Warriors, Humanitarians, Lawyers: The Howard Government and the Use of Force

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I. Introduction

This will be the 345th scholarly article to have been written on the legality of the Iraq War.[1] That may not be, in itself, a reason to decline the invitation to begin another one but I approach the task with a great deal of hesitation. What is there to add to the mountain of analysis, after all? Perhaps, I can comfort myself with two thoughts. First, this article tries to take a broad view by understanding the legal debate as part of a wider struggle around law and war; in particular, it asks, how do we argue about war? Second, it may be that for as long as Iraqis and Americans die in large numbers as a result of the war it is important for us, as public international lawyers, not to find the subject tedious.[2] 'Moving on' would be a crass demand in the circumstances.

Three aspects of the Howard government's approach to the *ius ad bellum* will be discussed in this article. I will consider the crime of aggression and the ongoing effort to provide a satisfactory procedural, substantive and jurisdictional basis for the criminalisation of this peculiar sub-species of inter-state force. I will discuss, glancingly at least, the short-lived and, not terribly well-received, Howard doctrine (the response to which may tell us a little about the prospects of the doctrine of pre-emptive force). A third aspect concerns, inevitably, the Iraq War. This cultural, military, political and economic disaster will be remembered as our generation's Vietnam.[3] There is likely to be a degree of wonderment and bewilderment among

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1 I thank Melbourne University Law librarian, Murray Greenway, for this figure. It is based on a search of relevant databases and includes only English-speaking material.

2 G Burnham et al, 'Mortality after the 2003 invasion of Iraq: A Cross-Sectional cluster sample survey' *The Lancet* (11 October 2006) 1-8 <http://www.thelancet.com/webfiles/images/journals/lancet/s0140673606694919.pdf>; 'U.S. Military Deaths in Iraq War at 4,132' *Associated Press* (6 August 2008).

3 As one person put it: 'Once you got to Iraq and took it over, took down Saddam Hussein's government, then what are you going to put in its place? That's a very volatile part of the world, and if you take down the central government of Iraq, you could very easily end up seeing pieces of Iraq fly off: part of it, the Syrians would like to have to the west, part of it – eastern Iraq – the Iranians would like to claim, they fought over it for eight years. In the north you've got the Kurds, and if the Kurds spin loose and join with the Kurds in Turkey, then you threaten the territorial integrity of Turkey. It's a quagmire if you go that far and try to take over Iraq.' Dick Cheney, 15 April 1994 <http://www.youtube.com/watch?v=ZzGGS6GXVIY&mode=related&search>.

my daughters' generation that such a war could ever have been contemplated by intelligent men and women. What role did law play in the debate about the war? As a preliminary matter, it may be that lawyers who opposed the war and those who supported it, or were obliged to lend legal cover for it (including government officials), were each caught on the horns of a (different) dilemma. In the case of those who opposed the war, the mere engagement with the question of legality possibly helped rationalise a war that on every other measure was a folly or it may have forced upon them a style of legal reasoning (stolid, formal) that seemed inauthentic.[4] I have written about this (with several London-based colleagues) in an article published in the *Leiden Journal of International Law* so I will say no more about it here.[5] In the case of government officials, the dilemma may have been a more familiar one: what is the position of a lawyer who happens to be a government official, a moral actor and a committed lawyer (ie, a person who has some fidelity to the integrity of the legal process) in a situation such as this? I suggest that she, like the rest of us, is caught at the intersection of three sets of intuitions about war. We might call these legal pacifism, humanitarianism and sovereigntism.[6]

II. The Iraq War and Aggression (one more time)

On 20 March 2003, Australia went to war with a country over 13,000 kilometres away from its own territorial boundaries. This war has left Iraq in turmoil, increased the incidence of terrorism in the world, contributed to a world-wide economic crisis and led to an estimated 600,000 excess Iraqi deaths by the end of 2006 alone.[7] The war resulted, also, in the downfall of Saddam Hussein, one of the most vile tyrants of the twentieth century, and the demise of his atrocious regime. The Prime Minister of Australia at the time, John Howard, was defeated in a general election in 2007 and has now retired from politics.

A vast amount has been written on the legality of the Iraq War. Nearly every international lawyer seemed to have a fixed opinion about the conflict and most of them wanted to publish at least one article on the subject. The war gave rise to one best-selling book, several government memoranda, a handful of public inquiries, letters to the editor, editorials and lengthy magazine articles.[8] Perhaps more

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4 On the first point, I was struck by the fact that the *legal* argument began, in 2003, as British Prime Minister, Tony Blair's Achilles' heel ('a necessary and just war but legally questionable') but ended up in, say, 2005, as the best argument for going to war ('a difficult and destructive war but, at least it was mandated by Security Council Resolutions'); I'm paraphrasing from a host of interviews from the former Prime Minister. On the second point, critical international lawyers experienced a certain degree of discomfort in deploying arguments that they had, previously, dismissed as prehistoric ('the war is clearly illegal according to the transparent terms of Article 2(4) or would be legal if China voted for it').

5 M Craven, S Marks, G Simpson and R Wilde, 'We are teachers of International Law' (2004) 17 *Leiden Journal of International Law* 363.

6 For a longer discussion of these intuitions see G Simpson, 'Law and Force in the 21st Century' in D Armstrong (ed), *Handbook of International Law* (2008) forthcoming.

7 G Burnham et al, above, n 2.

8 Eg, UK Attorney-General, Lord Goldsmith, Published Advice on the Legality of the

unexpectedly, there has been a large amount of litigation in relation to the war.[9] Iraqi and British citizens detained in Iraq have sued the British government before United Kingdom civil courts.[10] The war itself has been the subject of at least one major decision on the crime of aggression (in the United Kingdom), and the conformity of Security Council resolutions with human rights law has been subjected to legal scrutiny by the House of Lords.[11] In Australia, the courts have not become involved to the same extent, but the academic and professional literature about the war is voluminous.[12] Most Australian lawyers took the view that the war was unlawful. A minority expressed the opposite opinion in several newspaper articles.[13]

Prior to the war, the Howard government was careful to request and receive advice from its legal advisers that the war was lawful. This advice (brief and cursory) followed similar reassurances from the United Kingdom Attorney-General to the effect that any use of force against Iraq could be justified by reference to the sequence of Security Council resolutions beginning with Resolution 678 in 1991.[14]

Iraq War (17 March, 2003) <http://www.guardian.co.uk/world/2003/mar/17/iraq2>; C Greenwood and G Simpson, 'Iraq: Was it Legal?' (18 November, 2004) London School of Economics <http://www.lse.ac.uk/collections/alumniRelations/reunions AndEvents/2004AndPrior/20041118.htm>; P Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005); *The Hutton Inquiry* (2004) <http://www.the-hutton-inquiry.org.uk/content/report/>.

9 In the UK, *CND v Blair* [2002] EWCH 2759 <http://www.courtservice.gov.uk judgmentsfiles/j1458/cnd_v_prime_minister.htm>. In the US see *Doe v Bush*, US Court of Appeals for the First Circuit, (2003) <http://www.ca1. uscourts.gov/pdf.opinions/03-1266-01A.pdf>. In Germany see *BVerwG, 2 WS 12.04*, (21 June 2005) <http://www.bundesverwaltungsgericht.de>; N Schultz, 'Was the War on Iraq Illegal? The Judgement of the German Federal Administrative Court of 21st June, 2005' (2006) 7(1*) German Law Journal* 25.

