

Bond Law Review

Volume 16, Issue 2

2004

Article 1

Humanitarian Intervention and the War in Iraq: Why was it always an After-Thought?

Andrew Field*

*Monash University,

Copyright ©2004 by the author(s). All rights reserved.

This paper is posted at ePublications@Bond University.
<http://epublications.bond.edu.au/blr/vol16/iss2/1>

Humanitarian Intervention and the War in Iraq: Why was it always an After-Thought?*

Andrew Field

Abstract

The use of force in Iraq in 2003 by the United States, Britain and Australia was justified by these states as an act of self defence, based on the threat posed to them by Iraq's possession of weapons of mass destruction and its association with terrorists. Other justifications were also raised, including those based on United Nations Security Council Resolutions, and to a much lesser extent those based on humanitarian intervention to assist the people of Iraq remove an oppressive regime. Nevertheless, self defence remained the premier justification, and one which was undermined when occupying troops in Iraq ultimately failed to discover such weapons. That evidence first cited in support of self defence was at best circumstantial raises the question why these arguments were promoted so vigorously, particularly when those based on humanitarian intervention were almost ignored in spite of them having a sound evidentiary foundation. This article argues this course was adopted because acting in self defence will generate support from an electorate to whom elected leaders are answerable and will fit within international law. In contrast, humanitarian intervention, while it also has a legitimate basis under international law, will not promote action from states unless there is some collateral benefit to those states.

KEYWORDS: humanitarian intervention, international law, Iraq war, self-defence

*The author thanks Mr Andrew Coleman, Associate Professor Robin Edwards and Mr Brendan Sweeney for their helpful suggestions in the writing of this article.

HUMANITARIAN INTERVENTION AND THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

*By Andrew Field**

Abstract:

The use of force in Iraq in 2003 by the United States, Britain and Australia was justified by these states as an act of self defence, based on the threat posed to them by Iraq's possession of weapons of mass destruction and its association with terrorists. Other justifications were also raised, including those based on United Nations Security Council Resolutions, and to a much lesser extent those based on humanitarian intervention to assist the people of Iraq remove an oppressive regime. Nevertheless, self defence remained the premier justification, and one which was undermined when occupying troops in Iraq ultimately failed to discover such weapons. That evidence first cited in support of self defence was at best circumstantial raises the question why these arguments were promoted so vigorously, particularly when those based on humanitarian intervention were almost ignored in spite of them having a sound evidentiary foundation. This article argues this course was adopted because acting in self defence will generate support from an electorate to whom elected leaders are answerable and will fit within international law. In contrast, humanitarian intervention, while it also has a legitimate basis under international law, will not promote action from states unless there is some collateral benefit to those states.

Introduction

We make war that we might live in peace.

- Aristotle (384-322 BC).¹

In this battle, we have fought for the cause of liberty and for the peace of the world.

George W Bush (1946 -)²

* BA (Hons) LLM (Monash); Lecturer, Department of Business Law and Taxation, Monash University; Barrister at Law (Vic). The author thanks Mr Andrew Coleman, Associate Professor Robin Edwards and Mr Brendan Sweeney for their helpful suggestions in the writing of this article.

1 Aristotle, *The Nicomachean Ethics of Aristotle* Book X, 1177b.

2 'President Bush Announces Major Combat Operations in Iraq Have Ended – Remarks by the President from the USS Abraham Lincoln At Sea Off the Coast of San Diego,

Between 19 March 2003 and 1 May 2003 the armed forces of the United States supported by those of Great Britain and Australia conducted operations in Iraq which led to the removal from power of the Iraqi leader President Saddam Hussein. As President of Iraq for almost thirty years, Saddam Hussein had built up a particularly negative reputation in the west.³ He was reviled as the leader of a government which not only oppressed its own people, inflicting multiple human rights violations upon them, but which also was a threat to regional stability with Iraq having made war on its neighbours, most notoriously when it invaded and occupied Kuwait in 1990. Accordingly, it might have been assumed that any operation to remove this man and his government would be greeted with general approval. However, such an assumption would be wrong. Indeed, in the months before, during, and after the Iraq war, the issue as to the legitimacy of this use of force was fiercely debated – as should have been the case⁴ - and will probably continue to be debated for a long time. There are good reasons for this.

California', Office of the Press Secretary, 1 May 2003, obtained at <http://www.whitehouse.gov> (accessed 9 September 2003).

- 3 It should be noted, however, that Saddam's fall from grace in the West only occurred after Iraq's invasion of Kuwait in 1990. Prior to this, during the 1970s and 1980s the West was frequently friendly with Iraq, most notably supplying armaments to assist Iraq in its war with Iran, the latter having become fiercely anti-American after the overthrow of the Shah. Although the United States has identified France as having been the largest supplier of arms to Iraq during this period ('Library of Congress Country Studies: Iraq – Arms From France', May 1988, available at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+iq0099\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+iq0099))), it has also been alleged that the governments of Britain and the United States spent billions of pounds covertly assisting Saddam Hussein. See David Leigh and Rob Evans, 'How £1bn was lost when Thatcher propped up Saddam', *The Guardian* 28 February 2003, available at <http://www.guardian.co.uk/international/story/0,3604,904493,00.html> (accessed 17 October 2003).

With the benefit of hindsight, this short-sighted 'flirtation' can only be viewed in terms of *realpolitik* as an exercise in perceived self interest, in which 'my enemy's enemy is my friend'. Many of the armaments delivered to Iraq during that war would presumably have found some use in the subsequent invasion of Kuwait, and then in the subsequent war in which the Iraqis were expelled from that country.

- 4 As the British Prime Minister Tony Blair said to the House of Commons when opening the debate on the decision to go to war:
'At the outset, I say that it is right that the House debate this issue and pass judgment. That is the democracy that is our right, but that others struggle for in vain. United Kingdom, *Parliamentary Debates*, House of Commons (18 March 2003), col 760. Available at <http://www.publications.parliament.uk>.

These sentiments were echoed by the Australian Prime Minister John Howard who said in parliament when opening a similar debate:

'There is no more serious decision for any government than to commit its forces to military conflict abroad. Under our system, this decision lies with the cabinet. Nevertheless, it is appropriate that the parliament, at the first opportunity, have the chance to debate this motion. It is essential that the reason for that decision be made plain to the representatives of the people and that they have a full opportunity to

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

When United States President George W Bush addressed the American people to give the reasons for the use of force, he said that the operations were being undertaken to disarm Iraq.⁵ This was building on a theme which had been repeated many times by the President. He first described Iraq as part of an 'axis of evil' in his January 2002 State of the Union address.⁶ However, by the time President Bush delivered his 2003 State of the Union address, the subject of Iraq and the threat posed to the United States by Iraq's 'weapons of mass destruction' ('WMDs') occupied almost half of his speech.⁷

The threat of these weapons was also cited by the Prime Minister of Great Britain, Tony Blair, when he informed the British people of the reasons for the commencement of hostilities. He said:

...[T]his new world faces a new threat: of disorder and chaos born of brutal states like Iraq, armed with weapons of mass destruction; or of extreme terrorist groups. Both hate our way of life, our freedom, our democracy...Should terrorists obtain these weapons now being manufactured and traded around the world, the carnage they could inflict to our economies, our security, to world peace, would be beyond our most vivid imagination.⁸

In the Australian Parliament the Prime Minister John Howard when explaining his government's deployment and use Australia's armed forces in the action also placed the issue of WMDs well to the fore.⁹

Unequivocally, the leaders of these three countries were directing their armed forces to make war on Iraq, primarily, on the basis that WMDs posed a threat to their countries. However, ambiguities which arose prior to the war regarding the strength of evidence that Iraq possessed such weapons tended to weaken this basis for going to war. Further, the failure six months after the cessation of

debate them and to have their views recorded.' Australia, *Parliamentary Debates*, House of Representatives, (Tuesday 18 March 2003), 12506.

5 'President Bush Addresses the Nation', Office of the Press Secretary, 19 March 2003. Obtained at <http://www.whitehouse.gov> (9 September 2003).

6 'The President's State of the Union Address', Office of the Press Secretary, 29 January 2002. Obtained at <http://www.whitehouse.gov>.

7 'President Delivers "State of the Union"', Office of the Press Secretary, 28 January 2003. Obtained at <http://www.whitehouse.gov>.

8 'Prime Minister's Address to the Nation', 20 March 2003. Obtained at <http://www.number-10.gov.uk>.

9 Australia, *Parliamentary Debates*, House of Representatives (Tuesday 18 March 2003), 12505.

hostilities of the United States' Iraqi Survey Group to find any WMDs has made this reason for going to war appear spurious at best.¹⁰

That clear and unambiguous evidence supporting the allegations failed to materialise quickly after the war prompts the question as to why the United States, supported by Britain and Australia, chose to rely on the threat posed by Iraq's WMDs. Although the threat posed by WMDs – and therefore self defence – was placed at the apex of reasons for making war on Iraq, there were at least three possible justifications adverted to. First, self defence; secondly, implementation of certain resolutions of the United Nations Security Council authorising the use of force; and thirdly, an act of humanitarian intervention to assist the people of Iraq.¹¹

The purpose of the article is to assess the arguments as to why the first of these justifications was given priority over the others, when perhaps the last had greater credibility and could better withstand – or at least face – scrutiny under international law.

Self Defence

This is the best omen, to fight in defence of one's country

Homer (8th Century BC), *The Iliad*.¹²

That self defence was placed at the forefront of the United States' reasons for making war on Iraq should not have come as a surprise. Eighteen months earlier, the United States itself had been subjected to armed attack.

On the morning of Tuesday 11 September 2001, four passenger aircraft were hijacked by members of the terrorist organisation Al Qaeda. Two of the aircraft, Boeing 767s, departed Boston bound for Los Angeles. However, the terrorists having taken control of the fuel laden aircraft soon after take off diverted them to New York where they were crashed into the twin towers of New York's tallest building, the World Trade Centre. Both towers collapsed within 2 hours, before they could be fully evacuated. At about the same time, two Boeing 757s were also hijacked, one which had taken off from Newark, N.J, and the other from Dulles Airport, Washington DC, both also bound for the west coast. One of these aircraft was diverted by the terrorists back to Washington where it was crashed into the United States Department of Defence building, the Pentagon. On board the other aircraft, the passengers were made aware (via mobile telephones) of the fate of the

10 Roy Eccleston, 'Furore at weapons hunt failure', *The Weekend Australian*, 4-5 October 2003, 11.

11 President Bush (above notes 5, 6 and 7), and Prime Ministers Blair (above note 4) and Howard (above note 4) each noted these justifications.

