrhoea is endemic and the death toll is mounting. Medical and water staff are working for free, but cannot continue for long. Rubbish including medical waste is piling up. Clean water is scarce and diseases like typhoid are being reported in southern Iraq."⁵¹

Responsibility for Damages and Oil Revenues

The occupying powers are bound by the Hague Regulations with respect to dealing with Iraq's oil resources. Article 55 of the Hague Regulations requires that the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct. In other words, it must safeguard the capital of the oil wells, and may only use the revenue for the purposes of the occupation.⁵² Private contracts must be respected by the occupying forces and occupation may give rise to a claim for all damages to those rights.⁵³

Of course these provisions must be read in light of the United Nations sanctions and oil-for-food programme as well as the overriding claims for an illegal war and occupation and thus cannot be read in isolation. Following the Iraqi invasion of Kuwait, the Security Council passed resolution 660 (1990) on August 2, 1990 calling for the withdrawal of Iraqi troops. This was followed on August 6 by Resolution 661 (1990), which authorised economic sanctions against Iraq (and occupied Kuwait), declaring a trade blockade, and blocking Iraq and Kuwaiti assets, in the latter case to protect the assets. Resolution 687 (1991), provided that the sanctions will be lifted "upon Council agreement." Under

⁴⁷ AFP 6 May 2003, "ICRC Chief urges US to restore law and order in Iraq," at <http://www.reliefweb.int/w/rwb.nsf/9ca65951ee22658ec125663300408599/9f0b129b43264f71c1256d1e004336e3?OpenDocument> (Accessed 8 May 2003),

⁴⁸ Center for Economic and Social Rights, "Special Report: Water under Siege in Iraq: US/UK Military **Forces Risk Committing** War Crimes by Depriving Civilians of Safe Water". At <http://www.cesr.org/iraq/docs/waterundersiege.pdf>.

⁴⁹ MSF Press Release, 2 May 2003, "USA fails to fulfil obligation to support health system in Iraq", at <http://www.msf.org/content/page.cfm?articleid=FA28DB14-81C5-4D1A-988099131BE2A99F> (accessed 8 May 2003).

⁵⁰ Amnesty International, "US/UK occupying forces must protect refugees", 3 May 2003, <http://electroniciraq.net/news/741.shtml> (accessed 8 May 2003)

⁵¹ Catholic Agency for Overseas Development, 2 May 2003, Joint Agency Statement on Iraq, <http://www.reliefweb.int/w/rwb.nsf/480fa8736b88bbc3c12564f6004c8ad5/da0b577365f9f399c1256d1a00416e36?OpenDocument> (accessed 8 May 2003).

⁵² See R. Dobie Langenkamp, What happens to the oil: International Law and the Occupation of Iraq, January 13, 2003, at http://www.energy.uh.edu/documents/behind_the_gas_pump/Langenkamp_FullPaper.pdf (accessed 8 May 2003).

⁵³ Hague regulations article 46 prevent confiscation of private property and see Langenkamp, 22, 25.

the Oil for Food programme,⁵⁴ which expires on 3 June 2003, some oil may be exported under strict conditions to fund compensation claims, weapons inspection and humanitarian needs in Iraq. These resolutions would thus override any rights the belligerent occupants would have to sell oil.

If held responsible for illegally invading Iraq, the United States, United Kingdom, Australia and other belligerent parties would be liable as Iraq was for its unlawful invasion and occupation of Kuwait.⁵⁵

Responsibility and Liability of Coalition and Officials

Since the United States has not declared the war over, reportedly because the United States did not wish to trigger the release of Iraqi prisoners of war and prevent U.S. forces from trying to kill Saddam Hussein if he is still alive,⁵⁶ states sending personnel to Iraq under current circumstances do so as occupying powers and have obligations under international law, including the Geneva Conventions and Hague Regulations.⁵⁷ They may also share responsibility for acts committed by the coalition forces.