10 *R (on the application of Al-Skeini and others) v Secretary of State for Defence)* [2007] UKHL 26.

11 See *R v Jones and Milling* [2006] UKHL 16 <http://www.publications. parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones-1.htm>; *Al Jedda v Secretary of State for Defence* [2007] UKHL 58.

12 For an antipodean selection see: V Bantz, R Baird and A Cassimatis, 'After 60 Years – the United Nations and International Legal Order' (2005) 24(2) *University of Queensland Law Journal* 19; A Bellamy, 'International Law and the War with Iraq' (2003) 4 *Melbourne Journal of International Law* 497; F A Conte, 'All Necessary Means to Maintain Peace and Security: Did the United Nations Authorise the Use of Force in Iraq?' (2003) 9 *Canterbury Law Review* 306; A Field, 'Humanitarian Intervention and the War in Iraq: Why was it Always an After-thought?' (2004) 16(2) *Bond Law Review* 5; R Sifris, 'Operation Iraqi Freedom: United States v Iraq – the Legality of War' (2003) 4 *Melbourne Journal of International Law* 521.

13 See eg, G Hunt, 'Yes, This War is Legal' *The Australian* (19 March 2003). Several conclusions were drawn from all this. Some observers saw this disagreement as wholly typical of the legal field. Lawyers were irrelevant because they could not agree on anything. Others believed that those arguing for the legality of the war were acting in bad faith (they could not really believe this, could they?). Those lawyers who expressed in public their opposition to the war were variously regarded as heroes or posturers.

14 B Campbell and C Moraitis, 'Memorandum of Advice to the Commonwealth

There were two developments in the United Kingdom, though, that were not mirrored in Australia. First, an earlier piece of 'top secret' advice given by the United Kingdom Attorney, Lord Goldsmith, to Prime Minister Blair, and dated 7 March 2003, was published some time after the war had begun. This advice was equivocal, detailed and, in the end, convincingly unconvinced about the lawfulness of the war.[15] It was a measured and careful contribution to the debate. Second, Elizabeth Wilmshurst, the widely admired Deputy Legal Adviser to the United Kingdom Foreign Office did something rather unexpected: she resigned. Much could be said about all of this.[16] For example, is there, waiting to be revealed, a piece of Australian government advice containing the same attention to detail and scrupulous dissection of the legality issues as that found in Goldsmith's 7 March 2003 'Secret Memo'? Were there disagreements among Australian officials about the legality of the war? Were these disagreements ventilated in private meetings? Some future memoirist will tell us, perhaps.

It is Wilmshurst's resignation I want to think about in the context of the Howard government and war. It is important to ruminate on this explosive decision in the light of the reasons given for it and the relationship between these reasons and the Howard government's twin track approach to war. It is interesting, to say the least, that Australian government lawyers during the Howard years engaged in two apparently contradictory legal projects in relation to war. On one hand, there was the commitment to finding an adequate definition for the crime of aggression at the Special Working Group on Aggression created under the terms of Article 5(2) of the Rome Statute.[17] On the other hand, there was the effort to interpret the *ius ad bellum* on the Iraq War as permitting the large-scale invasion of a sovereign state in the absence of either the conditions necessary to justify a use of force in self-defence or a Security Council resolution explicitly authorising the war. Let me say a little about these projects before suggesting that in the end, the Howard government's equivocations around law and war can be understood best as part of a broader dissonance surrounding war and peace in international law. Government lawyers who find themselves engaged in projects to criminalise and legalise aggression at the same time face a dilemma that constitutes the international law of force. They are, as it were, performing international law in precisely the way one would expect from a reading of critical legal scholarship over the past 20 years.[18]

Government on the Use of Force Against Iraq' (2003) 4 (Special Feature: Advice on the Use of Force Against Iraq) *Melbourne Journal of International Law* 178.

15 UK Attorney-General, Lord Goldsmith, 'Opinion on the Legality of Military Action against Iraq' (7 March 2003) <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/28_04_05_attorney_general.pdf>.

16 I have said some of it in: G Simpson, 'The War in Iraq and International Law' (2005) 6 *Melbourne Journal of International Law* 167.

17 Special Working Group on Aggression <http://www.icc-cpi.int/asp/aspaggression.html>. See esp, Chairman's 'Discussion Paper on the Crime of Aggression' (June 2008) ICC-ASP/6/SWGCA/2.

18 See eg, M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2007) Postscript.

First, to the question of aggression and the International Criminal Court (ICC). The Howard government, and in particular, its Foreign Minister, Alexander Downer, were key supporters of the Rome Statute.[19] Australia played an influential role in the Like-Minded Group in Rome (Australia took over the Chair of this group after 1998) and before Rome, and the delegation to the treaty conference in Rome, under the astute leadership of Richard Rowe, was active in ensuring the success of the conference. Ratification of the Court's statute was a Liberal Party election promise in 2001. The Howard government cooled a little on the Court as the consultation process around ratification got underway.[20] Nevertheless, the treaty was ratified and implementing legislation was enacted.[21] It is by now notorious that the crime of aggression was not defined in the Rome Statute. Instead, the process of defining aggression and establishing some sort of jurisdictional framework around the crime was held over until after the Rome Conference. Ten years later, this process remains ongoing. I have written elsewhere of the reasons for this failure and why, given the structure of international society, I believe the project to criminalise aggression is ill-fated and unwise.[22]

Still, it is undeniable that sincere people in the diplomatic and legal communities are passionate and skilful advocates of the criminalisation project. Among them, of course, were the Australian delegations at the Working Group. While not as prominent as their counterparts at the Rome Conference itself, the Australian delegation has attended and contributed heavily to the negotiations at the Working Group. The Australian government, then, has expended a fair amount of political capital and legal expertise trying to promote and develop a concept of criminal war.

On 20 March 2003, then, the Australian government found itself in an unusual position. It was embarked on a law reform project to make war illegal while embarking on an illegal war.[23] In the United Kingdom, meanwhile, the Deputy

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19 A Downer, Speech by Alexander Downer on the Establishment of an International Criminal Court, Rome (15 June 1998).

20 See, for an analysis of this period: A Bellamy and M Hanson, 'Justice Beyond Borders? Australia and the International Criminal Court' (2002) 56(3) *Australian Journal of International Affairs* 417.

21 This legislation has been criticised for failing to properly implement ICC obligations. See, G Boas, 'An Overview of Implementation by Australia of the Statute of the ICC' (2004) 2 *Journal of International Criminal Justice* 179.

22 See eg, G Simpson, ' "Stop Calling It Aggression": War and Crime' (2009) 62 *Current Legal Problems* forthcoming. See also, G Simpson, 'Chapter 6: Law's Hegemony: The Justification of War' in *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (2007). It is fair to say that mine is a minority position. See, for a robust call for criminalisation: D Zolo, 'Who's Afraid of Punishing Aggressors?: On the Double-Track Approach to International Criminal Justice' (1997) 5(4) *Journal of International Criminal Justice* 799; See, too, R Cryer, 'Aggression at the Court of Appeal' (2005) 10(2) *Journal of Conflict and Security Law* 209.

