JUST DEFENCE

INSTITUTE FOR LAW AND PEACE

Does the Rule of Law Matter?

A lay view of the continuing crisis in International Law; followed by an account of a Round Table discussion organised jointly by Just Defence and the Institute for Law and Peace on Wednesday 3 November 2004; and the David Head Memorial Lecture

DOES THE RULE OF LAW MATTER?

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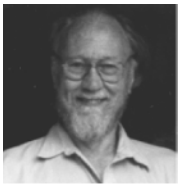

A Lay View

the continuing crisis in International Law

Examples of the collision between evolving international or world law and the claims of national law, above all by the United States, are occurring with increasing frequency. Recent events suggest that a crisis exists in international law. The International Red Cross reported that the treatment of British detainees at the UK army concentration camp at Guantanamo Bay in Cuba offered prima facie evidence of war crimes committed by the United States. The admission in January 2005 that former CIA employees could endanger UK interests because promises made to them at the time of their first recruitment as spies were subsequently not fulfilled was hardly surprising, but it did indicate once again the inter-relationship between intelligence systems and and international action associated with the disregard of international law.

Other items indicate a number of areas, some particularly relevant to the UK, which also bear on this question of confidence or crisis. This is not necessarily a complete list.

- The war on Iraq begun by the US and the UK is considered by the great majority of international lawyers as undoubtedly illegal; an opinion held by most governments and expressed in voting in the General Assembly of the United Nations.
- The conclusions of a panel of international lawyers reached after a 'Searching Enquiry' held in November 2003 at the London School of Economics was that serious breaches of law had occurred during the occupation of Iraq and that these may have amounted to war crimes.
- Publication of the notorious photographs of prisoners being abused at Abu Ghraib gaol, Baghdad and elsewhere reinforced fears regarding the apparent disregard of international law by the American army and administration.

- Equally damaging, if on a smaller scale, have been the charges by a group of Iraqi civilians from Basra of their maltreatment by British soldiers. The appeal to the High Court in London where the government defence that the matters had already been investigated by the army was dismissed and the judge ruled that the European Convention on Human Rights was applicable wherever British troops were in control of prisoners. This may be related to the reported British army decision to cease the hooding of prisoners of war, for fear that it would be held illegal, as it may already have been in the case of Northern Ireland by the European Court.
- A recent Appeal Court judgement in London accepting the validity of evidence gained by means of torture if this has not been used on British citizens is extremely disquieting, analogous as it is to the lawlessness of American behaviour in Guantanimo Bay.
- Within the Republican administration, the guiding idea is that while the rest of the world has to conform to international law, the United States will be exempt from provisions it chooses not to obey. President Bush has stated that the US would not permit 'secret and sudden attack with chemical or biological or radiological or nuclear weapons'. This attitude has similarities with the Bush administration's refusal to sign the Kyoto Treaty on control of carbon emissions or to accept the existence of the International Criminal Court. On the contrary, US politicians and emissaries have done their best to sabotage negotiations for the preparation of the Court, before, during and since the treaty establishing it.
- Equally one-sided and damaging to the very idea of international law has been the example of the US military in its Cuban enclave of Guantanamo Bay with the illegal detention and mistreatment of arbitrarily arrested prisoners. This has been universally seen as discriminatory, illegal and totally unacceptable by people across the world, but especially by Muslims.
- The judgment by the law-lords in an 8-1 ruling in mid-December has been another severe blow to the UK government's arbitrary attitude to the rule of law. They decided that the detention of a number of foreign terrorist suspects in Belmarsh prison in south-east London breaches the European Convention on Human Rights. In one notable summing-up by a High Court judge it was declared that the action of the government constituted a greater threat to the liberty of the people than release of these prisoners.
- At the same time the chief prosecutor at the International Criminal Court has announced that he will be examining allegations of war crimes committed in Iraq by British troops. These complaints were mentioned above but they were included in the report to the Court made by the group of eight leading experts in international law who considered evidence from a number of witnesses at a public hearing in London in November 2003.

- The head of the British Red Cross has stated that US action in Iraq has jeopardised the work of the Red Cross, which is protected by international law and is normally fully respected. That respect has also been lacking in dealings with the Red Crescent in Iraq.
- The recent public discussion about the role of the Attorney-General, a lawyer appointed by the Prime Minister, whose duty to advise the government appears to conflict with his necessary loyalty to the party in power. It is said that he bent his legal opinion in favour of the legality of the Iraq war in a way that is sharply at variance with the views of most international lawyers.
- An updated agreement on nuclear sharing between the UK and USA, the Mutual Defence Agreement, puts the British government in near-certain breach of the Nuclear Non-Proliferation Treaty.

Examples of opposition to such trends include:

- The attempt by a dozen or more MPs in the House of Commons to impeach Tony Blair for the deception used in taking Britain to war against Iraq illegally and on evidence of non-existent weapons of mass destruction.
- The continuing harassment by non-violent means and subsequent legal challenges to the presence of Trident nuclear submarines and their bases in Scotland and elsewhere, with the likelihood of future appeals to European courts and the testing of international legality for the British government.

The Need for a Legal Order

Three of the greatest crimes in history were committed during the last century: the Nazi German destruction of European Jewry; the atrocities carried out by Stalin and Mao; and the dropping of atom-bombs to wipe out the people of two Japanese cities. Responsible for these were an evil despotic tyranny, atheistical Utopists regimes and a Christian democracy. Being human was not enough: these were only too human. The sole protection against such disasters is reliance upon a legal order aimed to achieve justice through the rule of law. And that requires, above all, a commitment to the whole package of a global community aware and alert to the implications of each and every part of the whole.

Law is an expression of the will of a community: it needs institutions to make, to uphold, and at times to enforce it. Without them, like much of the most important concerns of the historic international law, it is merely 'half-law'. For a hundred years or more, international gatherings have tried, usually vainly, to exert some form of legal control over violence committed by governments. To this end, global institutions have been established, international law has been re-framed and every code of domestic law has had to take into account the new legal situation. Yet at the start of

this century, against the near-unanimous judgment of international lawyers that their actions were unlawful, two of the countries supposedly leading in the modern development of international law have gone to war.

What is the present state of play in the struggle to ensure that governments conform to law? What civil society organizations exist to mobilise public opinion in favour of legal control of war, both internationally and domestically? The Round Table discussion which follows aims to survey something of those groups and their supporters. The hope is that they will be willing to participate and contribute to strengthening the drive to bring the international activities of government under firmer and more effective legal control. Success in that requires public information and the mobilisation of opinion.

The Development of International Law

INLAP is concerned with ways in which law can serve the interests of peace. That may involve the use of domestic law but it is also concerned with international law and, often, with the intersection of the two jurisdictions. First it is helpful to consider the development of international law and to see how its present position differs so much from its past and how much more helpful current international law is to peace-making in comparison with its earlier form.

