

Iraq and the Use of Force: Do the Side-Effects Justify the Means?

*Robert Cryer and A.P. Simester**

To say that the matter of the legality of the armed conflict against Iraq in 2003 was divisive is an understatement. The primary justification given by the UK government for the lawful nature of the Iraq war (2003) was an implied mandate from the Security Council. The implied mandate was said to be derived from a combination of Security Council Resolutions 678 and 1441. Many international lawyers remain unconvinced that such a mandate can be inferred from those resolutions.

There is agreement among both supporters and opponents of the war in Iraq that Saddam Hussein's regime had an appalling human rights record. This was known to the coalition governments; indeed, Tony Blair expressly made the "moral case" for war on the basis of Hussein's human rights violations. The legal justifications offered for the conflict by the UK government, however, did not refer to humanitarian intervention. This paper investigates whether it is possible that, despite the fact that the justification was not raised by the UK, it can provide a defence to any claims that the UK acted unlawfully, or that individuals committed an international crime, by initiating the attack on Iraq.

* Respectively, Senior Lecturer in Law and Professor of Legal Philosophy, University of Nottingham. We are very grateful to Ben Batros and David Enoch for comments on an earlier draft of this essay.

INTRODUCTION

To say that the matter of the legality of the armed conflict against Iraq in 2003 was divisive is an understatement. It has engendered much and, at times, bitter, debate. However, few shed any tears for Saddam Hussein. If there is one thing that unites the otherwise polarized camps on the war, it is that Saddam Hussein was the head of an extremely brutal regime, whose human rights record was among the worst in the world. Unlike the highly controversial dossiers relating to the issue of Iraq's possession of weapons of mass destruction (hereinafter WMD), whose veracity varied from the plausible to the distinctly "dodgy,"¹ little, if any criticism has been directed at the accuracy of the UK Foreign Office's dossier, *Saddam Hussein: Crimes and Human Rights Abuses*.² Notwithstanding this, the legal justifications given for the military action against Iraq conspicuously omitted one possible claim that related to Saddam's record: humanitarian intervention. In post-Saddam Iraq, after more than a year of searching, the coalition failed to find any evidence of WMD in Iraq. However, abundant evidence of the violent suppression of Iraqis has been unearthed. Thus, as the claim that Iraq posed a military threat to the US or the UK became less convincing, the argument for intervening on behalf of the beleaguered Iraqi population gained a greater evidentiary base. In the later stages of the major combat operation, and now in the era of Iraqi occupation and insurgency, there has been a growing tendency to swat aside questions about the war with the moral claim that the Iraqi people are better off since the fall of Hussein's regime.

Commenting on the fact that the evidence proffered before the conflict that Iraq had WMD was not necessarily convincing, Professor Sir Adam Roberts, in an opinion written for the Foreign Affairs Select Committee, noted that "[a]s circumstances change after the war, it is possible that *ex post facto* other justifications will look more convincing."³ The nature of the Ba'athist regime

1 See Foreign Affairs Select Committee, *The Decision to Go To War in Iraq*, Ninth Report, 2003, Cm. 6062, at 6123.

2 U.K. Foreign & Commonwealth Office, *Saddam Hussein: Crimes and Human Rights Abuses* (2002). It should be noted, of course, that Saddam Hussein, and all others who are likely to be prosecuted for suspected offences during the Ba'athist era in Iraq, are innocent unless and until proven guilty.

3 Memorandum from Professor Sir Adam Roberts, *International Law and the Iraq War 2003*, Foreign Affairs Select Committee, *Foreign Policy Aspect of the War on Terror*, Tenth Report, 2003, Cm. 5986, § 21, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmcaff/405/405we20.htm>.

in Iraq was internationally recognized prior to the initiation of the conflict in March 2003. However, the fact that an increasingly cogent justification for the use of force, humanitarian intervention,⁴ was not deployed by the coalition prior to the conflict, provides us with an opportunity to examine something that is often overlooked in international law doctrine. This is the question whether a use of force, prima facie contrary to international law, can be rendered lawful by a justification that is known to the party resorting to force, but deliberately not relied upon when explaining its conduct.

The reasons international lawyers have largely ignored such questions are varied. Still, two stand out. The first of these is that until recently it has been broadly accepted that, absent express UN authority, the only justification for the unilateral inter-state use of force is self-defense.⁵ Since 1999 and the Kosovo conflict, the position has become more complex, with the arguable justifications for the use of force having expanded.⁶ Therefore it is only in the post-Kosovo order that such discussions have really gained currency.

The second reason is related to the first. At least since the *Nicaragua* case,⁷ most international legal discussion on the permissible use of force has been concerned with whether or not the relevant law has changed. As a result, the debate has tended to focus on divining *opinio juris* from what states have or have not said when using force.⁸ Of course, the two activities — discussing changes in the law, and applying the law to facts — are not entirely disjunctive, as claims that the law has changed are often accompanied by claims that the requirements of the new law are fulfilled, while failure to raise an argument is often also taken as evidence that the state does not think that it applies or that the state's *opinio juris* is to the effect that the exception does not exist.

For the most part, the legal arguments brought by the UK and Australia have fitted the self-defense/UN authority mold.⁹ Our purpose, however, is

4 As we shall see, the place of humanitarian intervention in international law is questionable. However, it is the formal position of the UK that such a right is at least emerging. *See infra* p. 26.

5 *See* Derek W. Bowett, *Self-Defence in International Law* (1958); Ian Brownlie, *International Law and the Use of Force by States* 251-80 (1963); Costantine Antonopoulos, *The Unilateral Use of Force By States in International Law* 187-405 (1997).

6 For a broad view of the practice here, see Thomas M. Franck, *Recourse to Force by States* (2002).

7 *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

8 *See, e.g.*, Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq*, 13 *Eur. J. Int'l L.* 21 (2002).

9 *See infra* pp. 21-23. The US arguments are more problematic, however, as they may

to look a little further than just the question of whether the action can be considered lawful under those claims. We also seek to consider whether the justifications not used could serve to render the action against Iraq lawful, and to make some comment on the interplay of legal and moral argumentation. To do this, it will be necessary to evaluate the claims made by the UK and Australia, alongside other factors that may preclude responsibility on the part of the members of the coalition, or render that action legitimate.

I. THE IRAQ ACTION: THE LEGAL AND MORAL ARGUMENTS

It is not the purpose of this paper exhaustively to detail the build-up to the conflict in Iraq that began, ultimately, in March 2003.¹⁰ This section will concentrate on matters relevant to the point at hand: whether justifications deliberately not deployed may later be restored from the sidelines to render action lawful without being previously called upon. The history of the legal and moral justifications proffered for the conflict can be separated into roughly three periods. The first period, which we shall term the "second resolution" era, began with the passing of Security Council Resolution 1441 and came to a close at about the end of February 2003, when it became clear that a UN Security Council resolution expressly mandating force would not be forthcoming. The next was the "implicit authorization" period, during which UK and Australian government arguments centered on an implicit mandate from the Security Council based on Resolutions 1441, 687, and 678. The final chapter is perhaps not yet complete; it began after the action against Iraq started and, although the arguments were less clearly legally focused, centred on the humanitarian benefits to the people of Iraq. The three periods do not correspond to periods when these arguments were being made exclusively,¹¹ but rather to the periods within which they were the dominant themes of those seeking to justify the war.¹²

be taken as asserting an expanded right of self-defense prior to the emergence of any clear threat.

10 For general histories, see John Simpson, *The Wars Against Saddam: Taking the Hard Road to Baghdad* (2003); *The War We Could Not Stop: The Real Story of the Battle for Iraq* (Randeep Ramesh ed., 2003). For an inside view, see Robin Cook, *The Point of Departure* (2003).

11 See, for example, Jack Straw, *Reintegrating Iraq into the International Community: A Cause with Compelling Moral Force*, Speech at Chatham House (Feb. 21, 2003) (on file with authors), containing a mixture of such arguments.