12 Book 16, 1.776.

World Trade Centre. Realising their situation, they elected to attempt to reassert control of the aircraft. They were successful in so far as the aircraft failed to reach the terrorists' planned destination, the aircraft crashing into a less populated zone 130 miles from Pittsburgh, Pennsylvania. All on board were killed.¹³ The destruction of the World Trade Centre occurred in full view of an American and global television audience of millions. At the time it was estimated that these attacks claimed a toll of over 6,000 dead.¹⁴

Undoubtedly, the climate of public opinion was geared towards self defence and retaliation against the attackers. However, what does retaliation against a non-state terrorist organisation have to do with the war with Iraq? Indeed, when it is noted that Afghanistan was identified as the location of the Al Qaeda leadership the question is accentuated. The answer is that by linking Iraq with the terrorist attacks, the use of force could theoretically be employed against Iraq in a manner less open to dispute and consistent with the United Nations Charter. Hence the language of 'self defence' and the broad description of a 'War on Terror'.

a) *The United Nations Charter and Self Defence*

The circumstances where force can be utilised by one state upon another are extremely limited under the United Nations Charter. This was, after all, the Charter adopted at the end of the mass carnage which was the Second World War, specifically to 'save succeeding generations from the scourge of war'.¹⁵ Thus, the prohibition on the use of force found in Article 2(4), states:

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 manner inconsistent with the purposes of the United Nations.¹⁶

The words of Article 2(4) of the Charter are well known and often repeated. Reflecting the principle of state sovereignty, they are the words which impose a general prohibition on the use of force by one member nation against another. They have been described as

outlawing any transboundary use of military force, including force justified by reference to the various doctrines developed in the pre-Charter era of

13 Information gathered from various reports in *Time* 24 September 2001, and *The Age* 12 & 13 September 2001.

14 Harriet Barovick, et al, 'For the Record', *Time*, 1 October 2001, 19.

15 Preamble, *Charter of the United Nations* (1945), reproduced in Louis Henkin et al (eds), *Basic Documents to Supplement International Law: Cases and Materials* (2nd Ed, 1987), 99.

16 Ibid.

forcible self help, reprisal, protection of nations, and humanitarian intervention.¹⁷

This is a strongly 'legalist' reading which views the Charter as a fundamental and inviolate piece of international law. In so far as there is great debate as to the continued existence of certain 'pre Charter era doctrines', such as that of Humanitarian Intervention, for example, such a reading of Article 2(4) is open to dispute.¹⁸ However, in establishing any legal case for the use of force, it is far preferable to be able to argue in terms which are not disputed, and minimise as much as possible allegations of violating international law. This would be uppermost in the deliberations of any national governments contemplating the use of force.

The terms of the Charter set down two situations where the use of force might be allowed. The first of these is pursuant to United Nations authority under Chapter VII of the Charter (discussed below). The second is pursuant to Article 51 which commences with the words:

Nothing in the present charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the United Nations...¹⁹

The right of self defence is 'inherent', not created by the Charter but (introducing an interesting contradiction with the 'legalist' reading of Article 2(4)) a pre-Charter era right or doctrine merely recognised in the Charter.

b) *The 'War on Terrorism'*

How the United States would exercise its right of self defence was suggested when on the evening of 11 September, President Bush addressed the American people. In a speech in which he first described the 'war on terrorism', he said:

The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbour them.²⁰

17 Sean D Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', (2002) 43 *Harvard International Law Journal* 41, 42.

18 For a discussion of this debate, see Andrew Field, 'The Legality of Humanitarian and the Use of Force in the Absence of United Nations Authority', (2000) 26 *Monash University Law Review* 339.

19 UN Charter, above note 4.

20 'Statement by the President in His Address to the Nation', 11 September 2001, obtained at <http://www.state.gov/coalition/cr/rm/2001/5044.htm> (accessed 5 October 2003).

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

This has since been identified as the ‘Bush Doctrine’.²¹ It was endorsed in almost identical terms in resolutions of both the United Nations General Assembly and Security Council,²² and when it was determined that Afghanistan was the ‘headquarters’ (in so far as they existed) of Al Qaeda, the Doctrine provided the basis for the invasion of that country and the ousting of the Taliban regime which governed there. In the process, these actions addressed the question whether an attack staged by terrorists who do not act for a state constitutes an ‘armed attack’ for the purposes of Article 51.²³ The judgment of the International Court of Justice in the *Nicaragua Case* clearly indicated that such a use of force did not constitute an ‘armed attack’.²⁴ However, the adoption of the Bush Doctrine by the United Nations appears to have overridden that view and suggested an answer in the affirmative. Amidst the ambiguities attaching to unidentified individuals attacking one state without the authority of another state, it would appear that the difficulty of identifying the enemy state was swiftly dealt with.

And yet, even after the identification of Afghanistan as the source of the major Al Qaeda threat, the description ‘War on Terrorism’ continued to be used. The expression might have been initially employed on 11 September owing to uncertainty as to the identities of the terrorists. However, the ambiguity in description and its failure to identify a specific enemy left open the possibility that many states could be the havens of terrorists – and subject to the Bush Doctrine and the application of the right of self defence recognised by the United Nations.²⁵

This is one reason why the events of 11 September were relevant to the war on Iraq. Indeed, any ambiguity in this thesis was dispelled when, after the defeat of the Taliban, President Bush stated in his 2002 State of the Union address that ‘our war against terrorism is only beginning’. In that speech he then identified an ‘axis of evil’ which included Iraq. In subsequent statements over the following year, further claims were made linking Iraq with the Al Qaeda terrorists, by

21 ‘The Bush Doctrine is the assertion that nations harbouring terrorists are as guilty as the terrorists themselves’. Benjamin Langille, ‘It’s Instant Custom: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001’, (2003) 26 *Boston College International and Comparative Law Review* 145, 146.

22 ‘[T]hose responsible for aiding, supporting or harbouring the perpetrators organisers and sponsors of such acts will be held accountable’. S/Res 1368 (2001).

23 See Murphy, above note 6.

24 ‘But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states’. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJR 14 at [195].

25 For a discussion of the language employed during the ‘War on Terrorism’ see Tawia Ansah, ‘War: Rhetoric & Norm Creation in Response to Terror’, (2003) 43 *Virginia Journal of International Law* 797.

President Bush²⁶ and his Secretary of Defense Donald Rumsfeld.²⁷ Finally, just over a month before the commencement of the war in Iraq the United States' Secretary of State Collin Powell addressed the UN Security Council and described a 'sinister nexus' between Iraq and Al Qaeda. He said:

Iraq today harbours a deadly terrorist network headed by Abu Musab al-Zarqawi, an associate of Osama bin Laden and his Al Qaeda lieutenants...Those Al Qaeda affiliates based in Baghdad now coordinate the movement of people, money and supplies into and throughout Iraq for his network, and they have now been operating freely in the capital for eight months. Iraqi officials deny accusations of ties with Al Qaeda. These denials are simply not credible....²⁸

Powell's discussion of the Al Qaeda link with Iraq occupied a substantial portion of his address and undoubtedly, it formed part of an attempt to bring Iraq within the terms of the Bush Doctrine and therefore the use of force against Iraq within the terms of war on terrorism and America's act of self defence.

With the benefit of hindsight it can now be seen unambiguously that this strategy was flawed. At the time the claim of a connection was first advanced, doubts were raised as to the evidence presented. Even British Prime Minister Tony Blair was muted when he said almost two months before the war:

Whenever I am asked about the linkage between Iraq and Al Qaeda, the truth is there is no information I have that directly links Iraq to September 11. If I can be absolutely frank with you, there is some intelligence evidence about loose links between Al Qaeda and various people in Iraq, but I think that the justification for what we are doing in respect of Iraq has got to be made separately from any potential link with Iraq.²⁹

26 'The regime has long standing and continuing ties to terrorist organisations. And there are Al Qaeda terrorists inside Iraq.' – President Bush quoted in 'President Bush Discusses Iraq with Congressional Leaders', Office of the Press Secretary, 26 September 2002, obtained at <http://www.whitehouse.gov> (accessed 5 October 2003).

27 'If you are asking me whether there are Al Qaeda in Iraq, the answer is yes, there are. It's a fact.' – Donald Rumsfeld, quoted in Terry Moran and Martha Raddatz, 'Making the Case', obtained at <http://www.abcnews.com/sections/us/DailyNews/Iraqpolitics020926.html> (accessed 5 October 2003).

28 Security Council Meeting Record S/PV.4701, Wednesday 5 February 2003, 14-15, obtained at <http://www.un.org/Depts/dhl/resguide/scact2003.htm> (accessed 7 October 2003).

29 Select Committee on Liaison, Minutes of Evidence, Examination of Witnesses, Tuesday 21 January 2003, Question 2. Obtained at http://www.parliament.uk/parliamentary_committees/liaison_committee.cfm (accessed 1 October 2003).

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

When United States and British troops were moving across Iraq in March and April 2003, evidence uncovered of such a link was meagre.³⁰ Finally, many months after the war, when United States Secretary of Defense Donald Rumsfeld was asked (again) whether there was a link between Iraq and the events of September 11, he responded:

I've not seen any indication that would lead me to believe that I could say that.³¹

Accordingly, this basis for using force against Iraq under the right of self defence, although it possessed the attraction of falling within what appeared to be an accepted reading of the UN Charter, failed because its evidentiary foundation was not made out.

c) *Pre-emptive self defence*

Undoubtedly, the most strongly argued justification for using force against Iraq as a matter of self defence was based on the threat posed by WMDs allegedly possessed by Iraq. The concern was one which had grown most appreciably after the Gulf War of 1990/1991 when Iraq's invasion of Kuwait brought its WMDs program to western attention. However, there was also evidence dating from the 1980s that Iraq had used chemical weapons not only in war against its neighbour Iran,³² but also against insurgent Iraqi nationals, specifically Kurdish peoples.³³ The allegation was not only that Iraq had possessed the weapons (which was not in dispute), but that Iraq still possessed the weapons, and that it was willing to use them. In other words, it was being argued that the inherent right of self defence included the right to act pre-emptorily before an expected WMD attack.