International law began with power. Its origins depended upon the capacity of rulers to inspire fear or respect for their power. As a consequence they laid down rules to govern their relations with each other and with their subjects. With one or two minor exceptions these rules concerned only the rulers or their followers as groups rather than as individuals.

As time passed, kings and monarchies developed more and more elaborate rules for their interactions. Customs relating to trade and seafaring evolved alongside them so that they too became codified as law. However, these were still principally concerned with the relations between the rulers, either as controllers of the traders involved, or as sovereigns whose subjects had to be regulated according to the needs and wishes of the rulers concerned. By the time of the Renaissance, when the classic forms of international law had evolved, feudal monarchies had largely come to be treated as sovereign states and their relations were formalised in that capacity. Feudal rulers had discovered that these new states augmented their power rather than limiting it.

One or two exceptions related not to states or rulers. Pirates, having no sovereign rulers, or being unwilling to recognize any, were treated as outlaws. As a result they were considered "enemies of mankind" and could be treated as such, meaning that they could be apprehended and executed by the agents of any sovereign power who could catch them. These exceptions were not thought of as

typical and thus it came to be assumed that international law usually applied solely to sovereign states. But in the last century an interesting development was reported from the United States, where a judge declared that an Argentinian police chief, as a torturer, was "an enemy of mankind."

Apart from important treaties dealing with waterways, such as the Rhine and the Bosphorus, the modern development of international law may be thought to begin in 1899, with the calling of the first Hague Congress, when ideas and proposals for fostering and maintaining peace between sovereign states were canvassed. From these a series of international agreements flowed. The irony of these attempts was that although they were well-meaning, their direction was flawed. The idea of building peace on the basis of nation-state sovereignty was never a good one. However, the disasters of the two world wars were the real cause of a slow but steady change of attitude, as the fallacy of any effective outlawing of war whilst upholding state sovereignty became very apparent.

The early establishment of a Permanent Court of Arbitration, which changed in successive steps into the International Court of Justice, was one fruit of the Hague Congress. Another was the agreement to lay down rules for the conduct of war: another futility because civilized warfare is ultimately a nonsense. However, it did direct minds to the scale and details of the problems involved. The laws of war developed more slowly than weapons of war which culminated in the invention and explosion of the first two atomic bombs in 1945, bringing an acute need to revise international law and thinking.

During the 19th and 20th centuries the evolution of international organizations, from their small scale start with control of navigation on European rivers traversing more than one country, went on so rapidly that within a hundred years they were numbered in scores and hundreds, but by the present time they number many thousands. Inevitably this brought the need for new forms of regulation as it became apparent that such bodies were not suited to the strait-jackets of national laws, since their activities almost invariably affected more than one country. The establishment of the League of Nations in 1919, and even more importantly, of the United Nations and its agencies in 1945, made new processes essential. Consequently, international law began to recognize legal personality for certain of these organizations.

But the greatest effect of the Second World War lay in its aftermath. The shock of the most terrible conflict the world had known led to a determination to prevent further such disasters. The attempt to bring law to bear led to the setting-up of trials of those said to be responsible for the war and at Nuremberg from 1946 surviving German leaders were put on trial. Convictions of most of them and subsequent punishments led to developments in international law that were to some extent amplified by the similar trials in Tokyo of Japanese war-leaders. The element of truth in the charge that these were examples of "Victors' Justice" did not vitiate their impact.

The principal changes in international law wrought by the judgements and their subsequent ratification in the United Nations were to proclaim and underline the responsibility not of states or governments but of the individual members of government and other organs of state. These were explicitly written to exclude the possibility of such individuals sheltering behind the doctrine of sovereign state immunity that had previously been the standard rule of international law. This enormous and crucial shift is one that has not yet been fully worked out and it took another half century for some of its chief implications even to be considered and we are still awaiting its further development.

The next beacon to light the path for international law was the 1948 Universal Declaration of Human Rights, once again directing attention away from the rights and duties of sovereign states towards the individual human being. Instead of the power structures that governments direct and use, the Declaration proclaimed the rights of the relatively powerless, unorganized, world citizen whose neglect had been at the root of most of the abuses perpetrated by governments. Only recently, with the new doctrine of 'the duty to protect' has there been a serious effort to redress the balance.

Although the Declaration did not have the force of law, it has been followed up in many countries after the adoption in 1966 of two Covenants, one on Civil and Political Rights and the other on Economic, Social and Cultural Rights. These came into force ten years later; they are legally enforceable and include the need to report regularly to the United Nations. Their creation owed a debt to the European Convention of Human Rights.

The Council of Europe from 1950 developed its own Court of Human Rights on the basis of experience of western countries in protecting individual rights. This had a series of salutary effects and has proved a model for other countries and regions. It has also raised standards within Western European countries leading, for instance, to the UK Human Rights Act. The Convention has become part of the legal code of most, if not all of them. Its influence has spread with the EU which has made it an essential component of the Union so that, for example, Turkey cannot hope to join the EU unless its government is willing to accept the same standards of conduct as the existing members.

The Geneva Conventions that are meant to govern the conduct of wars are detailed and they are generally enjoined upon national armed forces. Thus they have become legally binding throughout much of the world, largely because the reciprocity of treatment that should follow can protect even the soldiers of the most powerful states. Accordingly the military, particularly the lower ranks, have good reason to wish protection against maltreatment of prisoners, torture, and failure to preserve life and health, since any of them may finish up in the hands of enemies. The illegalities of the American camp at Guantanamo Bay have already led to retaliatory suffering inflicted upon US servicemen and women and more will surely follow.

The Genocide Convention that was adopted by the United Nations in 1948 and came into force three years later was largely a result of the lessons from the Second World War and the misbehaviour of governments and their military forces. It has been widely adopted into domestic law in many countries, including the United Kingdom, and is therefore a very potent weapon against many sorts of inhumane treatment that have now become illegal. The strength of this is also illustrated by the way that some countries, such as Germany, have incorporated its provisions into their own constitutions and can take legal action against nationals of other states that are not being charged by their own governments for crimes against the Convention.

The Limits of State Sovereignty

What this and similar developments have meant is that the old forms of international law, which applied only to sovereign states, have been partly superseded by the new form. This new form may reasonably be termed 'world law', since its application to individual human beings distinguishes it sharply from the earlier forms, both in its intent and ultimately in its effectiveness. Sovereign states can never justly be arraigned for their failings and crimes in the same way as individuals, since inevitably they contain people who are children, others who are innocent and unaware, and still others who may have actively striven against abuses that their own governments have been responsible for.

What action may individuals take that enlists the power of law, domestic or international, to support their struggle to strengthen peace-making and weaken the war-making potential that is generally in control of states and institutions? The crucial places to concentrate upon are where the law and its institutions are already upholding peaceful routines and practices. But scope also exists for mobilising what is already implicit in the structures but is not yet effective.