12 The most detailed statement of the US position can be found in the publication by two State Department lawyers, William H. Taft & Todd F. Buchwald, *Preemption*,

A. The "Second Resolution" Period

As mentioned above, this period can be dated from the passage of Security Council Resolution 1441, on 8 November 2002. This resolution declared Iraq to be in "material breach" of its obligations under Security Council Resolution 687, but was said on its adoption to contain no "hidden triggers" for automatic action by the two most polarized on this issue of the permanent members of the Security Council, the US and France.¹³ According to Resolution 1441, the next step for the Security Council was to convene immediately to consider what to do; it warned Iraq that continued violations of its obligations would lead to "serious consequences."¹⁴ At the time, most international lawyers in the UK interpreted the resolution as not having granted any state the right to use force against Iraq, in particular because it did not contain the phrase "all necessary measures," which is UN code for the use of force. Whether this interpretation was shared by all of the members of the UK government is uncertain. Robin Cook notes that on 25 November 2002, Defense Secretary Geoff Hoon "told the Cabinet that Resolution 1441 marked the end of containment," although whether Mr. Hoon envisaged another resolution is unclear.¹⁵ In public, the UK government remained committed to a second resolution, although in January 2003 Tony Blair said that the conflict would be lawful if a second resolution were to be blocked by an "unreasonable" veto.¹⁶

At the Labor Party Spring Conference in Glasgow, on 15 February 2003,

Iraq and International Law, 97 Am. J. Int'l L. 557 (2003). It is notable that the article does not contain the usual caveat that the authors are speaking in their personal capacity. The editors of the symposium in which the article appears also note the somewhat official nature of the article. See Lori Fisler Damrosch & Bernard H. Oxman, *Editor's Introduction* to 97 Am. J. Int'l L. 553, 553 (2003). However, the article does not contain the same focus as the formal letter to the Security Council from the United States, Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (Mar. 21, 2003) (UN Doc. S/2003/351) [hereinafter Letter to the Security Council].

13 See U.N. SCOR, 57th Sess., 4644th mtg. at 3-5, U.N. Doc. S/PV/4644 (2002) (statements of Ambassadors Negroponte and Levitte). The background to the adoption of 1441 is reported in *The War We Could Not Stop*, *supra* note 10, at 26-29.

14 S.C. Res. 1441, U.N. SCOR, 57th Sess., 4464th mtg., U.N. Doc. SC/RES/1441 (2002).

15 Robin Cook, *Point of Departure* 253 (2004).

16 He was taken to task for this in the House of Commons on 18 March 2003, 401 Parl. Deb., H.C. (6th ser.) (2003) 765.

Tony Blair seemed to reassert the UN route, saying expressly that "[our] belief is in the United Nations. I continue to want to solve the issue of Iraq and weapons of mass destruction through the United Nations.... [L]et the United Nations be the way to deal with Saddam. But let the United Nations mean what it says and do what it means."¹⁷ Although pushing hard diplomatically, the government stopped short of stating expressly that the only lawful route to war was through a second resolution. This was probably because Tony Blair was unwilling to exclude what actually happened, going to war without such a resolution in the event of it being impossible to obtain one.¹⁸ However, as Robin Cook said in a cabinet meeting on 13 March 2003, "the intensity of our efforts to get agreement in the Security Council means we cannot now pretend that it does not really matter if we get agreement."¹⁹ As is well known, that agreement did not come.²⁰ Thus the UK justification for war moved to a legal basis that denied the necessity of a second resolution.

B. The Implicit Authorization Era

This period, which can be said to have commenced by 17 March 2003,²¹ ended the ambiguity about the UK government's views on the use of force. On 17 March 2003 the Attorney-General, Lord Goldsmith, made public his opinion on the legality of the use of force against Iraq and there was a detailed debate over that view in the House of Lords. Lord Goldsmith did not attend the debate to answer questions on his advice.²² On the same day, the Foreign Secretary, Jack Straw, wrote a letter to Donald Anderson, MP, containing Lord Goldsmith's advice on the conflict, and a lengthier legal background paper in which a more detailed explanation of the position was given.²³ The background paper had been prepared by the Foreign and Commonwealth Office, and disagreement on the contents of the paper caused Elizabeth Wilmshurst, the

17 Prime Minister Tony Blair, I Want to Solve the Iraq Issue via the United Nations, Speech to Labour's Local Government, Women's and Youth Conferences, SECC, Glasgow (Feb. 15, 2003), *available at* <http://www.labour.org.uk/tbglasgow> (last visited Jan. 31, 2005).

18 Cook, *supra* note 15, at 302-03.

19 *Id.* at 321.

20 *See, e.g.*, The War We Could not Stop, *supra* note 10, at 30-41.

21 Note, however, that Jack Straw had claimed in private to Robin Cook a few days earlier, on 12 March 2003, that Resolution 1441 provided all the legal cover the UK needed. Cook, *supra* note 15, at 319-20.

22 646 Parl. Deb., H.L. (5th ser.) (2003) 68 *passim*.

23 Letter from Jack Straw, Secretary of State for Foreign and Commonwealth Affairs, to Donald Anderson, MP (Mar. 17, 2003) (on file with authors).

Deputy Legal Adviser and a civil servant of some 30 years standing, to resign in protest at its support for the lawful nature of using force against Iraq.²⁴

The advice given was that the combined effect of Resolutions 678, 687, and 1441 meant that the Security Council had authorized the use of force against Iraq. It is notable that there is no reference at all to the US idea of pre-emptive self-defense, which has obtained little, if any, support on the European side of the Atlantic.²⁵ We will appraise the merits of the UK argument later, but it is worth sketching it out here.²⁶ The legal advice tendered to the Australian government by its Attorney-General's Office and Department of Foreign Affairs and Trade was essentially the same as the UK position outlined here.²⁷

Force against Iraq was first authorized by the Security Council in 1991, by Resolution 678, which gave the mandate to "Member States co-operating with the government of Kuwait ... to use all necessary measures to uphold and implement Resolution 660 and all subsequent resolutions and to restore international peace and security in the area."²⁸ This mandate was suspended by Resolution 687,²⁹ which set out a number of requirements for Iraq to accept as a prerequisite for a formal ceasefire. One of these was Iraq's disarmament, to be verified by the UN. Iraq accepted the conditions of Resolution 687. Subsequent determinations by the Security Council that Iraq was in "material breach"³⁰ of its obligations under Resolution 687 led to UK/US air strikes

24 Ms. Wilmschurst only confirmed that this was the reason nearly a year later, in February 2004.

25 The doctrine was first enunciated in The National Security Strategy of the United States of America (2002), available at <http://www.whitehouse.gov/nsc/nss.html>. For statements in support (notably from the United States), see Taft & Buchwald, *supra* note 12; John Yoo, *International Law and the War in Iraq*, 97 Am. J. Int'l L. 563, 571-74 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 Am. J. Int'l L. 576, 582-85 (2003). Support is by no means universal in the States, see Miriam Shapiro, *Iraq: The Shifting Sands of Pre-emptive Self-defense*, 97 Am. J. Int'l L. 599 (2003); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 Am. J. Int'l L. 607, 611, 618-20 (2003). A representative European view may be found in Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 Am. J. Int'l L. 804, 819-22 (2003).

26 This sketch is based on the background paper.

27 Bill Campbell & Chris Moraitis, Memorandum of Advice to the Commonwealth Government on the Use of Force Against Iraq, in 4 Melb. J. Int'l L. 178 (2003).

28 S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990).

29 S.C. Res. 687, U.N. SCOR, 46th Sess., 2978th mtg., UN Doc/S/RES/687 (1991).

30 It should be noted that the term is one borrowed from the pre-UN Charter law of interstate ceasefires. See Jules Lobel & Michael Ratner, *Bypassing the Security Council*,

against Iraq. On one occasion (14 January 1993) the then UN Secretary-General, Boutros Boutros Ghali, asserted that such action was lawful.

Resolution 1441, the argument goes, was adopted against this background, and that Resolution expressly referred to Resolution 678. It also determined that there was, and continues to be, a material breach of Resolution 687 on the basis of Iraq's non-compliance with its disarmament obligations. However (as the background paper recognizes), Resolution 1441 offered Iraq "a final opportunity to comply with its disarmament obligations." If it were to fail to take this opportunity, by not demonstrating its cooperation with the UN inspectors, then the Security Council was to convene to consider the situation and the need for full compliance. Iraq was warned, in this event, of "serious consequences." Thus Resolution 1441 gave the US and UK the right to use force against Iraq not immediately, but only after the Security Council had considered the matter. The background paper makes much of the fact that the Resolution does not expressly require that the Security Council determine what further consequences there would be for Iraq should it not comply. The UK conclusion was that, since the Security Council had considered the matter, and it was clear that Iraq was still in material breach of Resolution 687, the authorization to use force was revived.

This was the argument used by Tony Blair in claiming that imminent action against Iraq would be lawful in the key Parliamentary debate that preceded UK action against Iraq.³¹ It is true that Blair also referred to the brutal nature of Hussein's regime. However, up to, and still at, this point, this consideration was advanced by the government only on the moral and political, as opposed to legal, level.³²

C. During and After the Major Conflict

During and after the war, facing continued questions regarding the lawfulness of the Iraq conflict, the UK government's response has tended to concentrate not on arguments relating to Resolution 1441, but on the benefits of the conflict to the Iraqi people, in particular because of the fall of the Hussein regime. The response concerning the legal or moral significance of those benefits has been at times ambiguous. For example, on 1 April 2003, Jack

Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime, 93 Am. J. Int'l L. 124, 144-46 (1999).

³¹ 401 Parl. Deb., H.C. (6th ser.) (2003) 760.