23 The lawfulness of the Iraq War is by now the most over-rehearsed and debated legal topic of the millennium but I suggest that there would have been no debate at all had China and Russia invaded Iraq in March 2003 claiming that a resolution stretching back 12 years had authorised them to do so. Not a single international lawyer in Australia would have argued for the legality of such a war. Context is all.

Legal Adviser to the Foreign Office resigned, arguing that a war on Iraq would be a crime of aggression. For Elizabeth Wilmshurst it had become impossible to reconcile the two tasks of offering legal advice to the government on the crime of aggression and providing legal cover for an act of aggression. She said:

> I therefore need to leave the Office: my views on the legitimacy of the action in Iraq would not make it possible for me to continue my role as a Deputy Legal Adviser or my work more generally. For example in the context of the International Criminal Court, negotiations on the crime of aggression begin again this year.[24]

For the Howard government, no such contradiction seemed to present itself. What is it about war that puts us in this position? After all, we have been here before. A common position among international lawyers involves holding that the intervention in Kosovo was lawful or, at least, legitimate but that the Iraq War was illegal. Yet, in neither case was there an explicit Security Council authorisation for war nor an adequate justification for it on the basis of self-defence. We seem to like some wars better than others and, sometimes, we structure our legal analysis around those preferences.

Let me offer here an alternative way of thinking about war: one that might shed some light on the Howard government's (by no means unusually) ambiguous approach to war and law.

III. Warriors, Humanitarians, Legalists

John Howard, in a press conference immediately prior to the war said:

> This, of course, is not just a question of legality, it is also a question of what is right in the international interest and what is right in Australia's interests. We do live in a different world now, a world made more menacing in a quite frightening way by terrorism in a borderless world … this Government has taken a decision which it genuinely believes is in the medium and longer-term interests of this country.[25]

On 6 February 2004, in the German city of Munich, Donald Rumsfeld, then Secretary of Defence in the Bush administration, was asked during a press conference whether there was a code of international rules. He replied: 'I honestly believe that every country ought to do what it wants to do … it is either proud of itself or less proud of itself.'[26]

In a different vein, Alexander Downer said a month before John Howard's speech:

> We allowed the slaughter of one million people in Rwanda – the international community did not intervene until it was too late. We allowed slaughter in Bosnia and again, the international community did not intervene until it was too late. We allowed President Milosovic to murder Kosovars until the US-led coalition of the

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24 UK Deputy Legal Adviser to the Foreign Office, Letter of Resignation (18 March 2003) <http://news.bbc.co.uk/2/hi/uk_news/politics/4377605.stm>.

25 Prime Minister John Howard's Speech on Possible War with Iraq (18 March 2003) <http://www.theage.com.au/articles/2003/03/18/1047749752942.html>.

26 Donald Rumsfeld at Munich Press Conference (6 February 2004) <http://www.guardian.co.uk/comment/story/0,3604,1145413,00.html> and <http://italy.usembassy.gov/viewer/article.asp?article=/file2004_02/alia/a4020905.htm>.

> willing put a stop to it. We have acted in Kosovo, in East Timor and in Afghanistan to redress the balance. Although imperfect, these actions represent critical steps in protecting the victims of barbarity. And yet still many – particularly on the political left – shrug and say that the murder, torture, and rape of hundreds of thousands of Iraqis – by their own rulers – should go unchecked. And they would trust Saddam not to repeat his use of chemical weapons on his own people and neighbours. Mr Speaker, I cannot in conscience ignore the record. Saddam Hussein is a ruthless tyrant who tries still – in the face of concerted international pressure – to retain and develop the most evil of weapons. As the Foreign Minister of our great country, I will not be remembered for turning my back on such evil and allowing the spectre of Saddam to haunt future generations.[27]

A year later, at his Sedgefield constituency, the British Prime Minister, Tony Blair, announced the end of the Westphalian era of international relations. It was time, according to Blair, to usher in a new interventionist period in which force would be used to avert or end humanitarian catastrophe: 'I was already reaching for a different philosophy in international relations from a traditional one that has held sway since the treaty of Westphalia in 1648; namely that a country's internal affairs are for it, …'[28]

The United Nations Charter[29] in Article 2(4) prohibits the use of force among states and the Charter's preamble speaks of eliminating the scourge of war altogether. International law, indeed, may be associated in the public mind with a form of pacifism. To be on the side of international law is to be on the side of peace, or, at the very least, the peaceful resolution of disputes.[30] This legalist-utopian insistence on the virtues of peace is pervasive but it co-exists in international relations and, more importantly, in our intuitions about security and survival, with two other fantasies. In one, war is imagined as a radical solution to the problem of social evil. This is reflected in Alexander Downer's Speech to Parliament in 2003. Tony Blair's Sedgefield speech and his whole humanitarian-military ethos, first articulated in Chicago in 1999, are built around a liberal version of this idea.[31] So, too, in a different vein is George Bush's war on terror, a self-conscious and publicly-proclaimed effort to destroy all those who would do evil (or commit (certain) acts of terrorism).[32]

The second fantasy is reflected in Donald Rumsfeld's response to his European interlocutors and, to a lesser extent, in John Howard's justification for the Iraq War. Here, sovereignty is anterior, prior and transcendent to any concepts of community or law or obligation. War is a question of pride (or, vanity) or strategic

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27 A Downer, Statement to Parliament (4 February 2003) <http://www.foreignminister.gov.au/speeches/2003/030204_iraq.html>.

28 Prime Minister Blair, Speech to Sedgefield Constituency Party (5 March 2004) <http://politics.guardian.co.uk/iraq/story/0,12956,1162991,00.html>.

29 United Nations Charter (26 June 1945) [1945] ATS 1.

30 Art 33 of the UN Charter obliges states to resolve conflicts peacefully. This is a background to the more specific prohibitions and exceptions found elsewhere.

31 T Blair, 'Doctrine of the International Community', Economic Club, Chicago (1999) <http://www.number10.gov.uk/Page1297>.

32 The National Security Strategy of the United States of America (2002) <http://www.whitehouse.gov/nsc/nss.pdf>.

calculation or national self-interest or revenge, or is the product of some neurotic urge. Whatever the case, sovereignty is its own justification; there is no normative universe outside the state or its elite capable of reining its (often violent) appetites. This sovereigntism sometimes is combined with a knowing realism about the true nature of international relations (Hobbesian) and the inclinations of nation-states (cold-hearted monsters). As Churchill put it:

> War is too foolish, too fantastic, to be thought of in the 20th Century … civilisation has climbed above such perils … the interdependence of nations … the sense of public law have rendered such nightmares impossible. Are you quite sure? It would be a pity to be wrong.[33]

Often, the debate about the use of force is conducted in terms of a contest between international law's commitments to peace and constraint, and a world of violence and politics in which law struggles for footing. Most often, this image is accompanied by a sense that law is weak and ineffectual (but the product of essentially decent inclinations). Arrayed against this timid repository of our best hopes and most creative ideas are the brute conditions of international anarchy and the programmatic impulses of charismatic leaders and exceptionalist nation-states. In 1970, Thomas Franck asked 'Who killed Article 2(4)?'.[34] According to this view the possible perpetrators are myriad (they include the Great Powers, 'sovereignty', political cynicism and the lack of a community or society in international relations). In the end, even the most ardent internationalist begins to ask: who would want to keep it alive?