For example, the United Nations Charter, basic international law, if it could be upheld, would prevent international violence and war; but it is ineffective because it is overridden or ignored by the proponents of different national laws. Civil society organizations have become significant in aiding the struggle against war and the upholding of human rights, including, notably, Amnesty International and Human Rights Watch. But until recently most such groups were more concerned with political action than recognizing the value of using law - national or international - to uphold human rights. Latterly, however, political demonstrations and actions against Trident have been waged by campaigns which cite the law as part of their rationale.

Opportunities for Action

Today the opportunities for informed concerned citizens to involve themselves in the use of law to enhance scope for peace-making and for hindering wars and preparations for war have never been better. Following is a list of current examples where these are great:

- writing to MPs in support of campaigns such as Trident Ploughshares, and to MEPs urging support in the European Parliament for the World Court Project;
- bombarding the UK government with arguments upholding international law against policies that are disregarding or breaking it;
- writing to local and national newspapers drawing attention to causes such as that of Fairford detainees and Trident protesters;
- writing to the Metropolitan Police supporting investigation by their new War Crimes unit;

These are among activities that can help alert public opinion to the growing crisis in international law: sooner or later this will come to the point where more lawyers will need to support law rather than nation-state bureaucracy.

One of the most promising initiatives has been the founding of Peacerights by a group of peace activists in conjunction with Public Interest Lawyers and academics. Their aim is to bring law to the aid of individuals and groups who are attempting to use domestic and international law which can hinder war-making and helps to bring an end to lawlessness. It has already had notable success in bringing actions relating to the war in Iraq.

The Need for Reform

Most, if not all, codes of national domestic law enjoin respect for and obedience to the international law that is still evolving, above all for the institutions and decisions of the United Nations. Therefore the discrepancies between the support needed and the failure to uphold the UN that are so damaging to peace have to be tackled. Doing so may offer a chance to compel reforms to national power structures which are detrimental to peace. Sooner or later those reforms have to be brought about and we should be clear that it is our task to forward them.

There is a further way in which law could serve the cause of peace. This is by making the costs of war to governments infinitely greater. Until now, governments have guarded themselves and their agents from paying compensation and damages for the great bulk of costs inflicted upon subjects and enemies alike by pleading 'reasons of state', and in effect exonerating their warriors from all financial liabilities, on the grounds that international law permits actions destructive of life and property in times of war, legally declared. If, however, it can be shown that in

the present changed circumstances war is virtually never legal, because armed force used in international disputes can only be justified if it is under authorisation from the Security Council, and under the very restricted Caroline Principles, the case is altered. If, for example, the attack on Iraq by the US and Britain is recognized as illegal, then anything done that results in loss of life or property to anyone in Iraq could lay open the perpetrators to claims for compensation as has already happened in a minor way.

Such claims - as have already occurred during or after the Second World War relating to the German actions against Jews and others - have amounted to billions of dollars. But to date these are small compared with the possible extent of damages that illegal attackers would be liable to pay if international law were to be upheld and rigorously enforced. A system applicable to countries taking illegal action - even if it excluded the politically super-powerful such as the US - might well prove an insurmountable obstacle to the use of force by small states even when allied to America or other great powers. As the US is generally the state most advanced in the expertise and handling of finance it is not surprising that the American government is now doing its best to make the country exempt from all international law jurisdiction.

Professor Jack Mendelsohn, adjunct Professor at George Washington University

Based on transcribed tape-recording

Not in our Interest ...

The Ramifications of Current US Security Policy

Thank you very much. Thank you all for coming. I'm very pleased to be here. I'm very displeased to see the news this morning because I actually thought that Kerry had a good chance in the Presidential election and that the larger the vote the better the chance, but it didn't seem to work out that way.

So what I'm going to be talking about is not history by any means. It looks like a lot of what I might try to point out is likely to continue under the second Bush administration.

Shaking off the Constraints

I thought I would start off with a general statement of one of the things that I think the administration's been up to in the security area, and a couple of examples of what I mean.

The basic elements or efforts of the Bush administration represent a school of thought which is strong in the United States, which is that what the US has to do is to shake off the constraints that have been placed on its freedom of action by inter-national agreements that were written or created or accepted during the last twenty years of the cold war - what you could say have been the beginnings of the structure of rule of law that we've been trying to establish to help to control the behaviour of sovereign states.

The administration was particularly focussed on those arms control agreements that limited American freedom to 'defend itself' to protect its population - those that were created between 1972 and 1996.

The most obvious example of this is one that had been a uniting theme in the Republican party. Interestingly enough although the Republicans had won, they were quite divided over many issues, but one issue they've never been divided over is this. One of the top priorities of this administration when it came to office was to get rid of the Anti-Ballistic Missile treaty, in order to deploy a large scale missile defence system. So the first step, of backing away from the constraints placed by treaties/international law, was to back away from the ABM treaty.

As a second issue, it was true that the United States and the Soviet Union (and now Russia) were involved in massive negotiations to reduce the number of nuclear weapons that were facing one another and had contrived rather elaborate agreements to do this.

This administration made it explicit before it came to office that that it thought the complexity and the time involved in the negotiations, and the constraints posed by agreements between the United States and any other country, handicapped our ability to 'be flexible' in designing our nuclear forces. Anything that did that was not in the United States' interests, and so the Bush administration rejected pursuit of the START 2 treaty (START is strategic arms reduction treaty). START 2 had been written and signed but never completely ratified by the United States. It was ratified then amended and that amendment was never ratified.

They let the START 3 framework die and came up with an extraordinarily brief two-page, very generalised document in 2002 called the Moscow Treaty. Some call it the Strategic Offensive Reduction Treaty or SORT treaty.

This has no verification provisions attached to it. It has a somewhat looser definition of what is a weapon that you are permitted to deploy.

So they basically broke out from under these very complex nuclear weapons treaties which had been devised starting in 1972.

There was some validity to the criticism that these treaties were complex. I used to use as an analogy the fact that I think it took Dostoevsky about three years to write the Brothers Karamazov but it took seven years to design the START 2 treaty. And Karamazov is much more interesting.

Preventive War

A third step in this freeing America from constraints is one that's very much the central topic of your discussions today. In order to make US declaratory policy as strong – as frightening, if you will – as possible, the administration has endorsed the policy of preventative war. It is being called pre-emption but there's really a distinction between pre-emption and preventative war.

The way the debate looks in the United States – I'm not sure if the same distinctions are used over here – is like this. Under International Law there *is* a space for pre-emption. If there is an immediate and necessary reason to respond to a threat, under international law as I understand it a nation is allowed to pre-empt (in other words to attack an attacker).

If, for example, British troops were again to amass on the Canadian border and clearly head South then the United States would be within its international legal rights and the obvious tactical right to respond to an attack. On the other hand, what the United States has actually said is that it has a policy of preventative war. Which is "If we *believe* that the Canadian Government intends to invite the British Government to deploy troops to attack the Northern States, in a year or two, with or without nuclear weapons or weapons of mass destruction, then based on our evaluation of the potential for the future we have the right to attack."