³² See, e.g., Jack Straw, Iraq: A Challenge We Must Confront, Speech to the International Institute of Strategic Studies (Feb. 11, 2003) (on file with authors); Straw, *supra* note 11.

Straw perhaps blurred the lines by saying that "all those who believe in the values of democracy, human rights and the rule of law should welcome the fact that the Iraqi regime's days will end."³³ However, at no point has Jack Straw, or any other member of the government expressly relied on the humanitarian benefits of removing Saddam Hussein to provide the legal basis for the action in Iraq. The Foreign and Commonwealth Office position remains that force was used "to enforce Iraq's disarmament obligations in accordance with Security Council resolutions," although the statement also notes that "as a result, millions of Iraqis now have the freedom to speak out and enjoy basic liberties denied to them for so long by a brutal and despotic regime."³⁴

It is worthwhile at this point to set out some of the *moral* arguments made by the UK government when arguing the case for war. The first of these was that the sanctions regime was harming the Iraqi civilian population and that it was therefore necessary to use military force so the sanctions could be lifted. This argument was asserted only early in the run-up to war and was not often repeated, largely because of the heavy criticism it received.

The major moral argument, however, centered around the benefits to the Iraqi people. Speaking at the UN General Assembly on 29 September 2003, and having acknowledged the legal controversy over the Iraq action, Jack Straw said, in addition to making the world a safer place and strengthening the UN,³⁵

let us not lose sight of what has been achieved and what is taking shape. Saddam Hussein's reign of terror is over. The apparatus of torture and oppression which claimed hundreds and thousands of lives is at an end. Instead we have the beginnings of representative government run by Iraqis for Iraqis....³⁶

The argument that the collateral effect of the action would be to bring to an end tyranny in Iraq was frequently raised in a more subtle form. Tony Blair used the plight of the Iraqi people as part of his "moral case for war." However, he stipulated that this was not the inspiration for the Iraq action:

33 Jack Straw, Commitment to the Liberation and Future Prosperity of Iraq, Speech to the Newspaper Society Annual Conference, Lanesborough Hotel (Apr. 1, 2003) (on file with authors).

34 Foreign & Commonwealth Office, Countries and Regions: Iraq, at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394374> (last visited June 30, 2004).

35 Some doubt about the latter assertion, in particular, may be prudent.

36 Jack Straw, Speech to the 58th General Assembly (Sept. 25, 2003) (on file with authors).

"[t]he moral case against war has a moral answer: it is the moral case for removing Saddam. It is not the reason we act. That must be according to the United Nations mandate on Weapons of Mass Destruction. But it is the reason, frankly, why if we do have to act, we should do so with a clear conscience."³⁷ According to Blair, the moral case for war took into account the fact that "[i]f we remove Saddam by force, people will die and some will be innocent. And we must live with the consequences of our actions, even the unintended ones."³⁸ At times, the argument was raised in a crass manner. Geoff Hoon, responding to claims that cluster weapons had been used near civilians,³⁹ leading to the deaths of a number of Iraqi children, responded that Iraqi mothers would come to thank the UK for using such weapons.⁴⁰ At the other end of the spectrum, Jack Straw, speaking before the conflict began, raised this argument in quite a sophisticated form. His comments deserve reproduction in some detail:

If there is military action, people will get killed and injured. That is the brutal and inevitable reality of war. Some of those killed will be innocent civilians; even those killed who are not innocent have souls, and wives, husbands, children who will suffer. This is why we have to strain every sinew ... to avoid war.... If military action does prove necessary, huge efforts will be made to ensure that the suffering of the Iraqi people is as limited as possible. And I know, I am certain, that we will have put an end to a far greater torment and killing which will otherwise be perpetuated by the Iraqi regime.⁴¹

Straw's comments were echoed in Australia by the Prime Minister, John Howard, in a Speech to the National Press Club on 14 March 2003:

Armed conflict is a terrible thing. If it occurs the agony and the deaths of people are many and I'm very conscious, as I know other world leaders are, of the possibility, the near inevitability of course of some civilian casualties in any military operation. I understand that. I also understand, of course, that the humanitarian arguments do not always

³⁷ Blair, *supra* note 17.

³⁸ *Id.*

³⁹ The use of cluster weapons is not inherently illegal, although in Foreign Affairs Select Committee, Fourth Report, 2000, HC 28-I/II, § 150 (regarding Kosovo), it was rightly noted that the "use [of cluster weapons] in an urban environment where civilians live might well fall foul of the prohibition on indiscriminate weapons."

⁴⁰ The War We Could not Stop, *supra* note 10, at 248-49.

⁴¹ Straw, *supra* note 32.

hang on one side. My ultimate responsibility is the security of the Australian people. The humanitarian issues at stake in relation to Iraq do occupy my mind. And one key aspect of that that appears to have escaped scrutiny is the enormous humanitarian cost, not least to the people of Iraq, of Saddam Hussein remaining in charge. Even if you believed that the failing policy of containment will continue to protect the world from possible danger from Iraq, and I don't, but even if you did, that policy's continuation would do nothing to relieve the suffering of the people of Iraq, it will do nothing to provide them with a more hopeful, happy and peaceful Iraq.⁴²

We will return to these arguments later, but now we must consider the legal pedigree of the arguments made, and of one that was not made, by the UK and Australian governments.

II. THE INTERNATIONAL LEGAL POSITION⁴³

The foundational rule relating to the use of force in international affairs, and arguably the founding rule of post-1945 international order, can be found in Article 2(4) of the United Nations Charter. This states that all UN members "[s]hall 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."⁴⁴ This is a near-comprehensive ban on the use of force. It is subject, in the eyes of most international lawyers, to only two exceptions: self-defense, under Article 51 of the UN Charter, and Security Council authorization under Chapter VII of the UN Charter.⁴⁵ The UK position is, post-Kosovo, that there is an emerging right to use force to avoid a humanitarian catastrophe. Academic views on this are, as we shall see, mixed.

Before addressing the details of the arguments in Iraq, however, we should mention a fundamental challenge that has been made to the normative status

42 John Howard, Speech to the National Press Club, Great Hall, Parliament House (Mar. 14, 2003) (on file with authors).

43 The classic study of the area remains Brownlie, *supra* note 5.

44 See generally Albrecht Randzelhofer, *Article 2(4)*, in *The Charter of the United Nations: A Commentary* 112 (Bruno Simma ed., 2d ed. 2002).

45 On the former see Albrecht Randzelhofer, *Article 51*, in *The Charter of the United Nations*, *supra* note 44, at 788; Bowett, *supra* note 5. On the latter see Nigel D. White, *Keeping the Peace* 115-28 (2d ed. 1997); Erika de Wet, *The Chapter VIII Powers of the United Nations Security Council* 256-310 (2004).

of Article 2(4). A number of scholars have, over the past thirty-five years, questioned whether Article 2(4) is truly normative, given that in practice states have violated it with impunity.⁴⁶ Indeed, some have claimed that the Iraq action essentially put the last nail in the coffin of Article 2(4).⁴⁷ In our view, this behaviorist interpretation omits the important role of *opinio juris* in international law.⁴⁸ No state has ever repudiated the normative force of Article 2(4).⁴⁹ Rather, states have sought to avoid being in violation of the Article by appealing, more or less convincingly, to its traditionally permitted exceptions, self-defense and Security Council authorization. As the International Court of Justice said in the *Nicaragua* decision,

[i]f a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.⁵⁰

While this can be taken too far, even to the extent of denying reality,⁵¹ there is sense in the Court's pronouncement. In domestic law we would not set up the standard of universal compliance as the test for the validity of law. Neither should we for international law.⁵² In 2003 the ICJ reiterated its view that the UN Charter rules are those applicable to the use of force.⁵³ In fact, the conflict in Iraq showed the continuing importance of Article 2(4). Both the UK and Australia made careful arguments to the effect that they

46 The first of these was Thomas M. Franck, *Who Killed Article 2(4)? Or the Changing Norms Governing the Use of Force by States*, 64 Am. J. Int'l L. 809 (1970). See also Anthony C. Arend & Robert J. Beck, *International Law and the Use of Force by States: Beyond the Charter Paradigm* (1993).

47 See, e.g., Michael J. Glennon, *Why the Security Council Failed*, 82 Foreign Aff. 16 (2003).

48 See Louis Henkin, *Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 Am. J. Int'l L. 544 (1971).

49 As Yoram Dinstein observes, "in spite of the frequent roar of guns — States uniformly profess their fidelity to Article 2(4)." Yoram Dinstein, *War, Aggression and Self-Defence* 89 (3d ed. 2001).

50 *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 168 (June 27).