Although the United States is not a Party to the Statute of Rome, and in fact 'unsigned' it,⁵⁸ many members of the 'coalition of the willing' are. If acts are carried out by a coalition involving the United States which may constitute war crimes, even if other forces are not primarily involved, coalition officials could be liable under the provisions of Article 25 of the Rome Statute of the ICC,⁵⁹ which provides for liability for a person who solicits or induces the commission of a crime, including if the crime is attempted, and for persons who aid, abet, or assist. Liability is also attached for any person who in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.⁶⁰

⁵⁴ Resolution 706 (1991) authorized 1.6 billion dollars worth of oil to fund compensation claims, weapons inspection and humanitarian needs in Iraq. Resolution 778 (1992) aimed to transfer funds (including Iraqi assets overseas) into the UN account established to pay for compensation and humanitarian expenses. Resolution 986 (1995) eased sanctions to allow Iraq to use part of its oil revenues for food and medicine. In 661 the Security Council decided in paragraph 3 that all States shall prevent: (a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution and various other ancillary measures e.g. activities by nationals promoting export, etc. In resolution 987 (1995) the Security Council authorized States, notwithstanding the provisions of paras 3(a) 3(b) and 4 of resolution 661 (1990) and subsequent resolutions, to permit the import of petroleum and petroleum products originating in Iraq, including financial and other essential transactions directly relating thereto, sufficient to produce a sum not exceeding a total of one billion US dollars every 90 days for the purposes set out in Resolution 987 and subject to specified conditions. The resolution authorized Turkey to permit the import of petroleum and petroleum products originating Iraq sufficient ... to meet pipeline tariff charges. The provision was to remain in force for an initial period of 180 days unless the Council takes other relevant action with regard to the provisions of resolution 661 (1990), and expressed its intention to consider renewal of the period. The oil for food programme continued in 180 day phases. The latest phase runs through 3 June 2003. Iraq will not be able to export oil after that date without a further Security Council resolution. In resolution 1284 (1999), UNMOVIC was established and the ceiling on Iraqi oil exports was removed (para 15) 'on the conditions set out in paragraph 1 (a) and (b) and subsequent provisions of resolution 986 (1995) and related resolutions'. In resolution 1447 (2002) the Security Council extended a new 180 day period.

In 1472 (2003), following the coalition invasion, the Security Council authorized the Secretary General to establish alternative locations for the delivery of humanitarian supplies and equipment and to redirect shipments of goods to those locations and proceed with approved contracts after a review to determine the relative priorities of the need for adequate medicine, health supplies, foodstuffs and other materials.

⁵⁵ "Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." Security Council resolution 687(1991) and see articles 35 and 36 of the ILC Articles on State Responsibility, note 37 on page 8.

⁵⁶ Reuters, May 1 2003, "Major Iraq combat over, US, Allies Prevail – Bush", at <http://reuters.com/newsArticle.jhtml?type=topNews&storyID=2670665>.

⁵⁷ The 4th Geneva Convention provides in article 6 that the Convention shall apply from the outset of any conflict or occupation and In the territory of Parties to the conflict, the application of the present Convention shall cease "on the general close of military operations." In the case of occupied territory, the application of the Convention ceases one year after the general close of military operations. However, the Occupying Power is bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the Articles I to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143 of the Convention.

⁵⁸ See note 74 on page 13

⁵⁹ Rome Statute of the International Criminal Court UN Doc. A/CONF.183/9 (signed 1 July 1998, entered into force July 1, 2002) at <http://www.un.org/law/icc/statute/rome.htm> (accessed 8 May 2003).

⁶⁰ This paper does not address individual criminal responsibility, which would depend on specific circumstances, *mens rea* (intention) as well as applicable laws, but rather draws attention to provisions of international criminal law which may be relevant.

A number of incidents have been reported to have been initiated by the coalition forces involving civilian casualties, including the bombing of a Syrian bus,⁶¹ use of cluster bombs,⁶² destruction of electricity supplies leading to disruption of civilian water supplies,⁶³ attacks on Iraqi television stations,⁶⁴ on Al-Jazeera⁶⁵ and on the Palestine hotel,⁶⁶ on markets at Al-Shaab⁶⁷ and Shula,⁶⁸ on civilians at Nasiriya and Hilla, on a van at Najaf,⁶⁹ shooting at ambulances,⁷⁰ and shooting of protesters. In addition, there have been reports of a failure to restore water, electricity and other humanitarian needs⁷¹ and encouragement, toleration and failure to avoid looting,⁷² including of nuclear installations.⁷³ State responsibility and individual criminal liability for these and other actions has yet to be determined. Any responsibility or liability assistance after the fact of other States or individuals or the adoption of these acts by other States, or the actions of States as belligerent occupants in Iraq, could be determined by the International Criminal Court, the International Court of Justice or an *ad hoc* or arbitral tribunal.