So there's a big difference. If there's imminence, then internationally you have the right of self-defence, but if there's just the potential then you don't have the right to attack.

But what the United States is saying is what has been played out in Iraq: "If we believe that Iraq has the intention of becoming a possessor of weapons of mass destruction and if we believe that those weapons will be used or intended for use against our allies, our territory or our own troops then we reserve to ourselves the right to, in this case, pre-empt the attack."

Of course this declaration has totally undercut the rule of customary international law and it has also undercut one of the centripetal forces (one of the forces that keep together) the non-proliferation treaty (NPT). Under the NPT the nuclear weapons states had pledged, independently and united, in 1978 and again in 1995, that they will not use or threaten to use nuclear weapons against non-nuclear weapons states that are members in good standing of the non-proliferation treaty.

The newer statement is only declaratory and if you were a cynical politician in power (of which there may be many or not, I don't know) you might have said that was only a declaration and had not much meaning in any case. But now it is clearly not a declaration that is likely to be followed when a contradictory policy exists that the United States could point to and say "Yes, we did say that in 1995 but we also said this in 2002 and this is our dominant policy."

The Rationale for New Nuclear Weapons

The United States has also, in its nuclear policy review, created what I would consider to be a phoney rationale for the need for new nuclear weapons, the argument being that we are no longer facing a large massive strategic nuclear threat from a discrete adversary (USSR/ Russia), but rather we are faced with a lot of small failed or rogue states. The term "rogue" has fallen out of favour, I'm not exactly certain why. So now people refer to "states formerly known as rogues" and failed states.

Because we now have different security concerns, the requirement exists for the development of weapons to deal with these concerns, specifically nuclear weapons. This all comes out of the nuclear posture review:

> We are concerned about non-state actors and terrorists (either groups or individuals). We are concerned about hundreds if not thousands of hardened and deeply buried targets. We are concerned about storage areas for chemical and biological agents. So we've moved away from the threat of long range attack by the Soviets or Russians and now are talking about storage areas and chemical and biological weapons that might be present either in these states or in the hands of terrorists. We are concerned about command and control headquarters that may be hardened.

It will warm your heart today to hear that:

> We are also concerned about collateral damage – we are very sensitive about that. The nuclear weapons we have – as capable and as destructive as they may be – just aren't the right ones. You wouldn't want us sending a hundred kilotonne nuclear weapon over to the Sahara when all we really needed was a weapon the size of the one that fell on Hiroshima. So what we'd need to do is to develop low-yield nuclear weapons.

Usually that means 5 kilotonnes or less. Money has been allocated for studies to develop such weapons, ones that would be more suited for use in a city where you could reduce collateral damage. A 5 kilotonne weapon is about a third the size of the weapon that struck Hiroshima.

What I love to do – I've never done it in the UK – maybe you already know the example – is to compare what the destructive capability of the Hiroshima weapon is to the blitz in World War II. According to UK records, 52,000 people were killed in the UK from aerial bombardment, through the entire war of six years. The major part of it obviously was the blitz.

At Hiroshima, with one weapon dropped on one day exploding over the city, the prompt fatalities were something like 70,000. So one bomb over Hiroshima killed more people immediately than the entire aerial bombardment of the UK.

That usually catches peoples' attention as to the comparative destructive capabilities. If you're interested in the data it's in Richard Rhodes' book 'The Making of the Atom Bomb'.

So we have a phoney rationale for new nuclear weapons.

In connection with that is the bunker buster. There is incredibly complex physics connected with the development of bunker buster weapons – and you cannot square the circle. The rationale is "We're not going to let you hide in a tomb next time around. If that's where the centre of command and control is, we're going after you."

The problem is, you can't go deep enough to destroy these underground targets without going back to large yields - without seriously compromising the above ground neighbourhood. If they're hundreds of feet underground you need very large nuclear weapons in order to create the shock that would destroy the bunkers. And if they're large enough to create the shock, they are large enough to destroy surface property as well as to project a great deal of radioactivity. And they can't get down all that deep for reasons that Frank could tell you about – stress on metals.

Loss of Transparency

And the last thing, which is not much talked about but which people should be aware of, is that the US has also backed away from increasing transparency, in some cases in order to protect proprietary rights. We have some reservations on the chemical weapons convention which are partly based on the fear that proprietary formulae could be stolen as a result of inspections. We have as you know rejected the verification protocols for the biological weapons convention. There is no verification for that.

That is partly because of proprietary problems but there are other problems involved in these conventions and I doubt whether we're going to be able to walk this administration back. We have not shown any interest in negotiating new verification procedures to go along with the SORT treaty and we have just announced that we are, in our goodness, willing to pursue a fissile material cut-off treaty but we believe the treaty is not verifiable. We'll be glad to sign something with you, but you're going to have to be aware that this is not a verifiable treaty.

These are just examples of the general statement I was trying to make, which is that the United States seems to be moving away from efforts to make more transparent the military infrastructures and military behaviour, plans, productions, deployments etc. All of which everyone, hardliners and others have said is a good thing. The more you know, the more stable and predictable and less threatening the world seems to be.

Nuclear Policy and Preventive War

Let me just talk a little bit about US nuclear policy and preventive war.

If it is not already known to you, you have to recognise that the United States and the UK have for years maintained a first use of nuclear weapons policy. NATO members reserve the right to respond to an attack with any level of force that is required. And to that purpose there are nuclear weapons.

True, the alliance has said that nuclear weapons are weapons of last resort, but it has never said that it would not use them first. It has never been known to adopt a "no first use" policy. As a matter of fact, the United States has actually said (and I believe it is implicit that it applies to NATO as well) that we forswear no options in response to the use of a weapon of mass destruction (which could mean chemical or biological weapons – the United States language is a little elliptical).

If you go to NATO you'll get the sense that you are talking to people who believe that this is NATO policy also – but the United States has made it absolutely explicit. It is a not-so-veiled threat that even if you don't use a nuclear weapon, and even if the life of the nation is not in danger, but if you do use chemicals or biologicals we reserve the right to respond with nuclear weapons, directly contrary to our commitments under the NPT.

Unless the response were necessary and proportionate, using a nuclear weapon against a chemical attack would be considered against customary international law as well, as it is more violent than is necessary, since the United States is more powerful by a magnitude of two than any potential enemy, in terms of conventional weapons. This would not be justified.

Having said that I hope that you all feel safer.

What is basically is going on is that there is an effort to make nuclear weapons more usable. This has been the drive of those who are supporters not just of nuclear deterrence, but who also believe that nuclear war-fighting and the use of nuclear

weapons is what you really need in order to straighten up those countries that think they can in effect challenge the United States. The theory behind this is "Let's give 'em a whiff of grape-shot. Give 'em a whiff of nuclear weapons and that will solve the political issues."

To the degree that these weapons do become more usable and are presented to the President (who is the ultimate decision-maker) then I think it becomes increasingly more likely that a weapon like this might be used (e.g. if you have a terrorist group or a failed state). I think that's something to worry about, but I don't sense that it is on the horizon. The United States has gone up that path several times in history and the political and moral impediments to using nuclear weapons remain strong.