51 See Christine Gray, *International Law and the Use of Force* 20 (2000).

52 Dinstein, *supra* note 49, at 88.

53 *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. Lexis 11 (Nov. 6); not, however, strongly enough for some — see the interpretation of Judge Simma, *id.* (Separate Opinion of Judge Simma, para. 2). See Justin Chenevier, *Oil on Troubled Waters — The ICJ Tackles Use of Force*, 63 Cambridge L.J. 1 (2004).

were complying with Article 2(4) and indeed only relied on (their belief in) a Security Council mandate, accepting that the basic rule remains as set down in Article 2(4). Although much has been made of the United States' assertion of a new right of preemptive self-defense, in fact, the justification made to the Security Council for the action relied almost exclusively on Security Council authorization.⁵⁴

A. A Security Council Mandate?

Let us turn to the merits of the argument made by the UK and Australia about the existence of a Security Council Mandate. The cases for and against this claim are more closely balanced than is sometimes claimed.⁵⁵ The case set out above is strengthened by the fact that members of the Security Council who passed Resolution 1441 certainly were aware that, in the past, the "material breach" argument had been used to justify force; knowing this, they deliberately incorporated that phrase within Resolution 1441.⁵⁶ France, in particular, is said privately to have suggested that it would not complain too loudly if the UK and US took action without submitting a second resolution to the Security Council.⁵⁷

However, in the end, the UK and Australian argument is not convincing. China and Russia had always protested earlier US/UK actions, taken on the basis of the "material breach" interpretation,⁵⁸ as violations of Article 2(4). Furthermore, such arguments rely on an assumption that, at the time of the passage of Resolutions 678 and 687, the unilateral use of force under the former resolution would be an appropriate response to a violation of the latter.⁵⁹ There is no evidence that this was the case; indeed, it seems quite clear from Resolution 678 that the mandate for the use of force was solely to remove Iraq from Kuwait.⁶⁰ Evidence against the suggestion that unilateral force was considered an acceptable response to violations of Resolution 687

54 See Letter to the Security Council, *supra* note 12. There is only (in a closely typed letter of one and a half pages) a one-sentence allusion to the doctrine, after a lengthy expression of the Security Council authorization argument.

55 Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 93 Am. J. Int'l L. 628, 629 (2003).

56 *Id.* at 630-31.

57 *Id.* at 631.

58 See, e.g., Nigel D. White & Robert Cryer, *Unilateral Enforcement of Resolution 687: A Threat too Far?*, 29 Cal. W. Int'l L.J. 243, 271-77 (1999).

59 See Franck, *supra* note 25, at 612-13.

60 See Vaughan Lowe, *The Iraq Crisis: What Now?*, 52 Int'l & Comp. L.Q. 859, 865 (2003).

may also be found in the contrast between the wording of Resolution 687 and in the temporary ceasefire declared by Resolution 686.

The authority to determine a material breach was vested in the Security Council. The Council has used this to determine such breaches, and did so in Resolution 1441. However, the authority to determine what to do in reaction to those breaches was also clearly vested in the Security Council. It was asserted by the UK that 1441's reference to the Security Council's reconvening, without stating that it must decide what to do, when read alongside the reference to "serious consequences" in the Resolution, amounted to implicit acceptance of a mandate to use force in the event of future non-compliance by Iraq. This was clearly not the understanding of the Security Council when 1441 was passed. A number of states made it very clear in the debate on 1441 that they only voted for 1441 on the basis that it did not lead to force without a further Security Council resolution.⁶¹ As Lord Lloyd put it in the House of Lords on 17 March 2003, "If Resolution 1441 had authorized the use of force in the event of any further material breach, it is clear to me that it would never have been agreed; and the proof of that pudding is in the eating."⁶² The states that were definitely of the opinion that 1441 did not include a mandate for force included a majority of the veto-holding permanent members of the Security Council. The UK and US knew this when the Resolution was adopted.⁶³

Language that would have automatically given the US and UK authority to take "all necessary measures" in the event of further Iraqi non-compliance was dropped from 1441 at the insistence of France and Russia.⁶⁴ The UK statement in the Council seemed to accept that this meant that the Security Council retained the sole authority to determine further action; the UK representative, Sir Jeremy Greenstock, said that "If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required in paragraph 12. We would expect the Security Council then to meet its responsibilities."⁶⁵

The use of force is a serious business, as Jack Straw, Tony Blair, and John Howard all noted. It inevitably leads to the deaths of innocents and

61 See Nigel D. White & Eric Myjer, *Editorial: The Use of Force Against Iraq*, 8 J. Conflict & Security L. 1, 2-4 (2003); Lowe, *supra* note 60, at 865-66.

62 464 Parl. Deb., H.L. (5th ser.) (2003) 107.

63 See Grant Niemann, Advice to the Hon Simon Crean MP on the Use of Force Against Iraq, *in* 4 Melb. J. Int'l L. 190, 194 (2003).

64 See George Williams & Devika Hovell, Advice to the Hon Simon Crean MP on the Use of Force Against Iraq, *in* 4 Melb. J. Int'l L. 183, 186 (2003).

65 U.N. SCOR, 57th Sess., 4644th mtg. at 10, U.N. Doc. S/PV/4644 (2002).

combatants. This underlies the requirement that, for a Security Council resolution to authorize force, it must be clear and unambiguously the will of the Security Council that the resolution grant such authority. That was not the case here.⁶⁶ Vaughan Lowe puts the point eloquently:

It is said that Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required, if that had been intended.... It is simply unacceptable that a step as serious as a massive military attack upon a State should be launched on the basis of a legal argument dependent on dubious inferences drawn from the silences of Resolution 1441 and the muffled echoes of earlier resolutions, unsupported by any contemporary authorization to use force.⁶⁷

B. Humanitarian Intervention⁶⁸

It is arguable that a right of humanitarian intervention can be found in international law before the twentieth century, both in the "classic" period of international law of Gentili and Grotius⁶⁹ and in the practice of European states in the nineteenth century.⁷⁰ However, any such rights would not have survived the coming into force of Article 2(4).⁷¹ Until the 1990s, the better view was probably summed up by a UK Foreign Office Memorandum of 1986, which stated that "the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal ... but the overwhelming majority of contemporary legal opinion comes down against the right of humanitarian intervention."⁷²

However, since 1991 the UK has moved towards asserting the right unilaterally to intervene in order to prevent or terminate a humanitarian catastrophe. The first claim of this nature was made in the aftermath

⁶⁶ White & Myjer, *supra* note 61, at 1-4.

⁶⁷ Lowe, *supra* note 60, at 866. For a similar statement, see Lord Goodhart, 646 H.L. (5th ser.) (2003) 71.

⁶⁸ See generally J.L. Holzgrefe & Robert O. Keohane, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003). For a critical work on the subject, see Anne Orford, *Reading Humanitarian Intervention* (2003).

⁶⁹ Theodor Meron, *The Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 Am. J. Int'l L. 110 (1991).

⁷⁰ Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 Am. J. Int'l L. 275, 277-83 (1973).

⁷¹ See Brownlie, *supra* note 5, at 338-42.

⁷² Foreign Office Policy Document No. 148 (1986), in 57 Brit. Y.B. Int'l L. 614 (1986).

of the Gulf conflict 1990-1991, in relation to no-fly zones set up over Northern Iraq to protect the Kurds.⁷³ The arguments brought by the UK at the time commixed reference to Security Council Resolution 688, which declared the humanitarian situation in Iraq to be a threat to the peace, with an independent claim of right to humanitarian intervention.⁷⁴ The formal UK legal position, set out before the Foreign Affairs Committee, was that the action was *consistent* with, albeit not authorized by, Resolution 688, and that a customary international law right of humanitarian intervention (not overridden by Resolution 688) rendered the action lawful.⁷⁵

The asserted right of humanitarian intervention was deployed again by the UK in relation to the highly controversial NATO bombings of Kosovo in 1999.⁷⁶ The UK position on this occasion was unambiguous. The governmental statement to Parliament about the lawfulness of the Kosovo conflict was that

[o]ur legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe.... The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the [United Nations] Security Council, but without the Council's express authorisation, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe.⁷⁷

International reaction originally was ambiguous, in that a condemnatory resolution submitted to the Security Council by Russia, Belarus, and India

⁷³ On which see Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 Eur. J. Int'l L. 114 (1991); Simon Chesterman, Just War or Just Peace? Humanitarian Intervention in International Law 196-206 (2001).

⁷⁴ S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc. S/RES/688 (1991) [hereinafter S.C. Res. 688].

⁷⁵ See Chesterman, *supra* note 73, at 204.

⁷⁶ The conflict gave rise to a flurry of academic work: for example, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l L. 1 (1999); Antonio Cassese, *Ex Injuria Jus Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 Eur. J. Int'l L. 23 (1999); Antonio Cassese, *A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 Eur. J. Int'l L. 791 (1999); Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 Int'l & Comp. L.Q. 330 (2000); Nigel D. White, *The Legality of Bombing in the Name of Humanity*, 5 J. Conflict & Security L. 27 (2000).