⁶¹ 24 March 2003: CNN, 24 March 2003, "US offers sympathies to victims of bus attack," at <http://edition.cnn.com/2003/WORLD/meast/03/24/sprj.irq.syria.bus> (accessed May 8, 2003) and ITV, 25 March 2003, "US bombs Syrian bus", at <http://www.itv.com/news/453822.html> (accessed May 8, 2003).

⁶² On Basra: 24 March 2003: Rosbalt, 24 March 2003, "Iraq claims US and Britain dropped cluster bombs on Basra," at <http://www.rosbaltnews.com/2003/03/24/61880.html> (accessed May 8, 2003) and Iraq ABC, 23 March 2003, "Iraq Minister says 77 civilians killed at Basra," at http://www.abcnews.go.com/wire/US/reuters20030323_54.html (accessed May 8, 2003). At al-Nisirayah: The Times, April 19 2003, "Children Main Victims of Cluster Bombs", <http://www.timesonline.co.uk/article/0,,5944-651852,00.html> (accessed May 8, 2003). At Hillah: The Age, March 28 2003, "US 'Cluster Bombing' Civilians: Iraq", at <http://www.theage.com.au/articles/2003/03/28/1048653834583.html> (accessed May 8, 2003) and The Independent, 3 April 2003, Robert Fisk: "Wailing children, the wounded, the dead: victims of the day cluster bombs rained on Babylon", <http://argument.independent.co.uk/commentators/story.jsp?story=393458> (accessed May 8, 2003).

⁶³ Basra: 24 March 2003: IRNA, March 24, 2003, "USWAR/Iraq says repelled US-led push on Basra", at http://www.irna.com/en/head/030324205831_ehe.shtml (accessed May 8, 2003) and BBC, 23 March 2003, "Basra Faces Water Crisis," http://news.bbc.co.uk/1/hi/world/middle_east/2879373.stm (accessed May 8, 2003). Baghdad: The Guardian, 4 April 2003 "In an instant, we were plunged into endless night", at <http://www.guardian.co.uk/Iraq/Story/0,2763,929450,00.html>. (accessed May 8, 2003).

⁶⁴ AP 25 March 2003, "New explosions in Baghdad; Iraqi Television knocked off the air after US says allies strike" at <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/03/25/international2239EST0909.DTL> (accessed May 8, 2003).

⁶⁵ Al Jazeera, 16 April 2003, "Dead correspondent was deliberately targeted", at http://english.aljazeera.net/topics/article.asp?cu_no=1&item_no=2162&version=1&template_id=277&parent_id=258 (accessed May 8, 2003) and The Guardian, 2 April 2003, "Al-Jazeera's Basra Hotel Bombed" <http://media.guardian.co.uk/broadcast/story/0,7493,928144,00.html> (accessed May 8, 2003).

⁶⁶ International Federation of Journalists, 8 April 2003, "IFJ says attacks on journalists are 'crimes of war' that must be punished," <http://www.ifj.org/publications/press/pr/030408iraq.html> (accessed May 8, 2003).

⁶⁷ 26 March 2003. See UN, 26 March 2003, "UN relief agencies express deep concern at reported bombing of Baghdad market", at <http://www.un.org/apps/news/story.asp?NewsID=6573&Cr=iraq&Cr1=relief>, (accessed May 8, 2003), BBC, 26 March 2003, "Eyewitness: Baghdad's shock and anger," at http://news.bbc.co.uk/1/hi/world/middle_east/2888429.stm, (accessed May 8, 2003), The Independent, 2 April 2003, "The proof: marketplace deaths were caused by a US missile" at http://news.independent.co.uk/world/middle_east/story.jsp?story=393066, and CNN, March 31 2003, "Iraq files complaint with United Nations," <http://www.cnn.com/2003/WORLD/meast/03/30/sprj.irq.un.letter/index.html> (accessed May 8, 2003).

⁶⁸ 28 March 2003: BBC, 29 March 2003, "Many dead in Baghdad blast," http://news.bbc.co.uk/1/hi/world/middle_east/2897117.stm, (accessed May 8, 2003).

⁶⁹ 1 April 2003: Guardian, 1 April 2003, "You didn't fire a warning shot soon enough!" <http://www.guardian.co.uk/Iraq/dailybriefing/story/0,12965,927233,00.html> (accessed May 8, 2003).

