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The Future of the United Nations in the post-Iraq International Order

*On 25 August 2003, **Mr Kevin Rudd MP**, Shadow Minister for Foreign Affairs, delivered the 3rd Annual Castan Centre for Human Rights Law Lecture. This is a condensed version of the speech at.* www.law.monash.edu.au/castancentre.

This has been a week to honour the memory of good men. Last week, we mourned the loss of Sergio Vieira de Mello. And this week, we honour the memory of Ron Castan. I do not know whether these men had ever met. But what I do know is what they have in common. Both were believers in the dignity of all humanity. Both believed that this dignity required protection by a body of human rights law, both national and international. And both believed that if these laws were to have effect, institutions both national and international, must be created and nurtured with that explicit charge.

The international order at the cross roads

Tonight I do not just wish to talk about the future of the United Nations as a vehicle for the further advancement of international human rights. Tonight I want to talk about the future of the United Nations itself. I want to talk about whether the United Nations has a future. Or whether the Iraq war, and the manner in which it has been prosecuted, spells the end of the United Nations.

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The UN Charter is based on a system of state sovereignty that explicitly outlaws the invasion of one state by another. The Charter does, however, provide for armed intervention in other states explicitly in three areas:

a) The first is Article 42 under which the Security Council may resolve to authorise collective military action against a member state or states who, in the collective view of the Council, have threatened international peace and security.

b) The second is Article 51, the right to self-defence, recognising the reality that, if a member state is attacked, time will not permit the convening of the Council to consider the authorisation of such action.

c) The third is the emerging doctrine of international humanitarian intervention under Article 24 of the Charter. Under this doctrine, member states may intervene militarily under strict criteria to preserve peace and security by preventing genocide or other such carnage **at that time**. I emphasise "at that time" because international humanitarian intervention should not be applied retrospectively, thereby masking a range of strategic, ideological or political reasons that may in reality have caused that state to go to war.

Iraq

The Howard Government argued that Article 42 applied in the case of Iraq and that Security Council authorisation could be derived from a careful analysis of 16 separate Security Council resolutions from 1991 on dealing with unaccounted for Iraqi Weapons of Mass Destruction (WMD). Barely a single public international lawyer concurs with this view.

First, the scope of these earlier resolutions dealt with *inter alia* the Iraqi invasion of Kuwait and the terms of the ceasefire, including evidence of the destruction of Iraqi WMD. However, on any interpretation, if war was to somehow be re-activated by Iraqi non-compliance with the ceasefire resolution, then the war to be re-activated was a war to remove Iraq from Kuwait, not a war for regime change in Baghdad. This is why so much effort went into a so-called "second resolution" in New York over the 2003 northern winter. The previous resolution (1441) of November 2002 did not authorise war against Iraq. It did give Saddam Hussein one last chance, which was why we had a protracted debate about how much time Hans Blix would need to produce a definitive report on his conclusions or outstanding questions on unaccounted Iraqi WMD. That final report was never completed. The rest is now history.

The second ground of self-defence under Article 51 does not apply either. Plainly Iraq had not attacked Australia or its allies. So what of the imminent potential for an attack? Labor said throughout the lead-up to the war that if a clear, identifiable link could be established between Iraq, Osama bin Laden and S11, we would have been prepared to support military action under Article 51 – as we had done so barely a year before in supporting Australian military operations against the Taliban and al Qaeda in Afghanistan. The relevant Security Council resolution on Afghanistan post September 11 explicitly drew on Article 51 in authorising military action by member states. Furthermore, we had direct alliance obligations at stake because the metropolitan territory of our American ally had been attacked. But when it came to Iraq, no linkage could be established between Saddam Hussein and September 11.

So what of the WMD threat? Again, the evidence trail was bare. No intelligence briefing the Opposition ever received indicated that Iraq had given, or was likely to give, WMD to terrorists. And furthermore, no intelligence briefing we ever received provided evidence that Iraqi WMD presented a real and present danger to the security of this country or that of our allies. The only conclusion we could draw was that Article 51 power of self-defence did not provide a sure footing for going to war either.

So we are left with the third and last ground for advancing an argument under the UN Charter that justifies armed intervention: namely international humanitarian intervention. Here again, we encounter fallow ground.

Saddam Hussein's regime was monstrous. It was responsible for the mass murder of its own citizenry. It was an ideal candidate for the application of international humanitarian intervention in the late 1980s when it used chemical weapons on the Kurds. Just as it was in the early 90s when it turned on the Shi'ites in the south who were so foolhardy as to rise up against Saddam after the first Gulf War when they had been led to believe that the allies would intervene on their behalf. These two actions would have provided ample justification for international humanitarian intervention **at that time**.