⁷⁷ 328 Parl. Deb. H.C. (6th ser.) (2003) 616-17.

was rejected, while a number of other States, including China, criticized the action as unlawful. However, after the crisis had begun to abate, it increasingly appeared that the arguments advanced by the UK were not accepted at the international or domestic level. In September 1999, 132 states, acting under the aegis of the "Group of 77", expressly stated that "the so-called right of humanitarian intervention ... has no basis in the UN Charter or international law."⁷⁸

In the UK and the Netherlands, parliamentary inquiries looked into the question of the lawfulness of the intervention. Both came to the same conclusion: that the action was unlawful, but legitimate.⁷⁹ This was also the position taken in the Report of the Independent International Commission on Kosovo.⁸⁰ The conclusion is striking, as it involves an interplay of legal and moral argumentation. It was not to the taste of some. For example, in none of the reports was there a detailed explanation of what legitimacy entailed — which earned a blistering riposte from Alfred Rubin:

Legitimate? By whose standards? And if legitimacy is to be a moral concept, as seems to be implied by the quoted language of the Commission where it is clearly distinguished from a "legal" concept, then whose value weighing is involved? Who is making the decisions and on what basis?⁸¹

After asking if it is NATO States who "make the decisions," Rubin continued:

[t]here is some sense to that position. After all, it is NATO's young people who die and NATO's taxpayers who pay for the invasion of

⁷⁸ Declaration on the occasion of the Twenty-third Annual Ministerial Meeting of the Group of 77, § 69 (Sept. 24 1999), *available at* <http://www.g77.org/Docs/Decl1999.html>.

⁷⁹ Foreign Affairs Select Committee, Fourth Report, 2000, HC 28-I/II, §§ 128, 138; Advisory Council on International Affairs, Advisory Committee on Issues of Public International Law, Humanitarian Intervention, Report No.13 (2000). *See* Steven Wheatley, *The Foreign Affairs Select Committee Report on Kosovo: NATO Action and Humanitarian Intervention*, 5 *J. Conflict & Security L.* 261 (2000); Ige F. Dekker, *Illegality and Legitimacy of Humanitarian Intervention: Synopsis and Comments on a Dutch Report*, 6 *J. Conflict & Security L.* 115 (2001).

⁸⁰ Indep. Int'l Comm'n on Kosovo, the Kosovo Report: Conflict, International Response, Lessons Learned 186 (2000). The Commission was appointed by the Swedish government.

⁸¹ Alfred P. Rubin, *Review Essay: Independent International Commission on Kosovo*, 6 *J. Conflict & Security L.* 147, 152 (2001).

non-NATO States' territory in what NATO regards as "legitimate" but "illegal" activity. But that is the logic which led to imperialism.⁸²

This notwithstanding, the formal position of the UK is that, in certain narrow circumstances, there is an exception to the prohibition on the use of force to stave off a humanitarian catastrophe. The conditions for this were set out in the UK Foreign Affairs Select Committee report on Kosovo: the Security Council determined the crisis to amount to a threat to international peace; there were policies to resolve the crisis which armed force could secure; and the crisis involved an imminent humanitarian catastrophe which, it is believed, could be averted only by the use of force and collective action.⁸³

These conditions may well have been formulated with the Kosovo crisis in mind. In particular, there seems no reason to require that a catastrophe be imminent if this serves to exclude situations in which humanitarian intervention could bring an end to an ongoing catastrophe. If it would be lawful to have intervened in Rwanda before 4 April 1994, there seems to be no compelling reason to say it should not be lawful to have intervened on 1 May 1994, when the genocide was ongoing.⁸⁴ Indeed, to wait for the Security Council to have determined that such a crisis amounted a threat to international peace and security would often conflict with a requirement that an imminent catastrophe could be averted by military action. The Security Council does not always act quickly. For example, it was not until the 1970s that the situation in *apartheid* South Africa was determined to be a threat to the peace by the Security Council.⁸⁵ Many serious violations of human rights committed by regimes, such as the military dictatorships in Latin America in the 1970s, never receive Security Council attention.

Against this background, it is notable that the UK did not choose to rely on a humanitarian intervention argument to back up its legal case for intervening in Iraq.⁸⁶ Whether or not it accords with general international law, the UK view is that there exists a right of humanitarian intervention. If the evidence relied on by the UK government regarding Saddam's record is accurate, his regime was responsible for crimes against humanity, including the widespread and

82 *Id.*

83 Foreign Affairs Select Committee, *supra* note 79, § 140.

84 Although Wheatley claims this is more consistent with state practice. Wheatley, *supra* note 79, at 268.

85 S.C. Res. 418, U.N. SCOR, 32nd Sess., 2046th mtg. at 1, U.N. Doc. S/RES/418 (1977).

86 The Australian advice said that as the authorization case was convincing, it did not need to deal with humanitarian intervention. *See* Campbell & Moraitis, *supra* note 27, § 3.

systematic use of torture and "disappearances" that characterized his regime and which had not abated by 2003.⁸⁷ If the UK position is that there is a limited right of humanitarian intervention, then an argument for the use of force *could* have been made on the basis of humanitarian intervention. After all, in Resolution 688 the Security Council expressed its grave concern about the "repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas,"⁸⁸ and declared the consequences of such repression to amount to threats to international peace and security. Resolution 1441 expressly reconfirmed Resolution 688. The level of repression in Iraq was at least as serious as that in Kosovo prior to the NATO action.

There are difficulties with such an argument, including the fact that Resolution 688 reaffirmed the commitment of all states to the sovereignty, territorial integrity, and political independence of Iraq. But the resolution has, as we have seen, previously been relied upon as part of a humanitarian intervention argument by the UK, to justify the no-fly zones which remained in place over northern Iraq until the fall of the Ba'athist regime.

To argue the lawfulness of the conflict in Iraq on the basis of humanitarian intervention might have required some reinterpretation of the conditions of that justification, but these have not been set in stone, owing to the doubts of many governments about its sufficiency in any event. On the basis of the UK view, an argument predicated on humanitarian intervention would have required no more (and, in some respects, less) of a stretch than the argument based on implied Security Council authorization, which the UK did make. Whenever the UK referred to the humanitarian situation in Iraq, it was always as part of an avowedly "moral" rather than legal case. Yet as time has passed, far more emphasis has been put on the fact that the people of Iraq will supposedly be better off in the long run because of the intervention. So, if we take the UK position as being plausible, could the action be considered lawful on the basis of an argument made solely on the moral level? To this issue we now turn.

⁸⁷ For a modern, though in some ways quite restrictive, definition of crimes against humanity, see Rome Statute of the International Criminal Court, July 17, 1998, art. 7, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002). Article 7 includes torture and disappearances as examples of crimes against humanity when they are committed on a widespread or systematic basis, pursuant to a policy to commit such attacks on the civilian population.

⁸⁸ S.C. Res. 688, *supra* note 74.

III. JUSTIFICATIONS AND SIDE-EFFECTS

It is a straightforward feature of every system of law, and of morality in general, that some actions call for justification. International law is no exception.⁸⁹ Characteristically, actions require justification when they prima facie violate a norm of the relevant legal or moral system. If D intentionally shoots V, for example, his doing so is a prima facie wrong. Other things being equal, V has a right not to be shot. D can be expected to supply reasons why his conduct was (if indeed it was) nonetheless acceptable. D should explain why we should exonerate him, and not proceed to the judgment that D's conduct was, all things considered, wrongful; and why, in a courtroom, D should not be convicted. The same applies, *mutatis mutandis*, to the responsibility of states under international law.⁹⁰

Justification may be on offer. Perhaps V mounted an attack on D, so that D was acting in self-defense when he shot V. Depending on the circumstances of the case, actions taken in self-defense, even lethal actions, can be justified both legally and morally.⁹¹ In offering such a justification, D must go beyond the prima facie wrong. He must point to other features of his behavior, to other actions or effects that are accomplished by the behavior that (also) brings about V's death. D must say, for example, "I did not merely

89 As is exemplified by the "circumstances precluding wrongfulness" in the International Law Commission's Articles on State Responsibility. Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 169-211, U.N. Doc. A/56/10 (2001) (art. 20-27). See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 160-90 (2001). For critique of the earlier ILC draft Articles, see Vaughan Lowe, *Precluding Wrongfulness or Responsibility: A Plea for Excuses*, 10 *Eur. J. Int'l L.* 405 (1999).

90 In saying this, we expressly take no position on the concept of international crimes of states, as originally contained in Article 19 of the pre-1999 ILC Draft Articles. Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 131, U.N. Doc. A/51/10 (1996). On this difficult issue see Krystina Marek, *Criminalising State Responsibility*, 14 *Revue Belge de Droit International* 460 (1978-1979); Alain Pellet, *Can a State Commit a Crime? Definitely Yes!*, 10 *Eur. J. Int'l L.* 425 (1999). The term "crime" in Article 19 was always controversial and cannot be considered to have been used in a technical sense.