The law of force, and the Australian dual (and otherwise inexplicable) approach to the crime of aggression and the Iraq War might be understood as the performance of an argument between these three competing and potent visions of international and social order sketched earlier. These can be characterised as an absolutist view that seeks to approach war and peace through non-negotiable, universalisable and unqualified moral norms ('humanitarians' like Downer, Blair), a sovereigntist perspective that holds the desires or fears of the sovereign to be the single source of legitimacy in assessing decisions to go to war or engage in diplomacy ('warriors' like Howard) and (an occasionally militant) legal-pacifism that wants to use law to abolish war (the project to criminalise aggression). These three are ideal types, of course. Most statesmen and scholars, for example, tend to offer some combination of the three approaches in their speeches and published work.[35] It is important, though, to understand the *ius ad bellum* as embedding, articulating and accommodating these three sets of claims. This may help account for the law's thematic ambiguities, its textual evasions, its judicial agonies and its interminable crises. It may explain also why its primary organs repeatedly move from institutional paralysis to hyper-activism and back. The Iraq War, then, rather

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33 B Woodward, *State of Denial* (2007) 44.

34 T Franck, 'Who Killed Article 2(4)?: Or Changing Norms Governing the Use of Force by States' (1970) 64 *American Journal of International Law* 809.

35 Eg, Howard, above n 25; A Cassese, '*Ex Iniuria Ius Oritus*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23.

than being viewed as an extraordinary challenge to the future of international law, can be reinterpreted as part of the perpetual crisis of law, war and peace. The project to criminalise aggression at the Working Group on Aggression is complicated by its need to recombine in treaty form each of these three sharply competing imperatives.

To put this a different way, because wars are occasions for national invigoration, political reinvention or personal heroism as well as moments of collective horror, mass psychosis and individualised evil, it is not at all clear what we want to do with, and about, war (a highly sentimentalised and sometimes exploitative version of this ambivalence about war is found in the commentary and speechifying on ANZAC Day in Australia). Public international law, while it promises the resolution of this angst, is instead an expression of it. This angst can be found in three doctrinal debates concerning the regulation of force and violence in the international system. These revolve round first, the nature of the prohibition itself (what exactly is made illegal by the UN Charter and customary international law?), second, the limit and extent of the right to use force in self-defence, and third, the parameters of properly-authorised collective or individual action (including the validity and desirability of wars for humanity (or humanitarian interventions)).[36]

IV. Rules, Exceptions

In 1907, the international community of states, under the influence of Latin American nations anxious about the regional ambitions of the United States, resolved to outlaw a particular form of violence in the international system. The Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts[37] made it unlawful for states to use military force against each other for the purposes of securing repayment of outstanding loans (contract debts). This moment of legal regulation marks the opening move in a century-long project to outlaw a particular genre of violence. Of course, the significance of the 1907 Convention lies, also, in the narrowness of its range of operations: most uses of force remained perfectly lawful and indeed, the 1907 Convention can be re-read as imposing merely a duty to attempt arbitration prior to embarking on a reparative war.

Most inter-state force at this time was still constrained only by the inclinations of sovereignty or the prerogatives of conscience. This was made explicit at Versailles with the ill-starred attempt to criminalise war (or at least certain types of war). Article 227 of the Versailles Peace Treaty[38] proposed the arraignment of the Kaiser on charges of having initiated a war of aggression or a war against the

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36 The application of individualised notions of criminal responsibility to the arena of war-making – the question of 'aggression' – is taken up in: Simpson, 'Chapter 3: Law's Subjects: Individual Responsibility and Collective Guilt' in *Law, War and Crime*, above n 22.

37 International Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Hague II) (18 October 1907) 205 ConTS 250.

38 Peace Treaty of Versailles (28 June 1919) 225 ConTS 288.

sanctity of treaties; the trial did not take place (largely because of the refusal by the Dutch government to surrender the Kaiser to the victorious Allies). The international law position, at this time, is best-articulated, though, by a commission established by the Versailles delegates and made up of a group of diplomats and eminent international lawyers (The Commission on Responsibility for the Authors of War).[39] This Commission states, in its final report, that the criminalisation of war is novel and unprecedented, and has no place under international law. War is to be left to the judgment of history and conscience; states do what they must do and the consequences are a matter for sovereigns and philosophers not lawyers (the United States. Memorandum of Reservations to the Commission at Versailles was particularly keen to preserve the immunity of these sovereigns).[40]

The inter-war period was marked by a series of haphazard initiatives largely made up of unequivocal prohibitions lacking legal status (a draft League of Nations Treaty of Mutual Assistance in 1923) or treaties with some force that, nonetheless have an ambiguity at their heart.[41]

The year 1945, then, was a constitutional moment for law and force. At Nuremberg, the International Military Tribunal (IMT) declared war of aggression to be the supreme international crime, one 'containing the accumulated evil of the whole'.[42] This time, in a reversal of the Commission at Versailles, rather than insisting that law vacate authority to ethics, the conscience of mankind demanded that the law criminalise war. The IMT Charter Article 6 made it a crime 'to plan, prepare, initiate or wage a war of aggression or wars in contravention of international treaties'. The formula is repeated in The Charter of the International Military Tribunal for the Far East, Article 6(a) and in Law No 10 of the Control Council for Germany (20 December 1945) and restated in subsequent UN General Assembly resolutions in 1965, 1970 and 1974 (though not with sufficient exactness to render easy the task of the Special Working Group on Aggression).

At San Francisco, meanwhile, the newly-created UN Charter contained a prohibition on the use of force (and a preference for pacific forms of dispute resolution) at its centre. Article 2(4) makes it unlawful for member-states to use force against the territorial integrity and political independence of other states or in any manner contrary to the principles and purposes of the UN Charter. This

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39 *Commission on the Responsibilities of the Authors of the War on the Enforcement of Penalties* (Conference in Paris 1919) reprinted in (1920) 14 *American Journal of International Law* 95.

40 Ibid 135.

41 The Kellogg-Briand Peace Pact outlawed recourse to war but omitted to delineate any possible exceptions based on self-defence. General Treaty for the Renunciation of War, Pact of Paris (Kellogg-Briand Pact) (27 August 1928) 94 LNTS 57. The inclusion of self-defence was deemed unnecessary by Kellogg-Briand's American sponsors because it was self-evident that sovereigns could use violence to defend themselves, or because, as John Howard, above n 25, argued international law must operate in the context of a potentially, controlling requirement to pursue the national interest.