But I must admit that they have been whittled away over the last decade, whittled away by a sort of frantic search for the best way to respond to terrorism. Whittled away by a genuine sense of being a target as a result of September 11th. It's not a daily fear but there's a certain amount of change to people's attitude. People are really thinking about homeland defence.

These smaller nuclear weapons make it easier to make the decision to use nuclear weapons. ("Mr President, we don't have to use a 100 kilotonne weapon any longer, we now have a three and a half kilotonne weapon – that's not such a big weapon – its just part of a continuum between a five thousand pound precision weapons and a 20 kilotonne nuclear weapon. We have this nice small nuclear weapon.")

Obviously the political and moral repercussions of using any nuclear weapon remain – because you have made a qualitative difference in the nature of warfare'.

There are still people that recognise that this is a moral disaster, and it's a political disaster in the sense that you have opened your own nation to that kind of retribution. Plus, you have, except perhaps in the case of the UK which is our staunch ally, probably frightened off most other nations from wanting to ally with you. Because you never know when your ally is going to dump a nuclear weapon on the opponent and you may not be informed and you may very well not agree.

So you have to argue that it makes it much more difficult to form alliances, except as I said with the UK, if the United States starts to throw small nuclear weapons around.

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Based on transcribed tape-recording

Britain's Nuclear Policy

An Accessible Framework

Good Morning. It's a pleasure and not a pleasure to be here.

It's not a pleasure to be here because this is the swan song of Just Defence. It's a pleasure to be here because I've always enjoyed whatever contact I've had with Just Defence. Every few years Frank Barnaby rings me up and asks me if I'll do something somewhere and he's one of the very few people I have never ever been able to say no to. And I haven't always regretted it.

Frank asked me to give an accessible framework for thinking about Britain's nuclear policy and it's fitting that just as our Prime Minister dips into his external policy in the context of the United States, I follow on from Jack Mendelsohn and pick up a few pieces and fit in what I have to say in the wider context of what Jack said.

I'm going to do three things. One, I'm going to talk about what's the problem. Secondly, does Britain matter in any of this?

Thirdly (and most of the time) I'm going to be talking about the ramifications of apparent changes in Britain's nuclear policy. And I'm going to do that under three headings - nuclear strategy, world order and British politics - and just give some pointers in relation to sets of questions under each of these headings.

Under the heading 'nuclear strategy' the questions are: Is British nuclear policy contributing to eroding the nuclear taboo? Are we seeing the end of nuclear deterrence and the arrival of nuclear compellance? Does such a strategy impose a terrible onus on intelligence?

Under the heading 'World Order' the questions are: Does this strategy of pre-emption or prevention undermine international law? Does the posture threaten the non-proliferation treaty and does it matter? Does Britain's nuclear strategy exacerbate the 'West vs. the Rest' division in world affairs?

Under the heading 'British Politics' the questions are: Whatever such declarations (the pre-emptive/preventive strategy) do to others, what does it do to us? What is the likely reaction in public opinion as the nuclear issue rises and the Trident replacement issue comes on the agenda? And finally what about the principles of Just Defence: is British policy consistent? If not, are the principles of Just Defence still relevant, or does British policy need changing.

So I've got about one minute to deal with each of these questions.

What's the Problem?

First of all, what's the problem? First of all, there's the context in which British nuclear policy is taking place and this is shown by the declarations that Tony Blair makes, along the lines that the combination of terrorism and the development of nuclear, chemical and biological weapons of mass destruction is the security threat of the 21st century. This is what British security policy has to be about and it's in this context that there is this move to pre-emption.

Geoff Hoon in the run up to the Iraq war made a number of statements along these lines. He said to MPs 'I am absolutely confident, in the right conditions, that we would be willing to use our nuclear weapons.' He insisted that Britain reserve the right to use nuclear weapons if Britain or its troops were threatened by chemical or biological weapons. And in the view of many people we were being told, for the first time, that the British Government would be prepared to use a nuclear first strike against a non-nuclear state.

Jack was right in pointing to the NATO strategy – a potential first use strategy (the 'flexible response') which was implicitly against a nuclear enemy. This was the first time that Britain had declared such a policy against a potential non-nuclear enemy.

And the other aspect, I guess, of the context is the money that we're spending to equip atomic weapons programmes, to build a new generation of tactical nuclear weapons, in a sense fitting in with the programmes that Jack was talking about.

So that's the problem.

Does Britain matter in any of this?

We can have a discussion about whether Britain matters. There are people, you might call them unilateralists, who would say "Well, Britain doesn't matter. Other governments will make up their minds about their nuclear weapons policy regardless of Britain. They might use anything Britain does to legitimise what they are doing , but basically they'd make up their own minds."

Then there are others, I think I would call them something like bandwaggoners, who would say "Well, Britain does matter because others in similar situations to Britain will make the same sorts of decision, they'll jump on the same sort of bandwagon."

And the problem here, it seems to me, is that the threat to the non-proliferation treaty is more likely to come from some of the 'good guy' states , say Japan, rather than some of the 'rogue' states. And the argument would go that those states like Japan would decide that the non-proliferation treaty is being eroded and if it makes sense for a country like Britain to have a nuclear weapons policy then it would make sense for a country like Japan.

Nuclear Strategy

Right. Onto the ramifications .

Firstly about nuclear strategy. Is it contributing to eroding the nuclear taboo? Jack gave us some arguments along these lines and there isn't a lot more to add. Recent developments in the United States and Britain are pointing to the Geoff Hoon series of statements as a policy moving towards normalising nuclear weapons.

Many people would argue that one of the most impressive things of the first 50 years or so of the nuclear age was that a tradition of non-use developed. And it was a tradition. It was a belief – this is why the phrase 'nuclear taboo' is sometimes used – that the prohibition against using nuclear weapons went beyond a simple cost benefit calculation. It was something that shouldn't be done because it was immoral to do. And important people in Britain and the United States are now talking about using nuclear weapons in rather different circumstances than had been envisaged before. So this is the argument that recent developments do in fact erode the nuclear taboo.

The second question – are we seeing the end of nuclear deterrence and the arrival of nuclear compellance? Compellance, the idea of threatening dire

consequences if somebody doesn't do something, taking the initiative, has been around for most of the nuclear age but not actually put into operation. The Bush administration is talking about taking dire consequences if a potential proliferator does not cease and desist from efforts to create a nuclear capability. Compellance rests on the threat being credible. You've got to have the words and you've got to have the weapons to carry out what you want. And in this sense Iraq was a perfect example of building up credibility for a compellance strategy. It was a perfect example because Iraq was weak. It was enfeebled by war. It was enfeebled by sanctions. If you want a brutal demonstration of your military power, do it against Iraq. And this will show that American power is real and that others must believe what American administrations say.