91 For investigations of some of the moral issues involved in self-defense in international law, see David Rodin, *War and Self-Defense* (2002); Michael Waltzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* 58-62 (2d ed. 1992).

kill V; in so doing, I also saved my own life from the threat that V created, and that is why my killing V was justified."

A. Constraints on Valid Justification

Notice, however, that it is not enough just to cite a second outcome of one's behavior, even if that second outcome is beneficial or justifiable. The second outcome must be such as to justify the first, *prima facie*, wrong. More specifically, the two outcomes must stand in a relationship that satisfies certain conditions. We can see this by elaborating on the self-defense example above, which may usefully be regarded as a paradigm case of the phenomenon of justification.

1. Sufficiency

The justification must supply a good, or sufficient, reason for committing the *prima facie* wrong. In particular, it must be (a) an appropriate type of response and (b) a proportionate response to the justifying circumstances.⁹² The self-defense case above is straightforward on this point. D's act in killing V is justifiable, in the example, because it is a response that addresses the threat from V directly, by seeking to stop V from carrying out that unjustified attack — thus it is an appropriate type of response — and because it is (*ex hypothesi*) proportionate. The International Court of Justice in the *Nicaragua* case identified very similar criteria for self-defense. Although the requirements of necessity and proportionality do not appear in Article 51 of the United Nations Charter,⁹³ the Court said that the customary law to which that Article refers only permits "measures which are proportional to the armed attack and necessary to respond to it."⁹⁴

92 These are not necessarily the only conditions of sufficiency. Perhaps other criteria must also be met before the justification supplies a good reason for committing the *prima facie* wrong. One such, at least in international law, may be (c) vindication: the reason must be valid *in fact*. This is not normally a requirement of morality or domestic law. (If D shoots V, reasonably believing that V is about to murder him, D is entitled to claim self-defense even if he was, in fact, wrong.) But, for institutional reasons that we cannot explore here, it is arguable that such a condition should exist in international law. On this view, for example, if State A claims that its existence is under threat from State B's invasion plans and that it must use immediate force to defend itself, State A can rely on self-defense only if its claim proves true.

93 U.N. Charter art. 51 reads (in relevant part), "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs."

94 *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, at 94 (June 27). See generally Judith G. Gardam, *Proportionality and Force in International Law*,

By contrast, it would be disproportionate to, say, shoot V in order merely to prevent V from insulting one's friend. Similarly, in international law it would be a disproportionate, and therefore unjustified, response to use force to intervene in Zimbabwe in order to prevent the mass expropriation of property from some of that country's citizens. Even if we were to grant (and this is something about which we express no opinion) that there are good reasons to prevent such expropriations, the reasons are not sufficient to justify military intervention. According to international law, the proportionality requirement includes a filtering criterion of *permissibility*. Protecting property rights is, *tout court*, ruled out as a justification for armed intervention in a foreign state. Similarly, the argument over humanitarian intervention can be understood as a dispute about whether armed intervention is a *per se* disproportionate response to humanitarian needs; in other words, whether humanitarian reasons are an impermissible justification for the use of force.⁹⁵

To the extent that it differs from proportionality, the requirement of appropriateness adds a further degree of complexity to the example at hand. Suppose that D is faced with an armed aggressor who threatens to inflict lethal violence, and that D knows that he can stop the aggressor either by shooting him or by taking his family hostage. In our view, only the former response is justifiable. The latter would be, at most, a claim of duress rather than one of self-defense; D's response is not addressed to the source of the threat but rather inflicts a wrong upon an innocent third party. Such an action may, in some cases, be seen to be mitigated because of the

87 Am. J. Int'l L. 391 (1993). There is no space to pursue the point here, but we doubt that "proportional and necessary" is really a two-pronged test. Indeed, we suspect that "necessary" is not a separate criterion at all; it is, rather, simply one of the many factors to be considered when deciding whether, on balance, the response was proportionate. This is because the question whether a response is proportionate depends, in part, on what alternatives were available. Suppose, for example, that V threatens to kill D forthwith unless D pays V one million pounds, and that D can either pay the money or defend himself by assaulting and disabling V. The assault may be proportionate, though unnecessary. Conversely, in the example described in the text following this note, it may be necessary to shoot V if D is to prevent the insult to his friend. But it would still be disproportionate to do so.

⁹⁵ Frequently, an agent may have multiple purposes when acting, some permissible and some impermissible. (Suppose, for example, that State A intercedes following the invasion of Kuwait by Iraq, both in order to defend the sovereignty of Kuwait and to ensure that world petroleum supplies are not disrupted.) In such cases, the impermissible motives drop out of the picture, so that the proportionality of the agent's justification is evaluated in light of the permissible reasons only.

extremity of D's circumstances. But mitigation does not make an action right. This requirement of appropriateness is an implicit part of the standard objection to the bombing of Hiroshima in 1945 by the US. In claiming that the admirable goal of bringing Japanese military aggression to an end did not justify the bombing, most objectors draw a distinction between an equivalent bombing directed solely against the military forces (say, operating within the Pacific war theatre) and the bombing of Japanese civilians who were, it is said, not an appropriate target for an act of self-defense.⁹⁶ This in-principle distinction, between military objectives (and forces) and civilian targets, is fundamental to the law governing the conduct of hostilities (the *jus in bello*).⁹⁷ The distinction presupposes that a proportionate use of force in response to unlawful aggression by X may be justifiable when directed against X, and yet inappropriate, and unjustified, when directed against Y as a means of inducing X to desist. We can imagine a pair of cases that, in part, illustrate this point:

Terror Bomber and Strategic Bomber both have as their goal promoting the war effort against Enemy, which has unilaterally declared war and attacked their nation. Both intend to pursue their goal by dropping bombs. Terror Bomber's plan is to bomb a residential district in Enemy's territory, thereby killing civilian adults and children, terrorizing Enemy's population more generally, and forcing Enemy to surrender. Strategic Bomber's plan is to bomb Enemy's munitions plant, thereby undermining Enemy's war effort. However, Strategic Bomber also knows that there is a residential suburb next to the munitions plant, and that when he bombs the plant he will also kill civilian adults and children living nearby.⁹⁸

We shall return to these cases in the next section. But it is important to notice that, even assuming that Enemy was an unprovoked attacker and that Terror

96 This is not the only type of objection made: it is, for example, sometimes argued that the response was in any event disproportionate. *See, e.g.*, Hilaire McCoubrey, *International Humanitarian Law* 244-45 (2d ed. 1998). Note that we express no view on the correctness of these objections. Our concern here is about how they fit with the structure of justification.

97 It was described as a cardinal principle of the *jus in bello* in the Nuclear Weapons Advisory Opinion, 1996 I.C.J. 26, § 78 (July 8). *See also* Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 82-87 (2004).

98 The cases here are based on a slightly different example first proposed by Jonathan Bennett, *Morality and Consequences*, in 2 *The Tanner Lectures on Human Values* 45, 95 (Sterling M. McMurrin ed., 1980).

Bomber's going to war is otherwise justified and lawful, killing Enemy civilians is not the same as killing Enemy combatants. Terror Bomber's conduct is wrong, all things considered, because it fails the justification test on grounds of lack of appropriateness.⁹⁹ One may sometimes wage a war, causing the deaths of others, and do so permissibly. Indeed, this point is implicit in Article 51 of the UN Charter and inherent in the distinction between military and civilian targets in the *jus in bello*. But that goal of self-defense, which makes it generally justifiable to target munitions dumps, does not entitle one deliberately to target innocent civilians; even though that, too, may promote one's war effort.¹⁰⁰ The end does not always justify the means.

2. A Means-End Relationship

It is also crucial that the two outcomes stand in a means-end relationship. Our paradigm example illustrates this nicely: D kills V *in order to* save his own life from V's attack. Both outcomes are intended and, furthermore, the *prima facie* wrong is done for the sake of the justifying outcome. That is to say, the justifying outcome is *the reason* D acts as he does.

Any claim of justification, then, must have both a (subjective) motivational and an (objective) evaluative dimension. D is justified because saving himself from V *was the reason why* D acted as he did; and this ("explanatory")¹⁰¹ reason was also a good or sufficient ("guiding")¹⁰² reason why he may or should so act. One may loosely think of the sufficiency criteria as normatively *objective*, or evaluative, constraints upon justification; yet the reasons that satisfy those constraints must also, we claim, actually be D's *motivational* reasons for his conduct.¹⁰³

99 The deliberate targeting of civilians is a war crime. *See, e.g.*, Prosecutor v. Stanislav Galić, 43 I.L.M. 794 (International Criminal Tribunal for the former Yugoslavia, 2003); William J. Fenrick, *Attacking the Enemy Civilian As a Punishable Offence*, 7 Duke J. Comp. & Int'l L. 539 (1997).

100 It may be acceptable, nonetheless, to cause proportionate collateral civilian casualties when a legitimate military objective is targeted. We return to this point below.