42 International Military Tribunal Judgment: The Nazi Regime in Germany 1948, 'The Common Plan or Conspiracy and Aggression at War', sect 4 <http://www.yale.edu/lawweb/avalon/imt/proc/judnazi.htm>.

provision has become part of customary international law and is regarded as a norm of *ius cogens*,[43] applying to non-member states also. This is the norm that Australia is alleged to have breached in March 2003.

Article 2(4) is a bold statement for an international system where military force had hitherto been a sovereign prerogative. But it is striking how much violence is left untouched by Article 2(4). This article (and its twin at Nuremberg) are directed at a particular and, increasingly, marginal genus of violence involving the formally-invasive war-making of sovereign states against one another. Article 2(4) has nothing to say about wars conducted by states against their own populations (eg, Guatemala, 1960-1996, Rwanda, 1994), or about wars within states between two or more collective groups (eg, conflict between Bosnian Croats and Bosnian Serbs within Bosnia-Herzegovina) or wars between the state and internal armed opposition (sometimes with a self-determination cast) (eg, Biafra 1967-1970). Nor is Article 2(4) concerned with the sorts of violence perpetrated on human beings under repressive economic orders or because of the maldistribution of economic goods within the global political order.[44]

Even in the case of its putative field of application, inter-state-war, there is, inevitably, an elasticity at the margins (sometimes at the core) of these provisions. For example, in the case of the UN Charter, it is not clear the extent to which the qualifiers 'territorial integrity and political independence' have real interpretive purchase. Did the Israeli raid on Entebbe Airport in Kampala (to free hostages taken by a Palestinian group) in 1976 have an adverse effect on Ugandan integrity and independence? Many legal experts took the view that this action fell foul of Article 2(4) but the United States, for example, in debates at the Security Council, emphasised the limited nature of the intervention as a way of excusing it.[45] Similarly, was the 2003 war in Iraq an effort to restore Iraq's political independence (by removing a tyrant)?[46] Or was it an egregious breach of that independence (the imposition of foreign-emplaced government to replace an indigenous one?).[47] Then there is the question of scale and intensity. How is the provision to be interpreted in such a way as to avoid its application to trivial cases of force while at the same time maintaining its integrity (this is an issue taken up in the discussion of self-defence)? Thomas Franck has considered these questions in his illuminating discussion of legitimacy.[48] The problem for international lawyers lies in coming up with prohibitions that offer clarity and flexibility at the same time. The twin dangers of the idiot rule (the rule that allows for no margin of appreciation, the norm that looks foolish if applied rigidly to a complex moral

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43 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* (1988) 76 ILR 1; [1986] ICJ Rep 14 [190].

44 Of course, international law has developed to cover these activities (anti-terrorism conventions, human rights standards, the application of war crimes law to internal armed conflict).

45 C Gray, *International Law and the Use of Force* (2nd ed, 2004) 30.

46 Downer, above n 27; A Soafer, 'On the Necessity of Preemption' (2003) 14(2) *European Journal of International Law* 209.

47 P Sands, *Lawless World* (2006).

48 T Franck, *The Power of Legitimacy Among Nations* (1990).

problem) and the vague rule (the rule that allows for myriad exceptions, provides for every possible nuance and ends up emptied of content) are with us at all times in this area. These dangers were exploited by the Howard and Blair governments before the war (the unusual context of the 'war on terror' could be combined with the indeterminacy of the legal texts to argue for the lawfulness of the war). These same dangers may make the Working Group's deliberations on aggression an exercise in futility (context and rule working against each other).

V. Situating the 'Howard Doctrine'

The law of self-defence, too, is constructed around the dilemmas of sovereignty, law and virtue. The legalist-utopian fantasy of abolishing war confronts, at the same time, the necessity of defending the state and statism in its abstract formal sense[49] and the intuition that some state-based ideological projects are worth defending and others are not.[50]

In late 2002, John Howard was asked on the now defunct *Sunday* program on Australia's Channel Nine television station whether he would contemplate using force, in the territory of neighbouring states, in order to prevent terrorist attacks on Australia. He replied in the following terms:

> Oh yes. I think any Australian prime minister would. It stands to reason that if you believed that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind, and you had the capacity to stop it and there was no alternative other than to use that capacity then, of course, you would have to use it.[51]

Judged by any standard measure, the Howard doctrine of pre-emptive self-defence failed to gain the sort of widespread support capable of giving rise to a new customary norm of international law.[52] Indeed, the whole idea must have been thought of at the time as an unnecessary distraction. We imagine the scene as government international lawyers were made aware of the speech enunciating it for the first time (United Kingdom Foreign Office lawyers must have had the same horrified reaction to Prime Minister Blair's spontaneous reference to the 'rule' that an unreasonable [French?] veto could be discounted for the purposes of Security Council voting).

The Howard doctrine, of course, is simply an expression of a sovereigntist *realpolitik* that regards the right to self-defence as pre-legal.[53] It is, though, a

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49 M Koskenniemi, 'The Future of Statehood' (1991) 32(2) *Harvard International Law Journal* 397.

50 J Rawls, *The Law of Peoples* (1999); F Tesón, 'The Kantian Theory of International Law' (1992) 92(1) *Columbia Law Review* 53.

51 M Grattan, 'Words are Bullets' *The Age* (4 December 2002).

52 For a discussion of the doctrine see N Abadee and D Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 *Aust YBIL* 19.

53 This assumption that self-defence is somehow present, (and therefore not requiring articulation) in a way that the prohibition itself is not, is found in Art 51 of the UN Charter: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United

version of self-defence that complicates, perhaps, nullifies, the project to criminalise aggression.

The criminalisation of aggression, after all, would only make sense if the right to self-defence was tightly circumscribed. In the absence of such limits, the self-defence exception swallows the rule prohibiting force altogether. The crime of aggression, like the offence of obscenity, is one of those acts that is said to be instantly recognisable in practice but regrettably difficult to define in the abstract. Many commentators are happy to point to the Iraqi invasion of Kuwait in 1990 as the paradigmatic case of aggression.[54] Yet, even here, the self-defence exception, if stretched far enough is capable of justifying the invasion. Saddam's government used the same tired references to national security and self-defence that are heard each time a nation embarks on an illegal war. The Howard doctrine on self-defence, then, was flatly incompatible with good faith negotiations around the crime of aggression being conducted by his officials.

Prior to 1945, the law of self-defence received what is regarded as its first thorough diplomatic airing in an exchange of letters between Lord Ashburton (the British Foreign Secretary) and Daniel Webster (the American Secretary of State) in 1837. In the *Caroline Incident*, a very familiar and early instance of a purported exercise of pre-emptive self-defence against the activities of terrorist non-state actors, the United States and the United Kingdom, while disagreeing on the specific case (involving the destruction, by the British, of a Canadian rebel ship operating from United States waters and alleged to be engaged in an attack on British interests in British North America (Canada)), arrived at a joint declaration as to the content of self-defence.[55] Such action was permitted in cases involving 'a necessity for self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation'. This case continues to exercise power over the legal[56] and political imagination.[57]

Nations …' The word 'inherent' has generated a fair bit of commentary. In *Nicaragua*, it was used to establish that the law on the use of force was part of customary international law independent of the Charter itself (this was important for the purpose of escaping the US reservation to its declaration accepting the jurisdiction of the International Court). In the work of many expansionists (those who wish to extend the right to self-defence), it is used to justify readings of self-defence that take it some way beyond the text of Art 51 itself (D W Bowett, *Self-defence in International Law* (1958)) and, more radically, it preserves the idea that sovereignty is prior to law, that the natural right to use force in self defence pre-exists the law of self-defence. This natural, pre-legal claim to use force in self-defence is close to the surface in John Howard's articulation of pre-emption.