And Tony Blair follows this line of thinking. Tony Blair said about Kosovo 'It is so important to win, to ensure others do not make the same mistake.' So again, an interest in the demonstrative effect of military power in order to make sure that all the bad guys get the message and will fall in line.

The third question is: Does such a strategy impose a terrible onus on intelligence? And I think here the argument is uncontroversial. I quote from a *Centre of Defence Information* article a couple of years ago. The writer said 'In principle there's a case for stopping terrorists before they act even if it means rewriting international law'. However anticipations of danger, wrong targets, disastrous bombing, radiation let loose, regions in chaos are more credible outcomes than the power of intelligence to forestall them.

Pre-emption demands extraordinary intelligence and as we know from the last few years extraordinarily accurate intelligence is something that we cannot guarantee. So there's a real problem about a policy of nuclear pre-emption that depends on intelligence.

World Order

Turning to world order questions now.

Does the strategy of pre-emption undermine international law? Jack has pointed in the direction that it does. And one of the ironies of this is that the definition of pre-emption that has been so powerful in international law comes from an American Secretary of State Daniel Webster in the 1837 Caroline incident. He defined pre-emption in a way that has become customary. He defined it as "instant, overwhelming, leaving no choice of means and no moment of deliberation."

President Bush said in 2002 "We must take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge." This is not instant, overwhelming, leaving no choice of means and no moment of deliberation. "America" he said "must act against these terrible threats before they are fully formed."

Bush and Blair have not been constrained by international law so far, and there's no reason to suppose that they will be in future. And one of the problems for the rest of the world is the increasingly expansive definition of self-defence on the part of the US administration. Think of the global surveillance systems for example. Think of the predator strike in Yemen a few years ago. Just everywhere is definable as self-defence. So international law is being undermined.

Second question: Does the posture threaten the non-proliferation treaty and does it matter?

Well here I think the argument is that the non-proliferation treaty had been progressively weakened through most of the 1990s. There were some false dawns but on the whole it has been progressively weakened. But it's the only global treaty on nuclear weapons in force and many people would regard it as an essential platform to counter or contain nuclear dangers. And as has already been pointed out there is the peculiar dimension to nuclear destruction. In this respect, part of the normalisation of nuclear weapons has been the way both governments (both the US government and the British government) have lumped in the public mind weapons of mass destruction so that there's no distinction between a chemical battlefield weapon and the most horrible nuclear weapon. And this is a way of lumping them all together to make them all seem the same – one is as bad as the other – but I think probably most of us would still regard nuclear weapons as being particularly horrific and dangerous.

The threat for the non-proliferation treaty doesn't I think come from the 'rogue' states but from the NATO nuclear weapon states. Many of the signatories of the Non-Proliferation Treaty do not see them as negotiating in good faith. Instead, the Alliance is normalising nuclear weapons through a strategy in which nuclear weapons are seen to be an essential part of a defence policy and which can be placed on the soil of any ally.

So there's an erosion of the non-proliferation treaty I think largely by the message being sent by the NATO nuclear weapons powers.

Thirdly: Does Britain's nuclear weapons strategy exacerbate the 'West vs Rest' distinction? And here I think it does. The negotiations over the last fifteen years or so, the review conferences and whatever, tend to perpetuate and exacerbate an image of the non-proliferation treaty being unfair. Resentment builds up. The cynics (or you might call them the realists) in the non-nuclear states in the rest of the world believe that the non-proliferation treaty is primarily an instrument of Western foreign policy. And what's been going on in the NPT mirrors what's been going on in the global economy and in global politics more generally. So the "Have Nots" in the global economy (that is, "the rest") are "the rest" in the NPT as well. So what the NPT has done, and what British policy has done by identifying so closely with US nuclear policy reinforces this sense of a rift between the West and the Rest.

British Politics

The final set of three questions relates to British politics.

Whatever the Hoon declarations do to others, what do they do to us? I think they reinforce this sense of British exceptionalism. We hear a lot about American exceptionalism, but in the European context and more widely, British Governments think that they are an exception in world politics. And the more we say those sorts of things, the more we think we are exceptional. It enhances our status and our political clout. Many people would argue that it also has potentially negative effects on our relations with Europe, this sort of exceptionalism that puts us alongside the United States, puts off indefinitely Britain making a decision as to whether it belongs in the rest of Europe or not.

So from my point of view this would be another negative consequence of such a policy.

The next question is public opinion. Couple of things to say about that. Earlier this year there was a MORI poll which said that only one person in a hundred in Britain rated nuclear weapons, nuclear war or disarmament as the most important issue facing Britain today. Only four in a hundred said that nuclear weapons and disarmament were 'among other important issues'. So it has very low salience, apparently, in British public opinion.

However, when people focussed on the nuclear issue, a MORI poll in 2003 said that 51% of people polled said Britain should not possess nuclear weapons. 11% strongly disagreed, and said that Britain definitely should possess nuclear

weapons. 40% said they tended to agree that Britain should possess nuclear weapons. 45% agreed that nuclear weapons are less central to British security than they used to be.

So there's some interesting things going on in British public opinion about nuclear weapons. It's much less serious an issue but when people think about it, nuclear weapons are thought to be less central to British security. How will this change as the Trident replacement issue puts nuclear weapons somewhat more in the forefront of British public life? Statements like Geoff Hoon's will become known … they are almost invisible at the present time.

And finally, what about the principles of Just Defence? Frank read out some of the principles of Just Defence and it seems to me that the policy announced by Geoff Hoon, the policy which in some sense is the ultimate neo-con policy adopted by Tony Blair over the last five or six years (the belief in a moralising foreign policy – it is our duty to go out there and change the world) backed up by the forceful interventionist policy (and Tony Blair has brought Britain into more wars since 1997 than the United States had got involved with - so in a minor way Blair is the perfect neo-con) and the principles being adopted (the missionary foreign policy associated with a more militarised security policy) seem to me to be completely contradictory to the Just War and Just Defence principles[1] which, I would argue, are still valid.

It's a pity that this is the swan song of Just Defence.

[1] **The Principles of Justice Defence, drawn up in 1983**

1. While all nations have the right to defend themselves, how they do so should be lawful should conform to *Just* War principles.
2. World security depends upon reduction (and ultimate elimination) of offensive weapons, and control meanwhile over their manufacture and trade.
3. A nation's defence should not depend upon threatened use of nuclear, biological or chemical weapons. Nations should phase out possession of such weapons.
4. All aspects of national defence - policy, equipment, logistics, military force strucures, deployment and training should be verifiably non-offensive and non-threatening.
5. An effective system of common security, based upon CSCE [now OSCE] initiatives including peace-building and conflict resolution by non-military methods, should be developed through regional organizations within the United Nations.
6. Nations should earmark peacekeeping and intervention forces for use as required by the United Nations, under the control of the Military Staff Committee.