⁷⁰ 10 April 2003. Al Jazeera, 12 April 2003, "US troops fire on ambulance, two killed" http://english.aljazeera.net/topics/article.asp?cu_no=1&item_no=2261&version=1&template_id=277&parent_id=258 (accessed May 8, 2003).

⁷¹ See ICRC, 9 April, "Humanitarian situation has dramatically worsened", <http://electroniciraq.net/news/607.shtml> (accessed May 8, 2003).

⁷² April 12, 2003, Reuters, 18 April 2003, "US culture advisers resign over Iraq museum looting," <http://www.reuters.com/newsArticle.jhtml?type=politicsNews&storyID=2588520> (accessed May 8, 2003) and April 5, 2003, The Times, April 5, "UN and army at odds as troops encourage looting," <http://www.commondreams.org/headlines03/0405-08.htm>, (accessed May 8, 2003) Human Rights Watch, 9 April 2003, "Iraq's civilians face human rights vacuum", at <http://www.hrw.org/press/2003/04/iraq040903.htm> (accessed May 8, 2003).

⁷³ BBC, 6 May 2003, "Looting' at Iraq nuclear sites," http://news.bbc.co.uk/1/hi/world/middle_east/3002169.stm (accessed May 8, 2003).

INTERNATIONAL LAW AFTER THE INVASION OF IRAQ

The framework of international law is currently under threat by the determination of the United States to redraw international law to allow its strategic imperatives. The unilateralist 'unsigning' by the United States of the Rome Statute of the International Criminal Court,⁷⁴ its withdrawal from the Antiballistic Missile (ABM) Treaty,⁷⁵ its failure to ratify the Comprehensive Test Ban Treaty⁷⁶ thus ensuring that it will not enter into force,⁷⁷ and its decision not to ratify the Kyoto Protocol⁷⁸ all represent significant departures from multilateralism and the rule of law. The United States role in the NPT⁷⁹ is of particular concern in the current context. There are two issues of particular note.

(1) Article VI of the NPT requires each of the Parties to undertake to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control. This is an ongoing obligation that was further described at the 2000 NPT Review Conference as 'an unequivocal undertaking by the nuclear-weapons States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament'.⁸⁰

(2) Anxious to achieve the indefinite extension of the NPT,⁸¹ the United States agreed to conclude the CTBT by the end of 1996 and the extension was linked with a fissile material cutoff at an unspecified later date⁸² and on "[t]he determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control."⁸³ The failure of the United States to ratify the CTBT or enter into substantive disarmament negotiations as it has agreed, the acknowledgement by North Korea that it possesses nuclear weapons, the declaration by the United States of its willingness to enter into 'preventive war' and the subsequent

⁷⁴ The United States wrote to UN Secretary General Kofi Annan in May 2002 to state that "the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000." At <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (accessed May 8, 2003)

⁷⁵ Treaty Between the United States Of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty), signed at Moscow May 26, 1972, ratified by U.S. on September 30, 1972, entered into force October 3, 1972, 944 UNTS 13, at <http://www.state.gov/www/global/arms/treaties/abm/abm2.html> (accessed May 8, 2003). See Statement by the White House Press Secretary Announcement of Withdrawal from the ABM Treaty, December 13 2001, at <http://www.state.gov/t/ac/rls/fs/2001/6848.htm> (visited May 2 2003).

⁷⁶ Comprehensive Test Ban Treaty, opened for signature September 24, 1996, at 35 ILM 1439 (1996), at <http://www.state.gov/www/global/arms/treaties/ctb.html> (visited May 8 2003). "As you know, we will not be asking for the Congress to ratify the Comprehensive Test Ban Treaty in this next session." Secretary of State Colin L Powell statement at confirmation hearing of the US Senate Committee on Foreign Relations, January, 2001, at <http://www.clw.org/clw/transition2000/powellconfirmation.html> (accessed 2 May, 2003). For further analysis of US policies and actions regarding security-related treaties, including discussions of United States actions with respect to the Chemical Weapons Convention and Biological Weapons Convention, see Nicole Deller, Arjun Makhijani and John Burroughs, "Rule of Power or Rule of Law" (2003).

⁷⁷ The United States signed the CTBT on 24 September 1996. The Treaty will not enter into force until all States listed in Annex 2, including the United States, have ratified the Convention. CTBT Article XIV(1).