This was the substance of US Secretary of State Colin Powell's 5 February 2003 address to the UN Security Council referred to above, which drew both on intelligence obtained by the United States and on information gathered by UNSCOM (the United Nations Special Commission). In an address which focused on Iraq's lack of co-operation with UNSCOM inspectors (discussed below), Powell also presented figures detailing massive amounts of biological weapons (ie '8,500 litres of anthrax, but UNSCOM estimates that Saddam Hussein could have produced 25,000 litres'), chemical weapons (ie '...between 100 and 500 tons of chemical weapons agent...enough agent to fill 16,000 battlefield rockets'), and the destructive potential of these weapons when handed over to terrorists such as Al

30 'Doubts over Iraq links to al-Qaeda', *The Age*, Wednesday, 30 April 2003.

31 Robert Burns, 'Rumsfeld sees no link between Iraq, 9/11', *The Guardian*, Wednesday 11 September 2003, obtained at <http://www.guardian.co.uk> (accessed 5 October 2003).

32 See 'Library of Congress Country Studies: Iraq', at <http://www.loc.gov>. (accessed 4 December 2003).

33 Robert D Kaplan, *The Coming Anarchy: Shattering the Dreams of the Post Cold War* (2000) 61.

Qaeda.³⁴ To bring home the threat posed by these volumes of material, Powell pointed out how a mere teaspoon of dry anthrax in an envelope had in the Fall of 2001 (soon after the 11 September attacks) shut down the United States Senate, forced hundreds of people into medical treatment and killed two people.³⁵

The British Government also placed most of the weight of its self defence justification for using force on WMDs, firstly, as detailed in the September 2002 'dossier' entitled *Iraq's Weapons of Mass Destruction*,³⁶ and finally when Tony Blair addressed the House of Commons on the outbreak of hostilities. At that time, he said:

When the inspectors left in 1998, they left unaccounted for 10,000 litres of anthrax; a far-reaching VX nerve agent programme; up to 6,500 chemical munitions; at least 80 tonnes of mustard gas, and possibly more than 10 times that amount; unquantifiable amounts of sarin,³⁷ botulism toxin and a host of other biological poisons; and an entire Scud missile programme.³⁸

Was this sufficient to justify a pre-emptive attack which would sit within the right to self defence?

Most discussions dealing with the legality of pre-emptive self defence commence with the dispute involving *The Caroline*.³⁹ This was the 1837 dispute between Britain and the United States in which British soldiers attacked the civilian vessel, the *Caroline*. The *Caroline* was being used by Canadian rebels to transport arms from the United States into Canadian territory to be used by Canadian rebels in attacks against their government. At the time of the attack, the ship was situated in United States waters off Fort Schlosser in New York State. Thus, the Canadian attack on the vessel was an incursion into the territory of another state. The *Caroline* was destroyed, set on fire and swept down Niagara Falls. Some of her crew were also killed. In view of the fact that no attack had been launched from the ship prior to this 'defensive' attack, the question arose as to whether the

34 See n28 above, 8, 10.

35 To a slightly narrower but more literate audience, the threat posed by these statements would also have been horrifying. See, for example, for an readily available introduction to developments in the field of 'germ warfare', and specifically what has been done to make disease inducing agents such as small pox, anthrax and the Marburg virus more 'suited' to warfare Richard Preston, 'The Bioweaponers', *The New Yorker*, 9 March 1998, 52 (interview with former Soviet germ warfare scientist now based in United States); Richard Preston, 'The Demon in the Freezer', *The New Yorker*, 12 July 1999 (deals with latest developments in delivery of small pox bacteria).

36 *Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (September, 2002), Obtained at <http://www.pm.gov.uk> (accessed 8 October 2003).

37 A nerve attacking agent.

38 Above note 4, at col 762.

39 See discussion in R Y Jennings, 'The Caroline and McLeod Cases', (1938) 32 *American Journal of International Law* 82.

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

British action was legitimate. However, the United States Secretary of State, Daniel Webster, eventually settled the matter determining that what occurred was based on 'a necessity of self defence, instant and overwhelming, leaving no choice of means and no moment for deliberation' and that the Canadian authorities did nothing 'unreasonable or excessive'.⁴⁰

Over a hundred years later, this was still accepted as a rule of customary international law when adopted by the International Military Tribunal at Nuremberg in 1945, although it was found not to apply on that occasion. Raised in that forum by the German defendants to justify the invasion of Denmark and Norway as an act of self defence, the argument was rejected by the Tribunal as it determined that any threat from Britain to attack Germany via these countries was neither certain nor imminent.⁴¹

In more recent times, there have been doubts expressed about this right of pre-emptive action, based primarily on the statement in Article 51 that the right of self defence arises 'if an armed attack occurs'.⁴² For example, in a statement signed by a number of Australian jurists published a week before the Iraq war, it was stated:

A principle of pre-emption would allow national agendas to destroy the system of collective security contained in Chapter VII of the UN Charter and return us to the pre-1945 era where might equalled right. Ironically, the same principle would justify Iraq now launching pre-emptive attacks on members of the coalition because it could validly argue it feared an attack.⁴³

And yet, even this statement also notes that when the legitimate right of self defence is exercised, it must only be so where the threat is 'actual or imminent'. What is meant by 'imminent'? Whatever the word means, it clearly does not mean that an attack has already occurred. The deployment of force adverted to in this statement is pre-emptive.

40 Ibid, 10. Quoted in Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', (2003) 4 *San Diego International Law Journal* 7, 13.

41 *Judgment of International Military Tribunal for the Trial of the Major War Criminals, Nuremberg*, 30 September 1946, available at <http://www.yale.edu/lawweb/avalon/imt/proc/jedgen.htm> (accessed 5 October 2003).

42 For a survey of the views 'for and against' see Jordan J Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', (2002) 35 *Cornell International Law Journal* 533 at 537, note 15.

43 Don Anton et al, 'Howard Must Not Involve Us in an Illegal War', *The Age* Wednesday 26 February 2003, 17.

Michael Greenwood in a recent article has suggested that to be legitimate, this quality of imminence requires a consideration of two factors.⁴⁴ The first is that the threat must be sufficiently grave. This might be satisfied where the threat is that posed by a nuclear weapon, or a biological or chemical weapon. In other words, a threat posed by WMDs. Examples of pre-emption being employed to counter such a threat include the United States blockade of Cuba in 1962 during the missile crisis, or the strike by Israel on a nuclear facility in Iraq in 1981.⁴⁵

The second factor is a consideration of the method of delivery of this threat. Obviously, more antiquated methods of delivering an attack allow a greater opportunity to assess, prepare and react to it. For example, the gradual massing of German armed forces along the border of the Soviet Union in 1941 provided an unambiguous precursor to invasion, observed and assessed for some time by Soviet intelligence agents in their reports (although these were then largely ignored by the Soviet leader, Joseph Stalin).⁴⁶ However, in the modern age where intercontinental ballistic missiles have existed since the launch of the Soviet satellite Sputnik in 1959, and the threat of attack by WMDs can be minutes away, the possessor of such technologies presents far greater potential to deliver an imminent attack. The problem, as Greenwood writes, is '[i]t is far more difficult to determine the time scale within which a threat of attack by terrorist means would materialise than it is with threats posed by, for example, regular armed forces'.

In the case of the Iraq War, however, where the difficulty arises is not in the acceptance of the rule of customary law. It arises, firstly, in regard to the scope of the rule. Consider the examples noted above. When the United States enforced a blockade against Cuba in 1962, there was no overt attempt to violate Cuba's territorial integrity. Similarly, when Israel bombed the Iraqi nuclear facility in 1981, beyond this 'hit and run' strike, there was no further attempt to violate the sovereignty or territorial integrity of Iraq.⁴⁷ Clearly, in using force to occupy Iraqi territory and remove its government any attempt to argue justification on the

44 Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', (2003) 4 *San Diego International Law Journal* 7, 16.

45 For a brief discussion of these examples of pre-emptive self defence, see Patrick McLain, 'Settling the Score with Saddam: Resolution 1441 and Parallel Justification for the Use of Force Against Iraq', (2003) 13 *Duke Journal of Comparative and International Law* 233, 270.

46 Indeed, Stalin's surprise at the German invasion provides a further graphic example as to how the personalities of a state's leaders can effect how they react in the face of a clear threat. Stalin's first reaction to the German invasion was to hid away for a fortnight. Isaac Deutscher, *Stalin*, (1986), 451-452.

47 This has led to a suggestion, therefore, that perhaps that use of force did not actually violate Article 2(4) of the UN Charter as it was not actually a 'use of force against the territorial integrity or political independence of Iraq', to use the words of Article 2(4). See Anthony D'Amato, 'Israel's Air Strike Upon the Iraqi Nuclear Reactor', (1983) 77 *American Journal of International Law* 584, 584.

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

basis of pre-emptory self defence is clearly taking the rule much further than has previously been the case.

The second difficulty is more basic. In the final analysis, it was the way events played out and the way evidence failed to materialize which undermined this justification. As has been noted elsewhere,⁴⁸ the imminent downfall of the government of Saddam Hussein under pressure from the armed incursions into Iraqi territory of British and American troops was as clear a provocation as could be imagined to seeing the use by Iraq of its most deadly weapons. And yet, there was nothing; no deployment of such weapons. Add to this the clear and admitted failure – even after six months of American occupation of Iraqi territory – to discover evidence of stockpiles or active production facilities for WMDs and the basis for an action of pre-emptory self defence as argued by the belligerents is severely damaged.⁴⁹ There was clearly no ‘imminent threat’ posed by Iraq, because there would appear to have been no weapons with which to threaten the west.

And yet, before moving on from this failed justification, it is nevertheless important to recall the words of British Foreign Secretary Jack Straw when he addressed the UN Security Council on this issue of pre-emptory self defence. When recalling the global experience in the 1930s, he said:

At each stage, good men said, ‘Wait. The evil is not big enough to challenge’. Then, before their eyes, the evil became too big to challenge. We slipped slowly down a slope, never noticing how far we had gone until it was too late.⁵⁰

This statement of Mr Straw is a difficult one to dismiss. To wait for an unambiguously imminent threat from a belligerent state before acting – as the current state of the law appears to prescribe – is to ignore its warning. Although dealt a sharp blow by its flawed deployment in the Iraq War, the issue of pre-emptive defence is clearly one which will be returned many times before it is settled in any satisfactory way.

Use of Force Against IRAQ with United Nations Authority

UN Resolutions are like hotdogs. If you know how they make ‘em, you don’t want to eat ‘em. You just swallow. No questions asked.

Unnamed United States delegate (late 1990s).⁵¹

48 Mirko Bagaric and James McConvill, ‘The War on Iraq: The Illusion of International Law? Where to Now?’ (2003) 8 *Deakin Law Review* 147.