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The Role of Law in Decision Making

The Need for Accountability

I feel somewhat disadvantaged talking about the rule of law because I am a lawyer – and have a considerable vested interest in the assertion that the rule of law matters in the sense that decisions, policies and actions should be in accordance with the substance, processes and procedures of law – both international and national and that the role of law in decision-making must be defended. I also believe that the two are linked in many ways – that those who violate the rule of law domestically for political expediency or for other ends – may well be likely to do so in their international policies, although I also think that the relationship between domestic and international rule of law is an area that requires more thinking. I should state at the outset that I am going to focus on compliance with international law.

Idealism and Cynicism

But I think it is important to acknowledge that there are problems in advocating adherence to legal solutions to major political dilemmas, especially within the international legal system which is generally and rightly regarded as weak. On the one hand international lawyers are accused of idealism, that is thinking that having a law on a subject equates with real change on the ground, or compliance. On the other hand there is a cynicism about legal responses, that is that a focus on law reduces political, moral and ethical issues to the language of legalism – and any lawyer worth his or her salt can find a legal argument to support a required political position. Legal discourse may be presented to justify what is the very antithesis of the values enshrined in the law. Both

these positions can be illustrated by the example of torture. It was widely regarded as a major victory for civil society/human rights NGOs when Amnesty International's campaigning in the late 70s and early 80s secured the adoption by the GA of the UN Convention against Torture, that is a multilateral treaty establishing a legal obligation not to commit torture and setting out a range of legal consequences flowing from the commission of torture. Today the Convention has over 130 states parties, but it is clear that this has not prevented torture. Further, creating a legal obligation not to commit torture means that there is now a legal definition – and legal definitions can be unpacked by lawyers to show that a certain act is not in fact prohibited by the Convention – perhaps it does not cause the requisite "severe pain or suffering" or is only of short duration. Lawyers' arguments are used to support policies that on any moral – or common sense - view are insupportable.

Iraq and Legality

The controversy over torture is part of the wider set of concerns about the issues around the legality of the war in Iraq, the occupation, the classification and treatment of detainees etc. These have set lawyers against each other and assertions one way seem to breed ever stronger legal arguments to refute the earlier claims, which allows governments to pick the legal advice they want to hear, thereby enabling them to assert that they are upholding the rule of international law, even when much opinion rejects this position, a position we might call "corrupt legalism". This leads one to question whether such major political events as recourse to war, or the justification of torture can be resisted by legal argument. On a personal level would it have been better if myself and 15 other international lawyers had never raised the question of the legality of the war against Iraq by writing the letter to the Guardian and opening the legal debate. The letter was printed on 7 March 2003, the Attorney General's famous advice asserting the legality of the war was published 10 days later, and was in some sense a response to our claims and was clearly instrumental in securing the Commons vote. Perhaps the issue would have been better addressed solely in moral, ethical and strategic terms than in those of international law.

The value added – or otherwise - of law is evidently something that there will be differing views about. Having expressed my own ambivalence I do however still believe that law has the potential to do good and that international laws have to be seen as a whole, that is laws relating to the use of force must be seen in conjunction with other laws such as those relating to human rights, including economic and social rights and issues of social justice. What I want to do first in this brief speech is to examine some of the legal mechanisms that demand government accountability against the standards of international law and the ways in which civil society groups can work to do this.

Mechanisms for Accountability

Accountability mechanisms exist at the national and international levels and comprise both formal and informal processes – using the word "formal" to describe those that are set up and operate according to the relevant legal system – and informal as those set up outside the formal legal structures, including by civil society. I think both have an important place – and one important task is to determine how they can be linked or used together, including how civil society movements can contribute to formal procedures. I will first run through what some of these mechanisms are and try to indicate some of the pluses and minuses around them.

Formal legal mechanisms

National law courts.

The briefing paper shows some of the obstacles to raising such questions in national courts, including problems of standing, justiciability and unpredictability of the outcome. For example we are waiting now to see how the House of Lords responds to the Court of Appeal acceptance that the Secretary of State could take into account material produced in interviews of third parties allegedly obtained by torture, provided that torture was not carried out by UK officials. A decision such as that of the Court of Appeal causes dismay among human rights advocates and challenges our adherence to the rule of law. Nevertheless there are appeal structures, and beyond the House of Lords there remains Strasbourg. It seems to me that even where the outcome is not what had been hoped for it is still important to test such decisions through the courts and to present arguments based on international legal standards, including through *amicus* briefs. This device of itself has expanded enormously over the past decade – and its use ensures that that there is a space for legal argument in response to the government position which may not be directly related to the immediate concerns of the parties, that is a form of argument in the public interest from civil society sources. While there can be frustrations and set-backs, there are also successes such as the decision of the US Supreme Court earlier this summer with respect to the jurisdiction of US Courts over prisoners in Guantanimo where many *amicus* briefs were submitted including some with signatures from people in other countries. This is one of the few ways whereby non-US citizens have been able to place their views on record through formal structures. At the very least litigation in national courts keeps the government alert to the fact that opponents to their policies are not going simply to back down and that it must defend its actions in public legal argument. Further attempts within domestic courts are needed if there is intended to be any appeal to an international body because of the general requirement of the exhaustion of local remedies.

International bodies

A major disadvantage is that there is no authoritative court of compulsory jurisdiction which can adjudicate on such issues. Nevertheless the possibility of international adjudication - even against major powers - should not be entirely ruled out. While the attempt to bring a prosecution against NATO States before the International Criminal Tribunal for the Former Yugoslavia with respect to targets in Serbia during the Kosovo campaign failed, the case is still before the International Court of Justice (ICJ) with respect to eight of the NATO states – the judgment on admissibility is expected soon. Even bringing the case has forced the respondent governments to formulate their arguments in open court. Last year the ICJ ruled the military attacks by the US against Iranian oil platforms during the Iran/Iraq war not to have been justified by self-defence. But this judgment also indicates one of the disadvantages of international legal litigation – the incidents occurred in 1988 and judgment was given in 2003. However a much more rapid process was the advisory opinion sought by the General Assembly about the legality of the Israeli security wall – the opinion was requested in December 2003 and the Opinion was given on 9 July 2004. This opinion was an overwhelming assertion of the illegality of the construction of the wall – and perhaps of wider significance an assertion that human rights treaties, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child are applicable in the Occupied territories. The US Judge Buergenthal – in a separate Declaration – largely disagreed but not on this point asserting that 'international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.' A strong statement of the importance of the rule of law by a judge nominated to the Court by the US itself.

Further issues of human rights violations may also be raised before the UN Human Rights treaty bodies that oversee the treaties. The Committee against Torture for example has decided to send a letter to the United States of America asking it to see to it that its next periodic report should reach the Committee by 1 October 2004 and indicating that it should include updated information concerning the situation in places of detention in Iraq up to the time of submission of the report. The committee also decided to send a letter to the United Kingdom informing the authorities that the issue of places of detention under British control in Iraq would be raised when their report was considered. A range of expert Working Groups and rapporteurs have made statements – while none are binding they do add to the steady stream of criticism.