54 Eg, Lord Hoffman in *R v Jones* [2006] UKHL 16 [59] <http://www.parliament.the-stationery-office.com/pa/ld200506/ldjudgmt/jd060329/jones-1.htm> ('If the core elements of the crime are certain enough to have secured convictions at Nuremberg, or to enable everyone to agree that it was committed by the Iraqi invasion of Kuwait, then it is in my opinion sufficiently defined to be a crime, whether in international or domestic law'.)

55 *The Caroline Case* (1841) 29 BFSP, 1137-38.

56 R Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82.

57 The National Security Strategy of the United States of America, above n 32.

If *Caroline* elaborates a principle of constraint, then almost a century later, Kellogg-Briand's silence around self-defence was just as eloquent. The renunciation of war as a means of settling disputes and as a national policy choice was unaccompanied by any qualification in regard to self-defence. For the Americans, at least, such a reference was simply otiose. The right to self-defence, an inherent sovereign prerogative, was a fact of international political life. This rendering of self-defence as simply 'there' – a fact of sovereignty – was restated 70 years later in the *Nuclear Weapons Case*.[58] The International Court of Justice (ICJ), contemplating the legality of nuclear devices, found it difficult to conceive of an instance in which such weapons could be used without offending principles of proportionality, necessity and humanity. Yet, always, self-defence and the requirements of sovereignty were in the background threatening to unpick the near-complete prohibition. Famously, then, the Court stated it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the state would be at stake'.[59] The Court was engaged in a tragic struggle to reconcile an overwhelming human instinct (for survival, for humanity, for law) with the potent formulations of sovereignty.

These formulations are dominant in articulations of pre-emptive self-defence. The Bush administration placed this debate centre-stage with its National Security Strategy initiative in 2002 but lawyers have wrestled with this problem since, at least, *Caroline*. Strict constructionists have argued that since Article 51 permits self-defence only when there is an 'armed attack', there can be no right to use force in anticipation of an armed attack. This position has been seriously eroded from at least three directions. Another group of textualists have argued that the word 'inherent' in Article 51 incorporates either a pre-existing right to anticipatory self-defence (*Caroline*) or an equivalent post-1945 customary right. Others have argued that an 'armed attack' begins from the moment a decision to use force has been made or from the moment such a use of force has become imminent (this collapses altogether the distinction between self-defence and anticipatory self-defence).[60] Finally, there are those who have taken a pragmatic or 'policy-oriented' approach to argue that the advent of nuclear weaponry or the speed of modern armies or some radical change of circumstances have made it impossible to reject a right to anticipatory self-defence. In each case, though, the formula for anticipatory self-defence has been yoked to a finding of imminence and this, in turn, has been linked to some notion of immediacy or temporal proximity.

The Bush and, more loosely articulated, Howard doctrines departed from all of these traditions to develop an expanded idea of self-defence based on preventative war. As President Bush put it in his West Point speech in 2002, 'we must take the battle to the enemy, disrupt his plans, and confront the worst threats before they

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58 Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion) [1996] ICJ Rep 226.

59 Ibid [105], disposatif E.

60 Y Dinstein, *War, Aggression and Self-Defence* (3rd ed, 2001) 172.

emerge'.[61] Imminence remains relevant; indeed there is considerable effort made to ground the new doctrine in old precedents (notably *Caroline*): 'we must adapt the concept of imminent threat to the capabilities and objectives of … rogue states and terrorists'.[62] However, this form of pre-emptive self-defence relies on a modified version of 'imminence'. It is no longer the imminence of the attack that is controlling but instead the likely emergence of an irreversible threat. This conception of self-defence is heavily weighted in favour of the responding state. This may explain why it suits the dominant hegemon. The 2003 intervention in Iraq, often, is cited as an example of the Bush doctrine in practice though the emphasis throughout the period immediately prior to the war was on issues of collective security. Still, it is no doubt true that figures in the Bush administrations and prominent voices in the political and media establishments in the United States believed this was a test of pre-emption's credibility.[63] In this sense, the existence or non-existence of weapons of mass destruction (WMDs) was somewhat beside the point from the perspective of pre-emption. What counted was the possibility or probability of Iraq emerging at some point in the future as a threat to United States security. The pre-emptive war was about Saddam's psychology not Iraq's capacity.

Needless to say, this invocation of a rather distant prospect of emerging danger failed to attract many adherents to the idea of pre-emption in Iraq. No doubt, the current weight of legal opinion favours heavily the existence of a right to anticipatory self-defence in cases of imminent attack (this has been confirmed in the UN Secretary-General's *In Larger Freedom* Report), [64] or 'irreversible emergency'[65] but there is precious little support for any expanded right to engage in preventative wars (as I have indicated the response to the 'Howard doctrine' says something about the status of this form of self-defence; more tellingly still, the United Kingdom Attorney-General, Peter Goldsmith, condemned the broader doctrine in a statement to the House of Lords in April 2004).[66]

It may be, of course, that what is being argued for, most often implicitly, by the United States in its National Security Strategy and by John Howard, are exceptional rights to employ force in self-defence.[67] One way to understand the doctrine of self-defence is to see it as constructed around an asymmetrical

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61 G W Bush, 'West Point Commencement Address' (June 2002) <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>; cf, Abadee and Rothwell, above n 52, 59, suggesting the Howard doctrine advocated a right of anticipatory self-defence.

62 The National Security Strategy of the United States of America, above n 32, pt I.

63 Soafer, above n 46.

64 *In Larger Freedom: Towards Development, Security, and Human Rights for All*, UN Doc A/59/2005 (21 March 2005) [124] <http://www.un.org/largerfreedom>.

65 Chatham House, High-Level Expert Group, *Principles of International Law on the Use of Force by States in Self-Defence* (2005) 5.

66 UK Attorney-General's Statement to House of Lords (21 April 2004) *Lords Hansard* col 371 <http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_spmin0>.