49 Roy Eccleston, ‘Furore at weapons hunt failure’, *The Weekend Australian*, 4-5 October 2003, 11.

50 Above n 28, 20.

51 Quoted in Linda Polman, *We Did Nothing: Why the Truth Doesn’t Always Come Out When the UN Goes In*, (2003), i.

In addition to basing the war in Iraq on self defence, it was also argued that it was not only justified on the basis of a series of United Nations Security Council resolutions, but also authorised by them. The attractiveness of this argument was, of course, that another valid exercise of the use of force against the sovereignty of another state is where it occurs under the authority of the Security Council exercising its power under Chapter VII of the UN Charter, and specifically under Article 42.⁵² However, these arguments ultimately raised problems as well.

Iraq had been the subject of numerous significant Security Council resolutions. Going back to 1990, these included:⁵³

Resolution 660 of 1990, adopted in the wake of the Iraqi invasion of Kuwait, which condemned the invasion and demanded Iraq withdraw from Kuwait;

Resolution 678 of 1990, the groundbreaking resolution which noted Iraqi non-compliance with resolution 660 and authorised the use of 'all necessary means' to expel Iraqi forces if Iraq failed to withdraw from Kuwait before 15 January 1991:

Resolution 687 of 1991, which having noted the 'restoration to Kuwait of its sovereignty' and the 'military presence in Iraq' of other Member States, required that Iraq 'unconditionally accept the destruction, removal, or rendering harmless of chemical and biological weapons', and further neither 'develop, construct or acquire' any of those items. The resolution also authorised the establishment of a 'special commission' to carry out on-site inspections or Iraq's capabilities in these areas, with which Iraq would co-operate.

Resolution 1284 of 1999 which established a further Special Commission for the inspection of arms in Iraq (designated 'UNMOVIC'⁵⁴) to replace that created in the previously noted resolution which had encountered substantial difficulties in carrying out inspections; and

Resolution 1441, of most immediate importance, adopted in November 2002, by a Security Council '[d]etermined to ensure full and immediate compliance or restrictions with its obligations under resolution 687 (1991)'. The resolution noted that Iraq had failed to comply with the requirements set down in each of the resolutions noted above and therefore was stated to

52 Article 42 states: 'Should the Security Council consider that measure provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations'.

53 Although only four resolutions are noted here – the four specifically referred to in the preamble to Resolution 1441 – Colin Powell noted that Iraq had breached the terms of 16 resolutions prior to the adoption of Resolution 1441. See above n 28.

54 United Nations Monitoring Verification and Inspection Commission.

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

give Iraq a 'final opportunity to comply with its disarmament obligations under relevant resolutions', noting that any false statements or omissions by Iraq or failure by Iraq to co-operate with the implementation of the resolution would constitute a 'material breach'.

Did Iraq breach resolution 1441? The head of the United Nations Verification and Inspections Commission (UNMOVIC), Hans Blix, said it did.⁵⁵ Did this breach automatically authorise the use of force? United States Secretary of State, Colin Powell, was emphatic that this was a material breach within the terms of the resolution.

However, did this mean that the use of force was authorised? In Australia, when justifying its own participation in the war against Iraq, the House of Representative passed a broadly worded motion which stated:

..United Nations Security Council resolutions adopted under Chapter VII of the United Nations Charter, in particular resolutions 678, 687 and 1441, provide clear authority for the use of force against Iraq for the purposes of disarming Iraq of weapons of mass destruction and restoring international peace and security to the region.⁵⁶

In contrast, the British Parliament when it adopted its motion was more cautious. It noted that the effect of a breach of Resolution 1441 in the absence of a further resolution authorising the use of force nevertheless had the effect of 'reviving' Resolution 678.⁵⁷

55 In his oral report to the Security Council on 7 March 2003, Hans Blix said: 'Against this background, the question is now asked whether Iraq has co-operated "immediately, unconditionally and actively" with UNMOVIC, as required under operative paragraph 9 of resolution 1441 (2002). The answers can be seen from the factual descriptions that I have provided. However, if more direct answers are desired, I would say the following: The Iraqi side has tried on occasion to attach conditions, as it did regarding helicopters and U-2 planes. Iraq has not, however, so far persisted in attaching these or other conditions for the exercise of our inspection rights. If it did we would report it. It is obvious that, while the numerous initiatives that are now being taken by the Iraqi side with a view to resolving some longstanding open disarmament issues can be seen as active or even proactive, these initiatives, three to four months into the new resolution, cannot be said to constitute immediate cooperation, nor do they necessarily cover all areas of relevance.' 55 Security Council Meeting Record S/PV.4714, Friday 7 March February 2003, 14-15, obtained at <http://www.un.org/Depts/dhl/resguide/scact2003.htm> (accessed 9 October 2003).

56 See above n 4.

57 In fact this was precisely what the advice received by the Australian Government also stated. See Bill Campbell and Chris Moraitis, 'Memorandum of Advice to the Commonwealth Government of Australia', reproduced in (2003) 4 *Melbourne Journal of International Law* 178.

Are either of these discussions of international law correct? At first appraisal, this statement would appear incorrect. Nowhere did Resolution 1441 state that non-compliance would result in the use of 'armed force' to compel Iraq to comply, merely that it would place Iraq in 'material breach'. Similarly, beyond general notions of 'peace in the region', what link had the instant dispute with the expulsion of Iraq troops from Kuwait which was the subject of Resolution 678? And yet, while precise links of this kind might be sought within the terms of the resolutions, the reality is that plain language has never been a feature of UN resolutions. They are not things of art. They are not written in precise terms.

Consider, for example, Resolution 678 noted above. It was never in doubt that it was authorising the use of force to expel Iraq from Kuwait, and yet no where was this actually stated. Obviously, the use of armed force would be included in such a broad expression as 'all necessary means', but the term is general.⁵⁸ Consider, further, Resolution 687 which created the weapons inspection regime and also dealt with other matters incidental to the expulsion of Iraq from Kuwait. Upon first appraisal the resolution appears to be unusually expansive, noting at length previous resolutions Iraq had breached, and also all of Iraq's obligations in a number of situations, under a number of treaties, and so on. And yet, despite it being one of the longer resolutions on record, no where in its terms does it actually refer to the fact that a war had just occurred, that armed force had been used, and that Iraq was a defeated power. These matters were the truths that dare not be spoken of in the polite language of diplomacy.

There are reasons why such non-specific language is used. There are many competing interests in the Security Council. Such resolutions can be made more palatable to states which may have qualms about authorising the use of force if that device is not actually stated – although as was apparent when Resolution 678 was adopted even then some states might abstain. And even then, the use of ambiguous language will not always achieve a passage through this chamber because it being intrinsically political, some states might determine that regardless of how the debate unfolds they will not vote to adopt certain resolutions 'whatever the circumstance'.⁵⁹ Thus can be seen the reason why resolutions are worded so broadly.

58 Mention might also be made of Resolution 1368 of 2001, the '9/11' Resolution adopted on 12 September stated the Security Council's readiness to take 'all necessary steps' to respond to the terrorist attacks of 11 September 2001. No where was the name 'Afghanistan' referred to or what would happen to it, but no one has since doubted the right of the United States' right to use force against that country. See text above.

59 French President Jacques Chirac, when asked in a television interview how France would vote if a further resolution was sought in the Security Council which presented an ultimatum to Iraq, stated that France would vote against it 'whatever the circumstances, because we do not think war is necessary to achieve the goal we've established'. He went on to explain that 'We are not opposing America for the sake of opposing them'. See Ben Aris, 'France and Russia will vote no', *The Telegraph*, 11 March 2003, obtained at <http://www.telegraph.co.uk> (accessed 1 October 2003).

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

The difficulty is that by using such language, there is created a situation which does create ambiguity, and opens the door to spurious arguments regarding what a resolution actually means. Thus, perhaps by some tortuous reading, resolution 1441 could read to authorise the use of force or to 'revive' resolution 678. Nevertheless, by the actions of the governments of the United States and Britain in the Security Council there is one matter which seems to undermine the credibility of this interpretation. By their own actions they demonstrated their lack of confidence in the argument. This was clear in the Security Council debate of 7 March 2002 when Colin Powell argued for a further resolution to follow up Resolution 1441. His government clearly did not believe there was sufficient authority already granted by the UN at that time for the use of force against Iraq. The British Government's support for a further resolution also evidences this opinion. It challenges the credibility of these governments' arguments to legitimacy under existing resolutions when such evidence can be so clearly cited.

Humanitarian Intervention and the War in IRAQ

It is necessary only for the good man to do nothing for evil to triumph.
Edmund Burke (1729-1797).⁶⁰

a) *Recent Acceptance of the Principle*

With the justifications based on self defence and United Nations authorisation apparently flawed, it should be asked whether a justification based on the doctrine of humanitarian intervention could be better sustained.

The doctrine is one which exists outside the UN Charter.⁶¹ It arose out of customary international law which justified the use of force by one state against another for the purpose of terminating the latter's abuse of its own nationals. For a time, it certainly appeared that its days as a legitimate part of International Law were numbered. This was particularly the case in the early 1990s, when with the passing of the Cold War, the United States and the Soviet Union acted

⁶⁰ Attributed to Edmund Burke, and quoted in Angela Partington, *The Oxford Dictionary of Quotations* (1996), 160. Compare with another quotation certainly attributable to Burke: 'When bad men combine, the good must associate; else they will fall, one by one, an unpitied sacrifice in a contemptible struggle', *Thoughts on the Present Discontents* (1770), 71, quoted in Partington, *Ibid* 159. This is perhaps a more appropriate description of the situation where the United Nations fails to act and individual States do *fail* to invoke the doctrine of humanitarian intervention and act to assist oppressed peoples. It is because the risks of disaster for the intervening State *acting alone* against an oppressor State are so much the greater. However, argument alone surely cannot make inaction by any individual state which has the choice whether or not to act any the better as a moral concept.

⁶¹ Field, above n 18.

together in the Security Council in securing Resolution 678 to liberate Kuwait – the first occasion since the Korean War in 1950 when the Russians had not vetoed the use of force. For a time it appeared that the United Nations might actually assume its mantle as a real force for global peace and security as planned by its founders, rather than continue to exist as a grandiose debating club with a diverse membership. The adoption of Resolution 687 (noted above) further enhanced this view, as did a number of other resolutions which authorised an unprecedented number of peace keeping operations. Even in the eyes of lay-people, there was a view suggesting the United Nations really was at the head of what United States President George Bush described as the ‘New World Order’. *Time* magazine, for example, was proclaiming ‘Globo-cop’ on its cover, suggesting the United States (and presumably any other willing state) would send its troops to any trouble spot the UN wanted them.⁶² This delusion was quickly dispelled.