⁷⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted in Kyoto on 11 December 1997, 37 ILM 22 (1998), at <http://www.unfccc.de/resource/docs/convkp/kpeng.html> (accessed 2 May, 2003). See <http://www.unfccc.de/resource/docs/tp0200.pdf>. See <http://www.whitehouse.gov/news/briefings/20010328.html> (accessed 8 May 2003).

⁷⁹ Treaty on the Non-Proliferation of Nuclear Weapons (NPT), opened for signature 1 July 1968 at London, Moscow and Washington, and signed by the United States on that date, entered into force 5 March 1970 and ratified by the US on that day. 729 UNTS 161, UKTS 88 (1970), 7 ILM 809, 21 UST 483, at <http://www.state.gov/www/global/arms/treaties/npt1.html#2> (accessed 8 May, 2003). There were some 187 States Party in January 2000.

⁸⁰ 2000 NPT Review Conference final Document, at <http://usinfo.state.gov/topical/pol/arms/stories/finaldoc.htm> (accessed 8 May, 2003).

⁸¹ Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.1995/32/DEC.3, 34 ILM (1995), 5132, at <http://www.fas.org/nuke/control/npt/text/extension.htm> (accessed 8 May, 2003). Article X.2 of the NPT states that "Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty."

⁸² See Rebecca Johnson, "Indefinite Extension of the Non-Proliferation Treaty: Risks and Reckonings: Report of the 1995 NPT Review and Extension Conference, New York, 17 April to 12 May 1995", Acronym Report No. 7 (September 1995), at <http://www.acronym.org.uk/acro7.htm> (accessed 8 May 2003).

⁸³ Principles And Objectives For Nuclear Non-Proliferation And Disarmament, NPT/CONF.1995/32/DEC.2. At http://www.fas.org/nuke/control/npt/text/prin_obj.htm (accessed 8 May 2003).

decision by the United States supported by the 'coalition of the willing' to use military force against Iraq are all ominous developments for nonproliferation, the NPT and the rule of law.

The NPT has also become relevant in Iraq after the looting of Tuwaitha and the reported refusal of the occupying powers to grant the IAEA access.⁸⁴ All States have undertaken to co-operate in facilitating the application of International Atomic Energy Agency safeguards on peaceful nuclear activities,⁸⁵ and the IAEA safeguards apply on all source or special fissionable material in all peaceful nuclear activities carried out under the control of a non-nuclear-weapon State Party to the Treaty anywhere.⁸⁶ Additionally the failure of the occupying powers to prevent looting and to safeguard the site, with the result of reported radiation sickness, could give rise to responsibility under the Hague Regulations and Geneva Conventions.

CONCLUSION

The international community finds itself in at a critical juncture. The guarantees of international peace and security and the determination to avoid the scourge of war put in place following World War II have been undermined and even imperiled by the use of military force under the doctrine of 'preventive war' and the invasion of Iraq. It is critical that member States following the attack on Iraq re-acknowledge their commitment to avoiding war and to the principles and purposes of the United Nations Charter, in order that the role of the rule of law in avoiding future wars may prevail.

In its National Security Strategy, the United States described the utility of 'coalitions of the willing' as standing outside the current institutions, saying that "[t]he United States is committed to lasting institutions like the United Nations, the World Trade Organization, the Organization of American States, and NATO as well as other long-standing alliances. Coalitions of the willing can augment these permanent institutions." Thus the United States has put itself and, by extension, the 'coalition of the willing', apart from the permanent institutions and international law, and is setting its own law and policy unilaterally.

States in the 'coalition of the willing' have aligned themselves with the policy of 'preventive war' and with the legal position of the United States in the Iraqi war, a war described by the UN Secretary-General as not in conformity with the Charter, and a war which still continues. This position also aligns States with a strategy which espouses a unilateralist approach to international problems and thus threatens a rift with other institutions which underpin the international system. Nations have a stark choice: they can choose multilateralism, the rule of law, and respect for international law, treaties and institutions; or, they can choose a unilateralist approach in which States pursue their own interests, irrespective of the will of the world community, and accept the rule of economic and military power.

⁸⁴ BBC, 5 May 2003, "Looting 'at Iraq Nuclear Sites,'" at http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/3002169.stm and Daily Telegraph, 11 May 2003, "Villagers suffer radiation sickness after looting nuclear power plants", <http://www.telegraph.co.uk/news/main.jhtml>.

⁸⁵ NPT Preamble

⁸⁶ NPT Article III