But nothing happened. Not from the US. Not from the UK. And not from Australia – either from the then Labor Government, or the then Liberal Opposition. There is little point trotting out the argument 10-15 years late – as Prime Minister Howard has done on Iraq. This is simply a post facto attempt at a humanitarian justification for the war. In any case, the fact is that, in the Howard Government's legal advice tabled in the Parliament on the eve of the war, international humanitarian intervention was not advanced as a basis for going to war. Regrettably, what is a serious emerging doctrine of international law resting on Article 24 of the Charter, has become an instrument of political spin rather than an articulation of serious foreign policy.

The truth is that neither the UN Charter nor the UN Security Council nor Security Council resolutions provided the basis for action in Iraq. The truth is that the Iraq intervention represented the application instead of pre-emptive action through the agency of 'coalitions of the willing'.

If the old rules (the Charter) and the old institutions (the UN) are broken, what is to replace them? Some of the questions the Howard Government has to answer are:

a) When (and under what circumstances) will pre-emption apply?
b) Will it be against all states harbouring terrorists? Or just some? And what is the difference of principle between the two?
c) Will pre-emption be applied against all WMD states beyond the P5; or beyond the P5 plus India; or beyond the P5 plus India and Pakistan; or beyond the P5 plus India and Pakistan and Israel; or only against WMD threshold states; or only against WMD threshold states who we don't particularly like?
d) Will pre-emption apply to all states that engage in large-scale killings, mass murder, crimes against humanity and/or policies that have the effect of starving their local populations? Or will pre-emption only apply against some such states?
e) Will Australia fight in future 'coalitions of the willing' on a pre-emptive basis; will this be the future price of alliance; where will we draw the line; or will Mr Howard define each in terms of the oft-quoted "national interest" which, as we all know, is a term which has no definition? For example, will we be in Iran?

Or is the truth likely to be more complex than any of these? Could it be that there will be no explicitly articulated replacement international order so that we end up instead with no order, no principles and no rules. Or alternatively, a smorgasbord made up of two parts pre-emptive coalitions of the willing, one part multilateral security under the UN.

If anyone thinks this is all too academic, ponder right now the operational dilemma, both in Baghdad and New York, as these two orders collide and seek to co-exist: the Coalition Transitional Authority seeking to maintain maximum control on the one hand; and the UN seeking greater control on the other, if it is to lend its legitimacy to member states providing contributions to security, economic and humanitarian assistance. This clash of the two orders is therefore real and there appear to be no rules, no principles readily available to resolve it.

On this question, I do not see a plethora of initiatives from the Howard Government. But the Government cannot escape from the unassailable reality that it is one of the three Occupying Powers in Iraq under the terms of the Fourth Geneva Convention (1949). In practical terms, what this means is that Australia today is conjointly responsible for ensuring the security, health, food, shelter and clothing for 20 million Iraqis.

Pretending Iraq is now somebody else's problem is just a domestic political strategy. The Labor view is that whatever people's views before the war might have been, the fate of 20 million Iraqis now depends on the Occupying Powers and the UN cooperating in a fundamental way to ensure that Iraq does have a future.

The Future of the UN

Churchill's great aphorism applies: just as democracy is the worst system of government in the world, except for all the others, so it is with the UN – the worst system of international government in the world, except for all the others. I believe it is better to reform the UN rather than replace it. So, what must be done?

a) We need to reform the composition of the UN Security Council and potentially its voting arrangements as well.
b) Second, we need to review the application of Article 51 on self-defence to deal with the realities of the new, post-1945 military technologies – as with the reality of terrorism.
c) Third, and most critically, we need to review Article 24 and the emerging doctrine of international humanitarian intervention.

Much good work has been done on the latter by the International Commission on Intervention and State Sovereignty in its 2001 report. This should form the basis of detailed evaluation in Canberra, London, Washington and New York – by governments and by the UN. The 2001 ICISS report represents the most comprehensive treatment of the subject to date and identifies clearly the policy choices which the international community will need to resolve. It recommends six threshold principles or tests to justify armed intervention on humanitarian grounds. These must now be examined in great detail.

If the UN withers on the vine, so too would the authority, legitimacy and efficacy of the body of international humanitarian law that currently hangs off both the UN and its Charter; for those concerned about international human rights, the consequences would be profound.

There is an alternative future for the UN. And that is a future for a reformed United Nations that remains vital to all humanity, not just some. And equally a UN that remains vitally engaged with all the concerns of humanity - security, economic and humanitarian - not just some.

Kevin Rudd MP and Prof David Kinley