The collapse of the peace keeping mission in Somalia in 1993 provided some early evidence that not all member states were fully committed to carrying out the mandates of the Security Council. The events in Rwanda the following year provided clear evidence that not even the Security Council was committed to preventing atrocities, the peoples of the world witnessing massacres of hundreds of thousands of people on their televisions while the Security Council debated what should be done.⁶³ In the final analysis nothing was done to prevent the deaths of possibly as many as 1 million people (in a country of just over 7 million!) and the flight of around 2 million refugees. That such failures might provide a compelling basis for the legitimacy of humanitarian intervention prompted no less than the UN Secretary General Kofi Annan to pose this pointed question five years later:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask – not in the context of Kosovo – but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?⁶⁴

The Secretary General was very careful to limit his words to the Rwandan case, as might have been expected considering that the NATO intervention in Kosovo that year to prevent atrocities being inflicted upon the local population by the Yugoslav

62 *Time*, 1 April 1991. The date of this issue might suggest that perhaps Fate had a better idea of reality.

63 See Field, above n 18, for a discussion and citation of documentary sources relating to the events in Rwanda in April 1994.

64 ‘Secretary - General presents his annual report to General Assembly’, Press Release SG/SM/7136 GA/9596, 20 September 1999, obtained at <http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html> (accessed 15 October 2003).

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

Government was still a matter of some argument; the Yugoslav Government had just brought a claim before the International Court of Justice disputing the legitimacy of the action.⁶⁵ However, in response to the Secretary General's question, the actions of the United States, Canada and their European allies in Kosovo would clearly suggest that they would answer that question in the negative.

Although some people still cling to the notion that the use of force without United Nations authority is illegal,⁶⁶ it seems to be becoming accepted that there are cases where such uses of force against another state as a matter of humanitarian intervention can be legitimate.⁶⁷ No doubt part of this acceptance stems from the discomfort caused by accepting the alternative adverted to above, that anyone intervening to stop genocide without United Nations authority would be acting illegally and would be required to desist.⁶⁸ Allowing mass murder and condemning

65 *Legality of Use of Force, Yugoslavia v Belgium & Ors*, No 108 of 1999, Application Instituting Proceedings filed in the Registry of the International Court of Justice, 29 April 1999; matter still pending. For further information see <http://www.ici-cij.org>.

66 'This decision is wrong because we should never support military action outside of that supported by the United Nations, and also because the Prime Minister has failed to make the case as to why war is the only option.', Australian Leader of the Opposition, Simon Crean, speaking in opposition to the Australian Government's motion in Parliament supporting the war in Iraq, Australia, *Parliamentary Debates*, House of Representatives, 18 March 2003, 12514.

67 See, for example, Antonio Cassese, '*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', (1999) 10 *European Journal of International Law* 23.

68 Consider, for example, the following opinion which explains the necessity of being able to accept such a doctrine as that of Humanitarian Intervention. It is clearly written from a perspective where uses of force not prescribed under the UN Charter was at one time considered illegitimate:

'By its very nature, international law is of necessity in a constant state of development in response to the emergence of new weapons, new actors and new threats, usually in hindsight.

A key example of circumstances in which a re-invention of the law may be justified came with the recent conflict in the former Yugoslavia, where states found themselves in a situation in which the existing international legal regime was inadequate. In the face of widespread and ongoing ethnic cleansing of the Kosovar Albanians by Bosnian Serb forces, the international legal community found itself unable to act. Self-defence was clearly not available, as the only state able to exercise this right was the state perpetrating the genocide. The Security Council was deadlocked by the threatened veto of China and Russia. This threat was based not on the objection by these states to relief for the Kosovar Albanians, but on considerations of the implications of this precedent for China and Russia. In these circumstances, the NATO forces launched military strikes in the absence of Security Council authorisation. The action, in hindsight, has been deemed to be legitimate by the international community, and the international legal order was not damaged. Rather, it has led to the development of an emerging principle of international law, albeit not yet universally accepted, of "humanitarian intervention".'

anyone seeking to stop it is generally a rule too difficult to stomach. However, dispute does clearly remain in determining when the use of the doctrine is legitimate.

b) Criteria

Many legal scholars have set down what they consider to be the relevant criteria. For example, when advocating intervention in Ethiopia in the 1980s to assist the local population who were suffering through a famine, Michael Bazzyler set down his five criteria.⁶⁹ At the time of humanitarian operations in Somalia and Haiti in the early 1990s, Byron Burmester set down a similar list of five principles.⁷⁰ Then in the wake of the Kosovo intervention in 1999, Nicholas Wheeler identified what he considered to be six principles which should be considered when judging the legitimacy of humanitarian intervention.⁷¹ And more recently, when discussing the legitimacy of the use of force in Iraq – before it was deployed – George Williams and Devika Hovell suggested ‘five fundamental criteria which must [sic] be applied before military use of force is justified in the absence of Security Council authorisation’.⁷² Although these criteria are expressed in various and diverse ways, a general degree of similarity between the concepts can be identified. Where serious problems can be found, however, is in the application of these distilled principles, a realisation which has led both Bazzyler and Wheeler to write that these rules cannot be applied rigidly.⁷³

What follows are the criteria which have received general recognition:

First, to justify the step of invading another country it must be established that there exists what Wheeler calls the ‘supreme humanitarian emergency’. Bazzyler identifies these as most apparent in the case of ‘large scale atrocities’ which must have occurred or be imminent. They must be the result either of a government’s positive act or of dereliction of its duty to its people. Generally, some clear examples of large scale atrocities can be cited without difficulty by simply glancing through the catalogue of twentieth century horrors. In recent memory, Rwanda heads the list with over a million murders in a matter of months. The 300,000 Ugandan citizens murdered during the reign of Idi Amin during the 1970s is

George Williams & Davika Hovell, ‘Advice to Hon Simon Crean MP on the Use of Force Against Iraq’, (2003) 4 *Melbourne Journal of International Law* 183, 188.

69 Michael Bazzyler, ‘Re-Examining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia’ (1987) 23 *Stanford Journal of International Law* 547, 598-607.

70 Byron Burmester, ‘On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights’, [1994] *Utah Law Review* 269, 279-283.

71 Nicholas Wheeler, ‘Legitimizing Humanitarian Intervention: Principles and Procedures’, [2001] *Melbourne Journal of International Law* 550, 554-560.

72 Williams and Hovell, above n 68, 188.

73 A discussion of the difficulty in applying the principles set down by Bazzyler is also contained in Field above n 18.

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

perhaps a better example as it is actually an example in which another state, Tanzania, did intervene. Where difficulties will arise with this element is in determining when the commission of 'atrocities' becomes 'large scale'. Must it be murders in the millions? The hundreds of thousands? Or the tens of thousands? Is the threshold of a supreme humanitarian emergency something which equates to genocide? As Wheeler brutally expresses the issue, 'does this mean that the bodies have to pile up to this level before an intervention can occur'?⁷⁴

A further problem arises when determining over what time frame these atrocities must be committed. Will the effect of a government murdering, for example, a thousand political enemies a year for ten years constitute an atrocity?

The way this question is phrased is clearly repugnant – but it would also appear to be very real and relevant, and no clear answer has been supplied. Further, it is probably also true to say that perspectives on the issue can also vary greatly. For example, someone formulating a view on the matter from the UN Building in New York, would almost certainly take a far more 'measured' view than might be formed by a Ugandan citizen awaiting the 'midnight knock' in the 1970s, an Ethiopian starving in the desert in the 1980s, or an Iraqi Kurd awaiting the next gas attack in the 1990s.⁷⁵

The second requirement is that such intervention constitutes the option of last resort. Williams and Hovell take this to mean, specifically, that the Security Council, is 'unreasonably deadlocked such that it is unable to act to address the situation'.⁷⁶ Once again, frequently the question raised here will be temporal. How much time should the Security Council be given to act? While its members debate whether or not to act to deal with the humanitarian emergency, such large scale atrocities might be being committed without check, and possibly with greater speed. Further, it should also be recognised that the natural inclination of the Security Council is not to act anyway. The point has been made by Frederick Petersen that in upholding the general belief in a state's sovereignty, that 'inaction guarantees sovereignty'. The same point has also been made in Linda Polman's recent book *We Did Nothing* – in its very title – in which the journalist

⁷⁴ Wheeler, above n 71, 555.

⁷⁵ Indeed, illustrating this notion of perspective, it is fascinating to note that during the Security Council debate on 5 February 2003 when Colin Powell was making his case on why force should be used against Iraq, many delegates commenced their speeches by offering their condolences to the Government and people of the United States on account of the deaths of the seven astronauts of the space shuttle *Columbia*. *Columbia* had exploded in flight four days earlier killing its crew. These UN delegates would then commence their speeches on the situation in Iraq, a discussion which barely adverted to the fact that many more than seven people lost their lives or were the subject of human rights abuses with the authority of the Iraqi Government. Perspective is a clearly a significant factor when UN delegates construct their speeches. See above n 28.

⁷⁶ Williams and Hovell, above n 68, 188.

author illustrates through personal observation that the *modus operandi* of the UN is to do nothing despite a series of humanitarian disasters over the last decade.⁷⁷ Once again, in examining an act of humanitarian intervention the relevance of the Security Council will frequently be thrown into doubt, and restraining acts of intervention while the potential of the UN to act is exhausted can be fatal to those waiting to be assisted.

The third requirement relates to notions of acceptability by the global community of the intervention. This has led Bazylar to suggest that joint action by a number of states is preferable.⁷⁸ Williams and Hovell take this further and state that a 'majority of the international community accept that force is an appropriate response'.⁷⁹ Once again, this is a requirement which will clearly add weight to claims of legitimacy. However, if only one state is determined to take the risk to assist a threatened people by intervening when no other state would, is it legitimate to condemn such conduct as a breach of international law? With the benefit of hindsight, it might be commented how tragic it was that not even one state chose to assist the people of Rwanda when the killing began in 1994. Unfortunately, the reality is that rarely will even one state seek to assist the oppressed. Therefore, once again this is a requirement which cannot be enforced strictly.

The fourth requirement is proportionality of the intervention. This requirement has two distinct aspects. First, proportionality refers to the scale of the force employed by the intervening state. In others words the use of force, the scale of troop deployment, use of air power, and such matters of 'volume', should be merely sufficient to bring to an end the commission of atrocities. And yet, this reasonable sounding requirement is not free of difficulty. To illustrate the difficulty, the NATO intervention in Kosovo in 1999 in the first month consisted entirely of air strikes – and the killing continued unabated. Thus, it might be argued that perhaps the use of force should be enormously disproportionate and so promote a quicker resolution of the issue.