67 G Simpson and N Wheeler, 'Preemption and Exception: International Law and the Revolutionary Power' in T J Biersteker et al (eds), *International Law and International Relations: Bridging Theory and Practice* (2007) 111.

distribution of rights.[68] No longer a universal right to use force when attacked, it becomes a right subject to expansion when the Great Powers, or large regional powers, act in the name of security, or international community or democracy, and contraction when less virtuous or powerful states (say, Iran, or Vietnam in 1979) claim to employ it as part of their repertoire of sovereign rights. The elasticity of the language used makes this tendency less visible than it might otherwise be. It becomes possible both to justify and condemn virtually every act. Thus, even relatively sophisticated articulations of the self-defence norm, such as those found in the Chatham House statement, rely on open-ended phrases like 'each case will necessarily turn on its facts' or 'depending on the circumstances …', and on subjective references to 'good faith'.[69]

To conclude, the law of self-defence is a painfully constructed abstraction. It embodies an effort to constrain war through law while at the same time permitting wars in the name of (self-judged) sovereign rights.[70] It purports to yield generalisable norms of behaviour and yet has been regularly interpreted to support expansive readings where elite powers use defensive force and restricted readings where outlier states respond to perceived aggressions. The law of self-defence is a conversation between legal pacifism (or abolitionism), sovereign vanity and self-preservation, and the sense that justifications for defensive force turn, to an extent, on the virtuousness of those employing this form of force. This latter turn was evident in the Howard government's approach to the Iraq War where, as Robert Manne has put it: 'the line between self-defence and aggression had become hopelessly blurred'.[71]

VI. Security, Humanity

The Iraq War turned on two matters other than self-defence namely, collective security and the idea of a war for humanity. The criminalisation of aggression, too, is dogged by the need to reckon with and accommodate security and humanity.

Along with self-defence, Security Council-authorised uses of force represent the other uncontroversial exception to the prohibition on non-consensual uses of armed force between states.[72] Indeed, the UN founders in San Francisco envisaged the eventual eclipse of self-defence altogether as the Council took full responsibility for international security. In fact, the reverse occurred, at least

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68 G Simpson, *Great Powers and Outlaw States* (2004).

69 Chatham House, above n 65, 7-8.

70 The ICJ has cast some doubt on this in *Oil Platforms* where the Court rejected the US argument in this case that there is a 'measure of discretion' when undertaking good faith evaluations of essential interests, *Oil Platforms Case (Islamic Republic of Iran v United States)* [2003] ICJ Rep 124 [73]; reprinted in (1999) ILM 38. For the Court, such evaluations were not a matter of subjective tests [43] but law.

71 R Manne, 'Explaining the Invasion' in R Gaita (ed), *Why the War Was Wrong* (2003) 22.

72 The use of force by invitation of the host government is deemed to be lawful. See *Case Concerning Armed Activities on the Territory of the Congo, Merits (Democratic Republic of the Congo v Uganda)* ICJ Judgment of 19 December 2005, General List No 116 (*Congo Case*) [42]-[54] for an interesting discussion of consent or invitation in this context.

initially. By the turn of the century, scholars such as Michael Reisman were calling for expanded forms of unilateralism to compensate for the moribund nature of the collective security order.[73]

This security order, articulated in Chapter VII of the Charter, was based on the assumption that the Council, upon finding that a threat to the peace, breach of the peace or act of aggression had occurred (Article 39), would take measures (first provisional (Article 40) then coercive (Article 41) and finally military (Article 42)) to restore or maintain international peace and security. These 'measures' might be effected by a state or group of states acting with the authorisation of the Council, or, in the case of military force, under Article 42, the UN's own would-be standing army (to be established under a UN Staff Command in Article 43-47) might deploy to confront an aggressor state. President F D Roosevelt believed that this system would work best where the Great Powers acted in concert to regulate or discipline a largely disarmed world (this was the 'Four Policemen' model).

A law of unintended consequences began to operate almost immediately. Prior to the Gulf War in 1991, US-Soviet strategic rivalry paralysed the Council and meant that a UN standing army could not be created. The Council authorised various activities but these were either exceptional Chapter VII interventions (in Korea in 1950) or consent-based peace-keeping activities not even envisaged by the drafters of the Charter (Congo, 1960; Kosovo, 1999).

The Iraq wars may be regarded in retrospect as a crisis for collective security but it was an opportunity, too. In 1991, the Security Council authorised, in Resolution 678, collective action to expel the Iraqi army from Kuwait. A coalition of largely Western forces, acting in combination with the Kuwaitis, launched a successful and brief war against Iraq. This was the Charter's paradigm case of collective action: perhaps its only one. Saddam Hussein's Iraq was the Charter enemy from central casting. The Charter had, after all, been designed around the idea that there would be no repeat of the inaction of the League in the face of the insidious inter-war aggressions of middle powers (Italy in Abyssinia, Japan in Manchuria). It was this inaction that was thought to have emboldened Hitler (this explains the talk of appeasement in relation to Iraq). Saddam's Iraq precisely was a middle power: weak enough to be overborne in a brief war but powerful enough to pose as a plausible threat to international peace and security.

The Iraq 2003 and Kosovo 1999 interventions presented, also, quite different and rather unexpected problems for collective security. Up until this point, disagreement turned on the desirability of collective security and, in a less visible debate, on the extent of the Security Council's powers under the Charter. Few questioned whether the Council had authorised war in 1950 or in 1994 or in 1991. It seemed clear that a combination of the appropriate voting pattern and language (the Council invariably referred to using 'all necessary measures' in resolutions authorising war) would activate a right to intervene. The Kosovo War though, raised two further, unexplored, possibilities. First, could a sequence of resolutions

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73 W M Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process' (2000) 11(1) *European Journal of International Law* 3.

characterising a situation as a threat to the peace, but not giving explicit authorisation to use force, be interpreted as an implicit authorisation? Second, might it be the case that an intervention illegal under the rules of the UN Charter could still be deemed legitimate because of some combination of necessity (ie, the necessity to end a humanitarian catastrophe) and Security Council condemnation or censure of the offending state? For the time being, it is premature to say that a doctrine of implicit authorisation has emerged from only a handful of cases,[74] particularly given the opposition of China and Russia to this interpretation of the resolutions passed shortly before the Kosovo War in 1999. Legitimacy, too, is underdeveloped[75] as a norm capable of explaining or justifying interventions. [76]

In the case of the 2003 Iraq War, the problem was one of interpretation rather than doctrine. The collective security argument for the war, articulated in the Joint Memorandum from the Commonwealth Attorney-General's Office and the Department of Foreign Affairs and Trade (DFAT), turns on the existence of a resolution (678) expressly authorising war (but passed in 1991) and allegedly revived by a later resolution (1441) passed in October 2002. What lawyers, and its fair to say many politicians, argued over was the form of words contained in Resolution 1441. The Howard government argued that since this resolution had afforded Iraq 'a final opportunity' to comply with earlier resolutions and avoid a serious breach of its obligations, and since Iraq had failed to take the opportunity and had continued to be in serious breach, Australia had been authorised by the Council, prospectively, to take action on 20 March, 2003. Put in different terms, the original authority contained in Resolution 678 had been revived by the failure to comply with Resolution 1441. The French position (shared to an extent by the Russians, the Chinese and many international lawyers) was that Resolution 1441 contained no 'automaticity' and, indeed, required the Council to reconvene to consider Iraq's behaviour. This, and the UN's repeated reference to its prerogatives on the question of Iraq, made any unilateral action by a small group of Council members acting without a specific, explicit and contemporaneous resolution, unlawful.

The intensely contested nature of the Iraq War, and collective security in general, can be explained partly by the existence of the three models of law and war discussed in this article. Legalists concerned with the integrity of the Charter and the need to preserve the constraining power of law have worried that Council activism has strayed into areas where the Council has no writ or where the Council has become a tool to promote hegemonic ends through war (eg, De Villepin). Sovereigntists, meanwhile, have encouraged the Council to act in cases where state

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74 House of Commons Select Committee on Foreign Affairs, 2000,Fourth Report at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2813.htm>.