101 This terminology is used by Joseph Raz, *Practical Reason and Norms* 16-20 (2d ed. 1990).

102 *Id.*

103 This requirement holds, incidentally, under domestic common law. *See R. v. Dadson*, 169 Eng. Rep. 407 (1850); *R. v. Thain*, 1985 N. Ir. L.R. 457; G.R. Sullivan, *Bad Thoughts and Bad Acts*, 1990 Crim. L. Rev. 559. An analogy can also be drawn here with U.S. constitutional law, which subjects government legislation and other actions limiting fundamental rights to "strict scrutiny." To survive strict scrutiny, the legislation must be necessary and proportionate to achieving an essential government purpose; and that purpose must be the very reason for which the

This, paradigm, feature is central to the *ex ante* implicit-authorization justification offered by the U.K and Australia for the invasion of Iraq in 2003; that the use of force, a *prima facie* wrong in international law, occurred in response to material breaches of Resolution 687 by Iraq. For convenience, we can illustrate this with a diagram representing the chain of reasoning involved:

Implicit Auth.: Coalition \longrightarrow invade Iraq_{Means} \longrightarrow uphold Resolution 687_{End}

This case has the right structure. Provided the end of upholding and implementing Resolution 687 was sufficient in principle to justify the use of force on this occasion, the UK's claim of justification is made out. On that analysis, the use of force was justified because the reason by which it was motivated was also objectively sufficient.

Consider, now, the two bomber cases described earlier. There is an important distinction between the contemplated causal chains that lead Terror Bomber and Strategic Bomber respectively to conduct themselves as they do:

Terror Bomber: TB \longrightarrow kill civilians_{Means} \longrightarrow win (justified) war_{End}

Strategic Bomber: SB \longrightarrow blow up plant_{Means} \longrightarrow win (justified) war_{End}
 |
 kill civilians_{Side-effect}

In the case of Strategic Bomber, the prospect of the civilian deaths does not provide him, at least so far as he is concerned, with a reason for his behavior. Neither does it explain his behavior. For Strategic Bomber, the deaths are neither a means nor an end, but rather a side-effect: his belief that they may occur does not connect to his motivation.

What difference does this make, and how does it affect the various claims to justification advanced by the UK and Australia? In our view, there are

government acted. (Contrast the "rational basis" test that applies to most other government legislation, which requires only that the legislation be rationally related to a *conceivable* legitimate governmental purpose, regardless whether this was the actual purpose of the legislation: Fed. Communications Comm'n v. Beach Communication, 113 S. Ct. 2096 (1993).) Moreover, the burden of proving its purpose rests with the state, since it has control over the public record. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (1997). (We are grateful to Ernest Weinrib for drawing our attention to this point, and to Alan Michaels for help with formulating it.)

important moral differences between means, ends, and side-effects that directly affect the possibility of justification.

First, we take it that the claim of implicit authorization, like the case of the Strategic Bomber, is a case where an intrinsically bad means may potentially be justified by the good end to which it leads. Such cases exist because we can say, subject to the constraint of sufficiency, that where an agent's conduct has both a bad and a good outcome, and if those outcomes stand respectively in a means-end relationship so far as the agent's motivation for doing them is concerned, then the agent's bringing about the bad outcome (intentionally and as a means of reaching the good outcome) may sometimes thereby be justified. In effect, a defense of justification may be claimed for an intentional action if the bringing about of the outcome-that-is-to-be-defended was motivated by the further outcome that (it is claimed) justifies it.

Side-effects are different. Bad side-effects also call for justification, but not in the same way. For Strategic Bomber, the bombing of the munitions dump may be justified by the legitimate need to defeat Enemy; but we must also, separately, ask whether the further outcome — the killing of the civilians — is justified. The key test for blame with respect to a side-effect is whether it is *reasonable* to run the risk of bringing about that side-effect. Such a test is, in effect, a test of whether the agent's conduct as a whole is reasonable, notwithstanding its potential to bring about adverse effects. Whereas we ask whether Terror Bomber's killing of civilians is justified by its war aims (and, in particular, whether the killing is an appropriate response to Enemy's aggression), for Strategic Bomber we ask whether the civilian deaths are a fair, proportionate, or reasonable price to pay for the destruction of the dump and its contribution to the war effort.¹⁰⁴ *Ceteris paribus*, one is justified in bringing about an intrinsically bad side-effect if — and only if — it is reasonable in the circumstances to risk doing so by behaving as one does.¹⁰⁵ Once this is accepted, it follows that when considering whether the advertent but unintended doing of a prima facie wrong is justified, then, as well as ends, the various means and side-effects may all be included in the assessment. This is because the question whether it is reasonable (and not

104 Causing disproportionate civilian casualties when attacking a military objective is a war crime. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 85(3)(c), 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]; *Galić*, 43 I.L.M. at 808.

105 Attacking civilians recklessly (by not attempting to discover whether what is being attacked is a military target or a civilian object) is also a war crime. See Protocol I, *supra* note 104, art. 85(3)(a); *Galić*, 43 I.L.M. at 807-08.

reckless) to behave in a given fashion, and thereby risk the bad side-effect at issue, may be affected by any of the ramifications of that behavior; by any of the outcomes it has the potential to bring about, whether good or bad; and whether in fact intended by the agent.

The contrast is clear with the justification of intended effects: these, we have claimed, can be justified only when done as means to (sufficient) ends. As such, an intrinsically bad outcome, if intended, cannot be justified merely by the fact that the agent's underling behavior is otherwise reasonable.

B. The *Ex Post* Justification for Intervening in Iraq

One upshot of these distinctions, which are reflected too in the *jus in bello*, is a structural asymmetry between intention and side-effects: side-effects do not lend any favorable weight to the justification of intended outcomes.¹⁰⁶ They can lend favourable normative weight only when considering the reasonableness of other side-effects. By contrast, the Strategic Bomber case illustrates that good ends, which motivate the choice to risk the side-effect or to essay the means, may sometimes be offset against an incidental bad outcome.

Consider now what one might loosely term the "collateral justification" emphasized by the UK during and after its intervention in Iraq. We have seen that, in the aftermath of the invasion, there has been a shift of focus toward the humanitarian benefits to be gained by removing the Hussein regime. Moreover, there is evidence that humanitarian intervention may, controversially, be (re)gaining recognition as a justification for the use of force in international law. Certainly, as we noted earlier,¹⁰⁷ this was the position adopted by the UK regarding the NATO bombings of Kosovo in 1999, where, indeed, the intervention was made for this very reason:

UK: NATO forces \longrightarrow bomb Kosovo_{Means} \longrightarrow avert humanitarian disaster_{End}

The question of justification in this scenario turns solely on its objective

¹⁰⁶ This asymmetry carries over to praise as well as blame. Eric D'Arcy supplies an illustration:

Suppose that A, who in his undergraduate days had belonged to some Fascist or Communist organization, which he has long since quit, is about to be appointed to high office; B happens to know of A's past association, but refrains from making it known, with the result that A is appointed. This may be to B's credit; but not if his reason was the prospect of blackmailing A once he was in office.

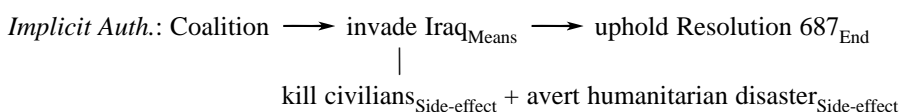
Eric D'Arcy, *Human Acts* 126 (1963).

¹⁰⁷ See *supra* p. 26.

dimension: was the humanitarian goal of the bombing *sufficient*, in international law, to justify the use of force? In Iraq, however, the motivational dimension of the analysis is far more problematic. Even if humanitarian ends can be sufficient to warrant an armed intervention, this was not *in fact* why the UK and Australia invaded. Recall the passage quoted earlier from the speech of the UK Prime Minister:

The moral case against war has a moral answer: it is the moral case for removing Saddam. It is not the reason we act. That must be according to the United Nations mandate on Weapons of Mass Destruction. But it is the reason, frankly, why if we do have to act, we should do so with a clear conscience.¹⁰⁸

The implications are clear. Like the civilian deaths consequent upon invasion, the humanitarian benefits are a foreseen side-effect, and not intended as a means or end of the invasion. Diagrammatically, given the facts of the matter and the actual motivations of the UK and Australian Governments, the claim of justification has the following structure:



Two of these outcomes are prima facie wrongs that stand in need of justification: the invasion of Iraq itself, and the killing of innocent civilians in the course of that invasion. But the factors that may be taken into account for their justification differ. The use of force to invade is justified *only* if the claim of implicit authorization is made — in other words, if the goal of enforcing Resolution 687 (in conjunction with other salient resolutions) is sufficient, objectively, to justify the invasion. By contrast, any claim justifying the human cost of invading, measured in terms of the deaths of innocent civilians, can legitimately make reference to *both* the need to enforce Resolution 687 (if, indeed, this is an objectively valid goal) *and* the offsetting humanitarian benefits.