The other aspect of proportionality relates to the length of time over which the intervention occurs. The Tanzanian intervention in Uganda in 1979 provides a good example of the intervenor not 'outstaying its welcome', Tanzanian forces having left Uganda in 4 months. Conversely, when the Vietnamese army invaded Cambodia and ousted the regime of Pol Pot, they stayed in occupation of that country for many years. And yet who can doubt the legitimacy of their actions in intervening, or the correctness of their remaining in Cambodia for so long, when it is remembered that the Khmer Rouge was still a thorn in Cambodian stability until very recently?⁸⁰

77 Polman, above n 51.

78 Bazylar, above n 69, 604.

79 Williams and Hovell, above n 68, 188.

80 Field, above n 18, 352.

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

The fifth and final agreed requirement to justify an act of humanitarian intervention is the notion of an 'over-riding humanitarian motive'. Williams and Hovell also consider that the decision to use force must be based on an 'objective belief that it is for the benefit of the global community'.⁸¹ The ideal is that there is no collateral benefit based on self interest, profit or defence strategy. And yet, experience has shown that to allow humanitarian intervention only in such circumstances is utopian. The reality is that without what might be termed the 'collateral benefit' there will generally be no intervention.⁸²

Therefore, examples of humanitarian intervention have been replete with collateral benefits to the intervening state. For example, in 1971 when India invaded East Pakistan (now Bangladesh), in addition to satisfying a humanitarian motive by preventing a large scale slaughter of the local population, it undoubtedly also gained a strategic benefit in removing from its north east border the presence of its sub-continental competitor Pakistan. Similarly, it almost certainly suited Tanzanian strategic purposes to remove Idi Amin from Uganda in 1979, although the humanitarian benefit in removing a murderous regime was unquestionable. And more recently, when NATO forces intervened in Kosovo to stop Serb forces 'ethnically cleansing' the local population, the humanitarian case was well documented.⁸³ However, it must also be conceded that it was in the interests of NATO members to bring stability to the 'powder keg' of Europe which commenced the twentieth century by igniting the First World War and was threatening a similar state of affairs on Western Europe's borders at the end of the century. Thus, noting these examples, the observation could be made that probably the only thing which might have saved one million Rwandans from slaughter would have been the discovery of oil or some other valuable commodity before 1994; perhaps the promise of access to such a commodity might have motivated a powerful state to intervene and to stop the slaughter. It was the sad fate of that country's people that Rwanda is one of the poorest countries on Earth and there was no substantial collateral benefit to be obtained by intervening.⁸⁴

81 Williams and Hovell, above n 68, 188.

82 It should be noted that Wheeler does refer to the Australian intervention in East Timor in September 1999 as an example where the use of force *was* primarily for humanitarian purposes. This would appear to be irrefutable. However, it should be noted that this use of force was in fact with the consent of the Indonesian Government and pursuant to a UN resolution, and as such by not compromising the sovereignty of another state does not constitute an act of humanitarian intervention as it is understood in this paper. Wheeler, above n 71, 558.

83 See Field, above n 18, 358.

84 Indeed, it might be noted that even when the United Nations did finally authorise the deployment of a 5,500 soldier strong force to act in Rwanda the month after a million people had been slaughtered there, the UN Secretary General Butros Butros-Ghali could not actually persuade any member states to provide the troops. As he said on 26 May 1994, 'It is a scandal. I am the first to say it and I am ready to repeat it'. Quoted in Polman, above n 51, 111. It would appear that individual states considered that there just was not enough to be gained by sending their nationals to Rwanda.

What does emerge from a brief discussion of these criteria, therefore, is that at best they can be viewed as guidelines. Beyond the acceptance that there must be a clear case of atrocities being inflicted by a state upon its own people (and as noted even within that concept there are unresolved questions), the best that can be said is that the listed criteria should be adhered to where possible, but where they are not satisfied this should not automatically form the basis of condemning an act of intervention. As Wheeler sensibly points out when discussing the western tradition of the 'just war', the relevant criteria should not be viewed as a rigid series of criteria to be ticked off; '[e]ach case must be judged on its legal, moral and political merits'.⁸⁵

(c) Atrocities in Iraq?

The question which was not hotly pursued in the months before the war in Iraq was whether the war could have been justified on the basis of humanitarian intervention. Could the case have been made out? In comparison with the arguments based on self defence and WMDs, no serious attempt was made to argue this case. This is frustrating because for the last decade it has been a constant concern of a number of organisations that Iraq had a deplorable human rights record with regard to such basic matters as the right to life of its citizens.

For example, in the annual reports of Amnesty International, entries dealing with Iraq regularly deal with the multiple executions, assassinations and torture. Consider the preamble to the *Amnesty International Report 2002* section on Iraq which stated:

Scores of people, including possible prisoners of conscience and armed forces officers suspected of planning to overthrow the government, were executed. Scores of suspected anti-government opponents, including people suspected of having contacts with opposition groups in exile, were arrested. The fate and whereabouts of most of those arrested, including those detained in previous years, remained unknown. Several people were given lengthy prison terms after grossly unfair trials before special courts. Torture and ill-treatment of political prisoners and detainees was systematic....⁸⁶

The reference to torture was drawing on a special report prepared by Amnesty in 2001 entitled *Iraq: Systematic Torture of Political Prisoners* which set down in some details the methods by which pain was inflicted on Iraqi citizens.⁸⁷ However,

85 Wheeler, above n 71, 560.

86 Obtained at <http://www.amnesty.org> (accessed 16 September 2003).

87 The following extract from the report gives a graphic sample of the allegations made by Amnesty:

'2. Methods of Torture.

Torture victims in Iraq have been blindfolded, stripped of their clothes and suspended from their wrists for long hours. Electric shocks have been used on various parts of

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

some measures against political prisoners did not involve torture. The 2002 report noted that many political prisoners were put to death, sometimes for alleged prostitution or for procuring prostitutes as both these activities carried the death penalty.⁸⁸

Another non-government organisation which also details the excesses of the regime of Saddam Hussein is the Iraq Research and Development Project (IRDP), located at the Center for Middle Eastern Studies at Harvard University. Since 1993, this body has created an archive of information, some of it available on the internet.⁸⁹ This information includes items relating to the day to day rule of law in Iraq, with government documents relating to amputations as a form of punishment for certain offences, which set down which limbs should be removed for which offences.⁹⁰ Other documents are more foreboding. One document dating from 1989 sets down the 'Plan of Action for the Marshes', detailing how poisoning, explosions, assassinations, burning of houses and the like would be used to combat Iranian backed 'freedom fighters'.⁹¹ Another series of documents details how the ominously titled 'Unit 5013' requires further shipments of 'Kurdish saboteurs' for

their bodies, including the genitals, ears, the tongue and fingers. Victims have described to Amnesty International how they have been beaten with canes, whips, hosepipe or metal rods and how they have been suspended for hours from either a rotating fan in the ceiling or from a horizontal pole often in contorted positions as electric shocks were applied repeatedly on their bodies. Some victims had been forced to watch others, including their own relatives or family members, being tortured in front of them.

Other methods of physical torture described by former victims include the use of Falaqa (beating on the soles of the feet), extinguishing of cigarettes on various parts of the body, extraction of finger nails and toenails and piercing of the hands with an electric drill. Some have been sexually abused and others have had objects, including broken bottles, forced into their anus. In addition to physical torture, detainees have been threatened with rape and subjected to mock execution. They have been placed in cells where they could hear the screams of others being tortured and have been deprived of sleep. Some have stayed in solitary confinement for long periods of time. Detainees have also been threatened with bringing in a female relative, especially the wife or the mother, and raping her in front of the detainee. Some of these threats have been carried out.'

Iraq: Systematic Torture of Political Prisoners, 15 August 2001, AI Index No: MDE 14/008/2001. Obtained at <http://web.amnesty.org/library/Index/engMDE140082001!Open> (accessed 16 September 2003).

88 Above note 16.

89 At <http://www.fas.harvard.edu/~irdp>.

90 'Iraqi Documents Relating to Amputations', at <http://www.fas.harvard.edu/~irdp/reports/amput01.html> (accessed 17 October 2003).

91 The document entitled 'Plan of Action for the Marshes', dated 30 January 2003 was prepared by the Directorate of Security in the Governorate of Arbil in the north west of Iraq. Obtained at <http://www.fas.harvard.edu/~irdp/docs/doc0602.html> (accessed 17 October 2003).

its experiments.⁹² Subject to any issues of authenticity which might be raised, these documents certainly substantiate a case of atrocities committed against Iraqi people.

However, to these sorts of reports can also be added the concerns expressed by both the United Nations, and various national governments. The 2001 report of the United Nations Special Rapporteur focussed on a series of matters including extra-judicial killings, torture, missing persons, ill treatment of women and expulsion and mass relocation of non-Arabian peoples.⁹³ In favour of the Iraqi Government, it is true that there was little conclusive evidence presented in the report, but it should be noted that this was largely due to the lack of co-operation of the Iraqi Government in the preparation of the report.

Over the years, the government agencies of the United States and Britain did present more clearly stated allegations. For example, Britain's Foreign and Commonwealth Office in November 2002 produced a report entitled *Saddam Hussein: Crimes and Human Rights Abuses*. In addition to the matters noted above, this report also described Iraq's methods of clearing its prisons. It cited, for example the slaughter of 4,000 at the Abu Gharib prison in 1984, and the deaths of another 3,000 at the Mahjar prison between 1993 and 1998. However, it must be said that even this sort of report indicates that the Governments of these countries were not pursuing the human rights issue as strongly as the issues relating to WMDs. This is said because despite the resources these governments have (and had) at their disposal to obtain information, much of what appeared in the report just noted was derived from the IRDP. Little of it was new. Indeed, in other places where the British Government set out its human rights concerns with Iraq, those concerns frequently appeared as a briefly concocted 'add on'. A clear example of this appears in the September 2002 dossier *Iraq's Weapons of Mass Destruction*.⁹⁴ The section 'Iraq under Saddam' included a discussion of human rights abuses. It noted, for example, the report of Iraq's treatment of its Kurdish population, of whom it was said some 100,000 were killed or had disappeared in 1987-88, with 15,000 being the subject of attacks using chemical weapons. It also noted that around 1 million of these people had been made to flee attacks from government troops in the wake of Iraq's defeat in the 1990-91 Gulf War. And yet despite the significance of these matters and their compelling nature, this section was merely a final and brief part of the fifty page document. It occupied a mere eight pages – a brief summation of what was probably the most certain (or at least the most corroborated) series of allegations in the report. The issue of human rights was presented at best as a back up basis for attacking Iraq.