75 Franck, above n 48 is a notable exception.

76 Eg, a Whitehall spokesman was quoted as saying, in relation to the proposed invasion of Iraq: 'What will be important is that what we are being told to do has legitimacy. Legitimacy can derive not just from a UN mandate. Lawful and legitimate are not necessarily the same thing', R Norton Taylor, 'Threat of War: Blair to Order Invasion This Month: Tanks Will Form the Core of British Contingent' *The Guardian* (8 October 2002) 12.

security is threatened, but have been less enthusiastic about more muscular or programmatic forms of intervention to promote human rights or counter-terrorism (eg, Bush I). Finally, there is a humanitarian-aspirational camp that views the Council as a vanguard organ capable of pursuing all sorts of designs for enlarged security or humanity or peace (eg, Downer, Blair, Bush II).

These threads have come together over the difficult question of humanitarian intervention: a norm enthusiastically endorsed by a previous Foreign Minister, Gareth Evans, and implicitly endorsed by Alexander Downer. To what extent should the international community protect vulnerable populations located in oppressive states? This is an ancient question; Grotius and Suarez were each engaged with it and it has re-emerged at different points in the history of international law. In the 1970s, international law academics debated the desirability of unilateral humanitarian interventions and developed 'criteria' for interventions (scale of suffering, likelihood of success, duration and scope of intervention and so on). Cases of possible humanitarian interventions were discussed (Bangladesh 1971, Cambodia 1979) and the development of a customary right of intervention was mooted. Scholars disagreed and then they lost interest.

Twenty years later the Security Council intervened to protect civilians in Mogadishu. This, though, ended badly and there was no significant intervention in the Rwandan genocide. Humanitarian intervention had become a troubling idea. The Security Council had the power to authorise interventions along these lines but, commonly, lacked the will. States acting unilaterally sometimes possessed the inclination but lacked legal authority to intervene. Meanwhile, argument raged between those eager to engage in wars for humanity,[77] those who were worried that this would be a cover for new variants of hegemony, those who continued to hold on to the idea that sovereignty remained a barrier to such interventions and those who believed that concerns about humanity were fraudulent (as Carl Schmitt put it: 'he who invokes humanity cheats').[78]

In 2000, the International Commission on State Sovereignty, a Canadian-sponsored group of elite policy-makers and lawyers, published a document outlining a 'Responsibility to Protect'.[79] This idea received further elaboration and status in the Secretary-General's High-Level Panel on Threats, Challenges and Change in 2004 and was endorsed by Kofi Annan himself in his major reform statement, *In Larger Freedom*.[80] The doctrine is grounded in two uncontentious propositions and two more novel formulations. Advocates of a responsibility to protect argue that sovereign states have a duty to protect the human rights of their own citizens (this seems self-evident given the slew of human rights conventions to which states have signed up) and that the Security Council has a right to authorise humanitarian interventions to protect acutely vulnerable people (this, too, is unremarkable given the language of Chapter VII and, in

77 Blair, above n 31.
78 C Schmitt, *The Concept of the Political* (trans G Schwab) (1996).
79 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) <http://www.iciss.ca>.
80 Above n 64.

particular, Article 39). These two norms, of course, give no protection at all to the victims of Rwandan or Guatemalan-style genocides. They are the victims of pathological sovereign states (their own sovereign state) and passive international organisations. The High-Level Panel, then, suggests two supplementary norms. The first provides a duty or responsibility on the part of the international community to take action against states. In particular, the Security Council is required to engage in a policy analysis, guided by a normative framework, not unlike that developed by the 1970's scholars discussed earlier. The second norm, barely adverted to, might permit states to act unilaterally where there has been no response from either the host state or the responsible international organisation.

This 'responsibility to protect' norm is preoccupying international lawyers at present precisely because it draws together the three thematics that form the core thesis of this essay. It negotiates with a legalist-pacifism that wants to constrain force through law and forbid uses of force whose justification is derived from supervening and highly-contested notions of humanity. It offends a sovereign-centrism that insists on the inviolability of borders and is suspicious of the motives and intentions of the Great Powers. And, finally, it advances a programmatic, cosmopolitan conception of community, and furnishes that community with reasons and justifications for using military violence to advance or protect its key values. This is the very stuff of the *ius ad bellum* and represents the past, present and future of collective security. It is there in the various positions adopted by the Howard government (the bureaucratic effort to define 'aggression', Howard's 'self-interest' doctrine and Downer's argument for humanitarian wars).

VII. Conclusion: Arguing about War

Law and force in the twenty-first century will be shaped to some extent by technological developments (computer-attacks, new weaponry, soldier-robots), environmental transformations (the much discussed resource wars over oil, water and minerals) and political pathologies (the decline of reflective democracy in Western industrialised nations, the rise of a post-democratic Russia, the increasing military assertiveness of an economically-emboldened China). However, there is an equally significant terrain of language and law that will determine how wars are understood and when they might be fought. At the beginning of the twenty-first century, it might be said that war has been abolished or that the abolitionist tendency has prevailed over Martin Wight's domain of eternal recurrence and repetition. But this is not the legalist-utopian-pacifism with which one branch of international law will always be associated. Instead, this termination is a linguistic, rhetorical and juridical turn embedded in the practice of war and the repositioning of international legal and political institutions (most notably the UN). At one level, war as a method of control has been displaced by political, economic and cultural hegemonies. To adapt von Clausewitz, force is the continuation of war in new languages.[81] In some of our linguistic and institutional practices, war has become peace. Previously (in some respects) oppositional, the language of peace has

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81 C von Clausewitz, *The Political Purposes of War*, Basic Texts in International Relations (Evan Luard ed, 1992).

displaced entirely the language of war. The international community now deploys its military forces in peace-keeping, peace-building, peace-enforcement and so on. Australia will, meanwhile, no longer fight wars but instead engage in what Carl Schmitt called 'pest control' (usually termed anti-insurgency operations or counter-terrorism).

It has always been the case that such wars have been justified as exceptions to the prohibition on the use of force. Increasingly though, the policing wars of the contemporary era could be regarded, as having transcended the prohibition altogether. Pacifism, sovereignty and humanity are conjoined in a legal order dedicated to abolishing wars by fighting them.

The Howard government's approach to war – idiosyncratic (the Howard doctrine) and contradictory (Iraq and the ICC) by the lights of conventional international law – is not so unusual or inexplicable viewed from the perspective of those same critical approaches to law that are sometimes regarded from within government as over-theorised or out of touch.[82]

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82 This is changing. I recall, a decade ago, a senior lawyer telling me that no-one practising international law in government could have any use for Martti Koskenniemi's *From Apology to Utopia* (above n 18). It is now a sort of critical theory urtext among most thoughtful, young, practising international lawyers. This is probably because it makes so much more sense than, say, Ian Brownlie's *Principles of Public International Law* (sometimes usefully precise, sometimes, dare I say, a bank of fog on a clear day).