Such offsetting benefits may be crucial. As was acknowledged by the Australian and UK Prime Ministers, the side-effects of waging war, even a justified war, are very serious indeed. John Howard specifically recognized

108 Blair, *supra* note 17. Similarly, the Australian Prime Minister, John Howard, presaged the passage quoted above, *supra* note 42, with the statement that "disarmament of Iraq has always been our prime policy goal but we certainly recognise that the end of Saddam Hussein's regime would provide an opportunity to lessen the suffering of the Iraqi people."

Suppose, further, that in either case the same number of civilian deaths is expected. In an analysis based on consequentialism, there may be no significant difference between them. Yet the conduct of Terror Bomber remains, we think, an unjustified wrong. Sometimes the end may justify the means. But the side-effect cannot. Similarly, notwithstanding the shift in rhetoric after the invasion of Iraq commenced, the UK and Australian case must stand or fall on the claim of implicit authorization from the UN Resolutions.

C. Further Philosophical Remarks

Some, especially those with consequentialist leanings, may reject this analysis.¹¹² Perhaps some intended *prima facie* wrongs have no further justification *qua* ends, but why should their assessment not be an overall one? That is, if some intended wrong is, objectively, justifiable as a means to another (albeit unintended) consequence, then why should we think the conduct, all things considered, wrong? Here is a pivotal case for moral and legal systems: where the actor's motive for inflicting harm is insufficient, but where her behavior as such is objectively reasonable. According to the analysis presented here, the actor is morally culpable and legally responsible for inflicting the harm, and may not justify her doing so by reference to those other, unintended consequences that happen to make her behavior reasonable. Crudely summarized, the importance of intention is that it knocks out of consideration, rather than outweighs, those good side-effects.

In effect, there are two alternative bases for blaming an agent. Consider first the case of doing harm as a side-effect. As proponents of the doctrine of double effect impliedly accept, to proscribe unintended harming outright would be intolerable; because we cannot always avoid taking risks and because the side-effects of our actions are so often incalculable. This is why we base culpability upon a very general assessment, one dependent upon the agent's behavior as a whole; and do not blame someone for doing harm in such a case unless her doing so is unreasonable. For whenever we say that an agent's risking harm as she did was unreasonable, then we can also say, on the same grounds, that her behavior was unreasonable. If blame for foreseen actions attaches to the agent, it is because such actions — in common with

¹¹² See, for example, the criminal law writings of Paul Robinson, *A Theory of Justification: Societal Harm as a Prerequisite to Criminal Liability*, 23 UCLA L. Rev. 266 (1975); Paul Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in *Harm and Culpability* 45 (A.P. Simester & A.T.H. Smith eds., 1996).

intended actions — provide reasons for, and more importantly, against, an agent's behavior. Those reasons are not contingent upon the agent's own intentions.

This may be put in another way. Side-effects are relevant to blame since, irrespective of their role in the agent's own practical reasoning, they supply reasons why her behavior is reasonable or unreasonable; and because we do not blame a defendant for choosing to run the risk of a bad side-effect unless that choice is on the whole unreasonable. It is always normatively acceptable to choose to run a reasonable risk.

The alternative basis is where a defendant inflicts harm intentionally. And the problem occurs when the question, did he do the right thing, is asked of a case where inflicting the harm would have been an acceptable way for him to achieve some further aim, but where he did not inflict the harm for that reason: in a sense, where the harm was justifiable but not actually justified. Should the law be concerned with such a case, where the behavior is, independent of D's intentions, reasonable? It seems to us that one may validly blame the agent for the wrong he does by inflicting harm in such a case, and that the law ought to hold that agent legally responsible for doing so. Observe that in both law and morality the primary thing prohibited is not the behavior generally, but rather the particular wrong: the killing, the use of force, and so forth. It is only when the scope of that proscription is restricted by a qualifier, "unreasonable," that we consider the agent's overall behavior — including the other outcomes that were or might have been brought about. Otherwise, there seems no reason to do so; nor to relax our stricture that the justification of intentional action operates just as a species of exculpatory *explanation*.

If the claim of implicit authorization fails, the denial of wrongdoing in the UK case rests if anywhere upon the fact that forceful intercession may be justifiable as a means to avert humanitarian catastrophe; hence, one may say, interceding is the right thing to do. We should make no mistake, however: it remains, in itself, a bad thing to do. This is why, *ceteris paribus*, it is a moral and legal wrong. We have seen that it is not proscribed absolutely (*cf.* the possibility of self-defense), but since it is a *prima facie* wrong then both the legal and moral systems have grounds to restrict the basis upon which it is permitted. The proper interpretation of situations where there is a justificatory defense to a *prima facie* wrong is that the circumstances underlying the justification partially liberate the defendant from her *prima facie* legal (and moral) duty not to commit that wrong.¹¹³ But they only do

113 See A.P. Simester, *Mistakes in Defence*, 12 Oxford J. Legal Stud. 295, 306 (1992).

so in virtue of the prima facie wrong being a means to the justificatory end. An extension to cover side-effects as well as ends would be gratuitous. Since the prima facie wrong is intrinsically bad, the licence ought not to be extended beyond that which is necessary. And the sheer existence of incidental benefits does not deny that the agent has culpably violated the rights of another. Even if there is no "net" harm, the agent still perpetrates a wrong.

None of this is to disparage the significance of bad side-effects. We do not claim they can be neglected, or deleted from a state's moral record. It is not only our intentions that matter, in international law or elsewhere: it also matters what we do. There is no ignoring responsibility for the cost, in civilian lives, of the decision to invade Iraq. Indeed, the claim of justification does not seek to evade responsibility. Quite the opposite. It *asserts* responsibility: yes, I did this, and I did it for good reasons. Those reasons have to do with the other effects, intended and foreseen, of my conduct; and they must be pressingly good ones. Our claim in this paper is simply that, when it comes to intended actions, the range of justifying reasons is even more limited than for side-effects. It is limited to my ends. If an incidental outcome does not explain why I sought to inflict harm, then it cannot justify my doing so. And we should not permit a state, hypocritically, to avail itself of a convenient defense by which it was not motivated. The overall reasonableness of its behavior should excuse neither a repugnant intention nor the wrong it perpetrates.

CONCLUSION

There is little discussion in international law in general, and concerning the use of force in particular, of the effect that a known but unrelieved-upon justification (or positive side-effect) may have on the lawfulness of conduct. In addition to the reasons we mentioned in the introduction, this may reflect an underlying assumption that states are likely to be profligate, rather than parsimonious, with their justifications. There is an empirical basis for such an assumption,¹¹⁴ but that does not answer the question whether a justification that is not, in fact, the basis for action may be used (by that state or another actor)

114 The US's multifarious explanations for its invasion of Panama in 1989 serve as a clear example of the tendency. See Simon Chesterman, *Rethinking Panama: International Law and the US Invasion of Panama, 1989*, in *The Reality of International Law: Essays in Honour of Ian Brownlie* 57 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

to claim lawfulness for that action.¹¹⁵ The invasion of Iraq therefore offers an interesting chance to investigate the matter, as detailed statements were made by the UK and Australia that emphasized the separation between their primary legal and secondary moral cases for action, at least prior to the conflict. In such a situation, the reason offered by D'Amato for his conclusion that there is no "requirement that the intervention be actuated by a legally proper motive" — that it is impossible to tell why a state acts — is unconvincing.¹¹⁶ D'Amato suggests, too, that it is in practice impossible to tell if a state is lying, but this is merely an argument of convenience; it unnecessarily permits a (questionable) evidential difficulty to justify an assertion of substantive law.

Given that there is no detailed discussion of the matter in international law, and no decisive authority, it is instructive to draw upon philosophical argument; which, we observe, acknowledges concepts very similar to those found both in the law relating to the resort to force and in the *jus in bello*. Through a mixture of normative and analogical reasoning from these sources, and its application to the circumstances at hand, we conclude that the better view is that the resort to force must be motivated, at least in part, by a legally-based justification that is relied upon at the time of acting.

115 Two assertions that it may cite no external legal authority to that effect. See Ved. P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 Am. J. Int'l L. 494, 494 (1990); Anthony D'Amato, *The Invasion of Panama Wars: A Lawful Response to Tyranny*, 84 Am. J. Int'l L. 516, 520 (1990). The latter writer cites only another of his works, dismissing the critiques of others by a reference to the play *My Fair Lady*.

116 D'Amato, *supra* note 115, at 520. The problem of identifying and documenting the mind of a corporate entity such as a state or government is a familiar one from public law (*cf. supra* note 103) and, indeed, from corporate liability in criminal law. It seems to present no special problems in international law; neither was it an "impossible" challenge in the case-study that is the subject of this article.