92 'Three Iraqi Documents Relating to Unit 5013', obtained at

<http://www.fas.harvard.edu/~irdp/reports/wmb01.html> (accessed 17 October 2003).

93 Andreus Mavrommatis, 'Situation of Human Rights in Iraq', United Nations General Assembly, A/56/340, 13 September 2001, obtained at <http://www.un.org> (accessed 19 September 2003).

94 See n 36, above.

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

Nevertheless, how well do these allegations fit in with the five criteria to justify the use of force as an act of humanitarian intervention? A number of questions may be raised:

First, was there a 'supreme humanitarian emergency'? Was there evidence of 'large scale atrocities'? Clearly there was evidence of atrocities. The detailing of the murders in Iraqi prisons could well satisfy this requirement. However, the documented cases of these large scale murders having occurred mostly in the 1980s and 1990s would appear to rob them of an element of 'immediacy'. Certainly, an act of intervention in 2003 could not rescue these people. However, if such matters as torture, amputation and rape occurred under the auspices of the Government, perhaps a case could have been made out.

Second, was intervention the option of last resort? In favour of intervention, it should be recalled that the process of relying on mechanisms other than the use of force had been pursued for more than a decade, and that in the meantime the Iraqi Government had continued on its program against its citizens largely without interruption. The contrary argument is that the Iraqi Government would have eventually altered its practices. However, as evidenced by the United Nations own Special Rapporteur, it was proving very difficult to obtain the co-operation of the Iraqi Government even in supplying information.

Third, was there joint action? The United States was careful to encourage action from other countries. Britain and Australia contributed contingents of their armed forces. President Bush also referred to a contribution from Poland when he addressed the American people on the first day of the war. Clearly, these contributions from other states do not evidence the acceptance of the 'majority of the international community' required by Williams and Hovell, but it does satisfy the more commonly accepted requirement of 'joint action'.

Fourth, when addressing notions of proportionality, as noted above this requirement is clearly one open to varying interpretations. That the regime of Saddam Hussein was removed within two months by the armed forces of the interveners would suggest that the size of the force was sufficient *for that purpose*. On the other matter of restoring stability to Iraq, only the passage of time – and further hindsight – will determine whether the action was proportionate, both in terms of the size of the force and the period of time it remains on Iraqi soil. However, when six months after President Bush announced the successful end to 'major combat operations' in Iraq, there are daily reports of the deaths of British and American troops stationed there, there is a strong indication that the force deployed was inadequate to bring a final peace to Iraq and impose a sense of order. Indeed, by November 2003, it was being reported that deaths of United States troops in Iraq since May had overtaken the number of such deaths which

occurred during the war itself.⁹⁵ Perhaps the use of force was well below what might be described as ‘disproportionate’. Certainly, in this context, it was not disproportionately large.

Finally, was there a humanitarian motive? If the words of the leaders of the intervening states are to be accepted, the answer is clearly in the affirmative. In most statements defending the war, it was argued that the removal of Saddam Hussein (to use the words of Tony Blair) would ‘be a blessing to the Iraqi people’.⁹⁶ However, if an attempt was made to argue that this was an ‘over-riding’ motive, or that such intervention would be free from a collateral benefit, then clearly the answer would be in the negative. And yet, as must be accepted, this alone cannot be a serious basis for denouncing acts of humanitarian intervention – otherwise no state would ever intervene anywhere.

Accordingly, the case for humanitarian intervention was arguable. Whether it could have been compelling is at best a matter for speculation. The reality is that most effort was expended on arguments based on self defence and WMDs – arguments which failed. Had a similar amount of effort been expended by the intelligence agencies of the United States and Britain in finding evidence to support a war based on humanitarian intervention, perhaps a strong case might have been established. However, it was determined by these governments that other arguments should be deployed in preference to those based on helping one’s fellow man when he was in danger.

War, Law and Politics

All politics is local

‘Tip’ O’Neill (1912 - 1994).⁹⁷

In comparison with arguments based on WMDs or authority, a case for using force against Iraq based on humanitarian intervention had the advantage that there was little dispute that the government of that country had committed atrocities and still engaged in brutal practices against its people. And yet, understanding why that case was not pursued with such vigour illustrates very clearly one of the fundamental differences between how a private citizen argues its case in a domestic dispute and how a state does so under public international law.

95 Editorial, ‘Battle for Iraq now fought on several fronts’, *The Australian*, 3 November 2003, 16.

96 Tony Blair, ‘Prime Minister’s Address to the Nation’, 20 March 2003, obtained at <http://www.number-10.gov.uk> (accessed 9 September 2003).

97 US Congressman and Speaker of the House of Representatives, *All Politics is Local* (1994).

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

In a domestic legal dispute a litigant pursues the legal course and presents the argument which will convince the court of the merits of its action or claim. The court is, of course, usually made up of highly trained judges who are experts in complex areas of jurisprudence. However, when the government of a state acts to commit its troops to the threat of danger and loss of life the audience which needs to be convinced is somewhat larger. This is particularly the case in western democracies if those governments seek to retain power in their states. Those who hold government offices in such democracies only do so with the consent of the people of these countries, and at regular intervals they are called to account for how well they have governed when elections are held. If the voting public is not satisfied or actually displeased with the actions of those who hold office, they will be voted out of those offices and replaced by other candidates contesting the election.⁹⁸ This is the realisation of Abraham Lincoln's Gettysburg creed that government be 'of the people, by the people, for the people'.⁹⁹

Thus, the effect on the electorate is extremely important in determining how western democracies use force. Noting this, two important points well reflect how the arguments justifying the use of force against Iraq came to be deployed. The first of these relates to the electoral undesirability of humanitarian intervention. The second relates to the contrasting desirability of self defence.

Quite probably humanitarian intervention was a substantial factor in the deliberations of the United States, Britain and Australia when they chose to invade Iraq. However, the experience of humanitarian intervention over at least the last decade dictates that this is the justification of almost last resort in a western democracy. This is the clear lesson of the operation in Somalia 1993 in which troops of the United States and other countries were used to distribute food to a starving population. Although not strictly an act of 'humanitarian intervention' because the operation occurred pursuant to a Security Council Resolution and so didn't raise the legal issues usually associated with the doctrine,¹⁰⁰ it does illustrate why humanitarian intervention is the exception and not the norm.¹⁰¹ The operation at first was successful, and it has been suggested

98 This experience can be contrasted, for example, with the situation in Iraq. In October 1995, when a 'referendum' on the Presidency of Saddam Hussein was conducted, the President received an overwhelming vote of approval with 99.96 per cent of the votes cast. However, the ballot was not secret and he was the only candidate, and therefore in no danger of being replaced by another candidate. (US Department of State, 'Country Reports on Human Rights Practices: Iraq', March 4 2002, obtained at <http://www.state.gov/g/drl/hrrpt/2001/nea/8257pf.htm> (accessed 19 September 2003)). Accordingly, governing Iraq in a way which met with the approval of the Iraqi people was unlikely to be an issue. This is clearly not 'democracy' as practised in the west.

99 Abraham Lincoln, 'The Gettysburg Address', reproduced in Geoffrey C Ward, Ric Burns and Ken Burns, *The Civil War: An Illustrated History of the War Between the States* (1991), 262.

100 SC Res 794.

101 Field, above n 18, 355.

that perhaps as many as half a million people were assisted. However, when United States troops attempted to arrest General Mohammed Aideed (who was the local warlord who was preventing some supplies being distributed), their failure resulted in scenes blitzed around the world on the evening news of the stripped corpses of United States soldiers being dragged around the dusty streets of Mogadishu by triumphant Somali militiamen. It was a disastrous scene for the government which had sent those troops to Somalia and prompted a very quick decision by the United States President, Bill Clinton, to bring his country's involvement in Somalia to an end.

Since at least the Vietnam War in the 1960s and 1970s, the effect on the fortunes of American governments caused by unsuccessful military ventures which result in loss of life has been profound.¹⁰² It would appear that in political terms the justification for risking the lives of American troops must be involved in countering a threat which directly affects the American people. The fate of the Somali people evidently was not sufficiently relevant to the American people. However, it must also be recognised that this attitude is not unique to the United States. The Somali situation also did not have a sufficient effect on the people of other western democracies to warrant those states risking the lives of their troops. As a German soldier stationed in Somalia at the time said before departing, 'Bonn wanted to be part of this mission, but didn't want to risk German lives'.¹⁰³ In contrast to this situation, the intervention in Kosovo in 1999 could be accomplished in relative safety because it only involved the use of air power which encountered minimal opposition, rather than the use of troops on the ground. It also possessed a politically justifiable element in that it had the collateral benefit of bringing some stability to a place which was too close for comfort to the borders of NATO states.

Nevertheless, in plain terms where the risk is great, helping and protecting people on the other side of the world from the worst excesses of their own governments is simply not a sufficient justification in political terms for a government to endanger its own troops. If any further example were required of this rule, Rwanda should be sufficient.

102 For a brief discussion of how the Vietnam War became an increasing problem to United States Presidents, see Henry Kissinger, *Diplomacy* (1994), Chapters 25-27.

103 Quoted in Polman, above n 51, 44. Interestingly, it can also be argued that such matters have been of varying importance to western governments well before the twentieth century. For example, the Duke of Wellington was once heard to remark that his great adversary Napoleon Bonaparte had a great advantage over him in that he could do whatever he pleased with his armies, but remarking of his own soldiering said: 'I could not risk so much: I knew that if I ever lost five hundred men without the clearest necessity, I should be brought upon my knees to the bar of the House of Commons'. Quoted in Earl of Stanhope, *Notes of Conversations with Wellington 1831-51* (1888), reproduced in Paul Johnson (ed), *The Oxford Book of Political Anecdotes*, (1989) 111. Presumably these concerns had diminished somewhat by 1914.

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

In contrast, arguments based on self defence are more desirable, and the more direct and immediate the threat against which actions are being taken, the more electorally desirable. A threat to one's own person tends to focus the mind far more immediately than a threat to another. In the wake of the 11 September attacks referred to above, this was certainly the case. American voters were themselves under immediate attack, and expected their government to act. Similarly, United Nations delegates meeting in their New York offices only a few blocks from the ruins of the World Trade Centre also acted with unusual haste to pass the resolutions the day after the attack, authorising the use of 'all necessary steps' to respond to the terrorist attacks. That the delegates acted so quickly should not be too surprising. The immediacy of the danger to them could not be ignored, given the ash, dust and smoke drifted down on them as they arrived for work that day.

With regard to Iraq, if it could be associated with the 11 September attacks, then once again the battle for legitimacy would be won. Therefore, the substantial portion of the arguments justifying the use of force against Iraq were directed towards this goal. Further, even if a link could not be established, the arguments based around WMDs also were directed to the threat of immediate danger. It is now a matter of record that these arguments did not clearly win over the United Nations. Clearly, as perceived by the delegates and their governments, the immediate threat had passed. However, from the point of view of the government of President George W Bush, what was probably more important was how well the voters of the United States accepted and responded to these arguments. It is well known that the 2000 United States Presidential election was won by George Bush by a handful of votes, with the final decision being the subject of multiple recounts and court challenges.¹⁰⁴ In such a situation as this, the opinion of the voters is crucial. It is in this context that the reactions to the 11 September attacks appear to have played a part in setting the agenda. The American people wanted to be defended – overwhelmingly according to the polls. Further, in a poll published the week after the attacks by *Time* magazine, 77 per cent of respondents considered it either very likely or somewhat likely 'that Saddam Hussein was personally involved' in the attacks.¹⁰⁵ In other words, arguments based on self defence have two benefits. First, if successful they are legitimate under international law. But secondly, and more importantly to a President or Prime Minister hoping to be re-elected at some time, they also bear the approval of the voters if the danger is sufficiently immediate.

104 The final results of the 2000 Presidential election indicated that although George W Bush won more states and more electoral college votes than Al Gore, Gore polled around half a million more votes when in aggregate figures. For further information, see the United States Federal Election Commission's website, at <http://www.fec.gov/pubrec/fe2000/tcontents.htm>.

105 *Time*, 24 September 2001, 38.

The irony is that those arguments which were relied on and the ways in which they were deployed have proven to contain within them elements which have harmed the electoral prospects of the governments which used them. The issue of WMDs has proved the most harmful. After the war, as noted above, it proved a challenge for the occupying troops actually to find any WMDs. However, even in early 2003 when the use of force was still being debated, each of the governments of the United States, Britain and Australia, was subject to allegations by 'whistleblowers', government insiders who said that the claims made regarding WMDs were inflated. In Australia, the whistleblower was former army officer Andrew Wilkie who quit the government's intelligence organisation, the Office of National Assessments, in early March 2003 – just before the outbreak of hostilities – having advised the media that he could not abide the conclusions being drawn from the work he was doing.¹⁰⁶ He subsequently also gave evidence in Britain and Australia to Parliamentary Committees established to investigate such matters.

In Britain, a great deal of consternation was raised when a second dossier of information detailing the Iraqi threat was published in February 2003. It became a subject of embarrassment when it was observed that a significant portion of the document was copied from a twelve year old PhD thesis without attribution. This was an embarrassment and did not bode well for the quality of the intelligence upon which the government was preparing to make war. However, the most vocal concerns were raised by the BBC when it was revealed that a claim in the November 2002 dossier – that Iraq would be ready to deploy WMDs 'within 45 minutes of an order to use them' – was exaggerated or 'sexed up' (as was the expression used in the media).¹⁰⁷

106 AAP, 'Analyst "vilified" for quitting over Australia's stand', *Sydney Morning Herald*, 12 March 2003, obtained at <http://www.smh.com.au/articles/2003/03/12/1047144999476.html> (accessed 27 October 2003).

107 The BBC journalist who first raised this allegation said on BBC Radio 4 on 29 May 2003:

I've spoken to a British official who was involved in the preparation of the dossier and he told me that in the week before it was published, the draft dossier produced by the intelligence services added little to what was already publicly known. He said:

"It was transformed in the week before it was published to make it sexier. The classic example was the claim that weapons of mass destruction were ready for use within 45 minutes. That information was not in the original draft. It was included in the dossier against our wishes, because it wasn't reliable. Most of the things in the dossier were double-sourced, but that was single sourced, and we believe that the source was wrong".

'A complete transcript of Andrew Gilligan's claims against the government on Radio 4's Today programme.' *The Guardian*, 9 July 2003, available at

<http://media.guardian.co.uk/print/0,3858,4709110-111190,00.html> (accessed 28 October 2003).

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

In contrast, in the United States, most of the concerns expressed within the ranks of the government remained there until after the war. However, in July 2003 it was revealed by former diplomat Joseph Wilson that a year earlier he had been asked to investigate claims that Iraq had attempted to obtain uranium from Africa. He reported that the allegation was baseless. Nevertheless, the claim still appeared in President Bush's January 2003 State of the Union address to Congress.¹⁰⁸

That the weapons have not been discovered tends to substantiate such claims that the governments overstated their claims, and had the effect of undermining their credibility. However, the efforts which were taken to discredit the whistleblowers appears to have had a further damaging effect. For example, the leak by a White House aide stating that Joseph Wilson's wife was an undercover intelligence agent was viewed as a clear attempt to punish the former diplomat by proxy for speaking out.¹⁰⁹ More damaging still, was the result of the identification of the British arms inspector David Kelly as the source of the concerns raised in the BBC report and his subsequent suicide on a lonely English wood in July 2003. A subsequent inquiry into Kelly's death merely gave this issue greater prominence.¹¹⁰ The furore surrounding Kelly's death did little to help the standing of the government of Tony Blair, as he experienced his first real substantial fall from grace with the both the British public and his own political party.¹¹¹ The sought after political benefits of making war on Iraq were therefore lost to his government.

In other words, arguments based on self defence were pursued in favour of those based on humanitarian intervention because they boded better for governments which had to contest popular elections. Even if there were legitimate reasons under international law for using force against Iraq, such as those based on human rights violations, they were put to one side in favour of those which appeared to have public support. It was not of foremost importance that these arguments did not satisfy the international community, because that community was not directly responsible for the approval of the governments in question. However, the inability to convince the international community also gave an early

108 Roy Eccleston, 'Vindictive leak spawns Washington whodunnit', *The Weekend Australian*, 4-5 October 2003, 20.

109 Ibid.

110 The 'Investigation into the Circumstances Surrounding the Death of Dr David Kelly' (the 'Hutton Inquiry') conducted by the Rt Hon Lord Hutton commenced hearing evidence on 1 August 2003 and concluded on 13 October 2003, His Lordship noting at that time that he did not expect to deliver a statement of his findings until the new year. See <http://www.the-hutton-inquiry.org.uk/index.htm> (accessed 27 October 2003).

111 Paul Majendie 'Britain's Blair to Fight on Despite Grim Polls', *Reuters*, 27 September, 2003, obtained at <http://www.reuters.com/newsArticle.jhtml?type=topNews&storyID=3518829> (accessed 28 October 2003).

indication of a further danger that the argument could not ultimately be made out to domestic or international audiences.

Conclusion

Many of the lessons delivered in the wake of armed conflicts are not the most palatable. The war in Iraq is no different from other wars in this respect. The lesson set down in this article is that although there might have been a legitimate basis for using force against Iraq, it was relegated in favour of other arguments which although less certain appeared more attractive to those who deployed them.

It is unpalatable to realise that right thinking people will readily use force to defend themselves against questionable threats but will hesitate to use force in the defence of clear threats and dangers to others. This might be described as a natural response of human nature, but in a world where collective security and higher ideals or the protection of human rights and liberties are frequently lauded – and which were actually the basis for founding the United Nations – it might have been hoped that we had transcended such basic motivations. And yet, by way of confirming what has been argued in this article, it was recently noted again that the United States did not invade Iraq on a humanitarian impulse. As stated in the *New Yorker*:

...Deputy Defense Secretary Paul Wolfowitz has said, although Saddam's 'criminal treatment of the Iraqi people' was a 'fundamental concern' for Washington's war planners, it was 'not a reason to put American kids' lives at risk, certainly not on the scale we did it.'¹¹²

This is the irony of problems in international law. Its players are states, massive edifices, constructed to surmount the base and petty motivations and inclinations of individual people. It is to states that we look to protect one individual from the abuses of another. And yet, since at least the 1946 judgment of the International Military Tribunal at Nuremberg, it has been recognised under international law the states do act under the direction of individuals. Therefore, it can be recognised that how states behave can be founded on the more base and petty motivations of individuals. These might be the motivations of the leaders of those states, and certainly this was argued during the war in Iraq.¹¹³ However, what has been

112 Paul Gourevitch, 'Might and Right', *The New Yorker*, 16 June 2003, 69.

113 For example, more than once President Bush was quoted as describing Saddam Hussein as 'the guy who tried to kill my dad', a reference to a 1993 assassination plot to kill former President George Bush who had orchestrated the 1990 coalition of states which expelled Iraqi forces from Kuwait. This could certainly be considered a powerful motivator for revenge in an individual, although the identifying effect on the President of a superpower might prove more elusive. See John King, 'Bush calls Saddam "the guy who tried to kill my dad"', CNN.com/Inside Politics, 27 September 2002, obtained at <http://www.cnn.com/2002/ALLPOLITICS/09/27/bush.war.talk/> (accessed 3 October

HUMANITARIAN INTERVENTION & THE WAR IN IRAQ: WHY WAS IT ALWAYS AN AFTER-THOUGHT?

suggested in this article is that it is not even directly the motivations of the leaders of states which determine how states behave, but rather the motivations of the voters in the case of the democratic state (admittedly as perceived by the leaders of that state). It means that it might be the views of the nine to five Newark office typist who commutes on the New York metro at either end of the day which is most important in determining how the United States behaves. This is a revelation which does tend to strike a blow at the 'magnificence' of the modern nation state.

The war in Iraq presents an interesting problem in international law, in so far as it will create many mixed opinions because an evil regime was removed for the wrong reasons. This is because the evidence supporting the reasons for using force failed to materialise, leading to the conclusion that the use of force was illegitimate. At the same time, there were arguable reasons why the regime of Saddam Hussein should be removed. The dilemma is that the international community of states, as well as the people who make up the communities in those states, regularly fail to embrace those reasons as a stimulus for using force.

This is the dilemma of humanitarian intervention. It is right to assist one's fellow man when he is in trouble. But on its own, it is not right enough.

2003). For an account of the plot, see David Von Drehle and R. Jeffrey Smith, 'U.S. Strikes Iraq for Plot to Kill Bush', *Washington Post*, 27 June 1993, A01, obtained at <http://www.washingtonpost.com/wp-srv/inatl/longterm/iraq/timeline/062793.htm> (accessed 3 October 2003).