Initiatives by Civil Society

It is evident that all these avenues have disadvantages – and another approach for civil society movements is to establish their own spaces and processes to air the issues and provide further legal analysis. Such activities are based on the premise that law is an instrument of civil society that does not belong to governments, whether acting alone or in international arenas. Where the state fails to assert the law or weakens or erodes it, civil society can and should step in to ensure that the state's interpretation of the law is not unchallenged and to affirm its authority. Accordingly when states fail to exercise their international legal obligations civil society can and should step in. Although civil society activities are not within the formal structures of the state, they ensure that violative conduct is not ignored for to do so is to invite its repetition and sustain a culture of impunity and continuing violation. It is such beliefs that have inspired and sustained such initiatives as peoples' tribunals and inquiries, and public events where people bear witness to events and their consequences. The beauty of such initiatives is that there is no set form (as for example with formal courts) but rather a range of innovative models that can be adapted to the required objectives. Some models are overtly legal, others focus on debate and others are theatrical but what I find especially interesting is how theatre has drawn on the law as anyone who has seen the performance of *Guantanamo* knows and peoples' tribunals have a strong sense of the dramatic. In the current climate I have been involved in two such initiatives in the UK that exemplify many of the issues – the first was as a panel member at the Peacerights Legal Inquiry into Aspects of the Military Operation against and Subsequent occupation of Iraq During 2003 and the second has been through submitting a legal opinion of the compatibility between the Mutual Defence Agreement and the Nuclear Proliferation Treaty which I understand will be referred to at a civil society event coming up shortly. In the context of the war it is important that there are similar initiatives in many places worldwide – I know directly of similar events in Stockholm and Tokyo – and all these initiatives illustrate what I perceive as core to their relevance, that is the question of legitimacy.

Legitimacy is the normative belief by members of a community that a rule or institution ought to be obeyed. 'The actor's perception may come from the substance of the rule or from the procedure or source by which it was constituted.' One writer has identified the criteria of legitimacy as historical pedigree and respect accorded the originating authority; determinacy; coherence and adherence. The concept of civil society assumes a divide between states and non-state actors. The former have authority (power) with respect to international law-making and its implementation that the latter do not. States also assert that it is the formal processes that are determinative of legality – although governments cannot always control their outcomes. However what civil society movements can do is attempt to harness legitimacy. Their actions do

not have the legitimacy derived from the formal sources of power such as a Public Inquiry established by the Government . A Hutton or Butler will always be presented as carrying the formal weight of the state but civil society devise their own many ways of establishing legitimacy. The more effectively they establish legitimacy, the stronger is their case and the more likely to have some long term effect.

Enhancing Legitimacy

A number of ways of enhancing legitimacy can be suggested – here are a few and other people will have many suggestions. First, peoples' tribunals may be constructed so as to observe the symbols, rituals and formalities of court room procedures, thereby associating such processes with the formal indicators of authority for example through opening statements; giving of the oath; oral testimony supplementing detailed written evidence; written and oral legal argument; expert testimony; explanation of historical context and so on). Second, is the weight of legal argument and opinion. This is important at a number of stages, for example legal opinions given in advance by counsel or other lawyers where there has been time for research and full assessment; public legal argument before a peoples' tribunal and finally a fully reasoned, coherent and substantiated opinion or judgment. At all stages the more fully the legal case is developed, reasoned and sourced the harder it is to discount. Association with figures of authority such as QCs adds to the weight of the legal opinion. The reputation of those called upon to act as judges is also important – the original concept of Peoples' Tribunals was based upon the legitimacy of eminent and high-minded people. Another important aspect is diversity among the judges, for example with respect to known political views, or nationality, or gender, - the Peacerights tribunal had eight panel members allowing for a range of opinions and backgrounds. Another source of legitimacy may be the use made of authoritative reports and conclusions of formal bodies for example the work of the *ad hoc* international criminal tribunals, framing of the questions in terms of seeking the advice of the prosecutor of the ICC. Fourth is the legitimacy that comes from the strength of narration and victim testimony supplemented by expert evidence, especially from voices that are silenced by formal judicial arenas. This brings the moral legitimacy of victims speaking for themselves. Another important aspect is the establishment of a historical record about issues which governments may be reluctant to address – types of injury and victim testimony.

Of course many arguments are used to discredit such processes, or to trivialise them as one-sided, associated with people who are predisposed to determine in a certain way and as no more than play-acting – a mock trial, inquiry or opinion. Efforts can be made to redress such critiques, for example holding public sessions where people from the floor can ask questions of the participants and where those involved have no way of knowing how they may be challenged; inviting people,

for example government members, to give the other side and if they refuse to do so ensuring the existence of an opposing brief or argument.

The crucial question is in whose eyes must action be legitimate? Who is the actor whose perception that a rule or institution ought to be obeyed is required? Under classic international law the crucial actor is the state and if states are taken to be the primary actors for determining legitimacy as well as legality, such initiatives are likely be deemed illegitimate, as anarchic and as such able to be readily dismissed. If however we look more broadly to civil society there may be a different response. There can be no definitive answer. Such initiatives will always be regarded as illegitimate by those who deny any parallel and complementary role to civil society institutions and consider that international law-making and application must remain a state prerogative. Legitimacy in many ways is a code word for differentiating 'good' or 'bad', including god and bad civil society movements, and purporting to clothe subjective internalisation with objective criteria.

Legitimacy of International Law

I have considered the legitimacy of civil society movements but there is however another side to consider. International institutions relying upon formal authority must also be seen to be legitimate and, crucially in the context of the role of international law, that law must be seen as legitimate. At the international formal level it has become routine for those who reject the substance and processes of international law to denounce its legitimacy. On the one hand we get assertions from the powerful who seek to reject the restraints of international law that it has become outmoded and unable to respond effectively to contemporary challenges. A classic exposition of this view is that reliance upon the texts and rules of international law is excessively formalistic and instead rules should be determined by reference to their needs. This view also denounces the institutions of international law – UN, Courts, Human Rights bodies as undemocratic, inefficient – in total illegitimate. Perhaps an extreme example of this form of response is that from Harvard Law professor Alan Dershowitz who attacked the Wall case through what he called the 'questionable status' of the ICJ:

> No Israeli judge may serve on that court as a permanent member, while sworn enemies of Israel serve among its judges, several of whom represent countries that do not abide by the rule of law. Virtually every democracy voted against that court's taking jurisdiction over the fence case, while nearly every country that voted to take jurisdiction was a tyranny. Israel owes the International Court absolutely no deference. It is under neither a moral nor a legal obligation to give any weight to its predetermined decision.

Arguing that a "judicial decision can have no legitimacy when rendered against a nation that is willfully excluded from the court's membership by bigotry", Dershowitz likened the ICJ to "a Mississippi court in the 1930s."

There are various responses that members of civil society can make to such attempts to denounce the institutions of international law and thus the legitimacy of the system. The first is to remind critics that the obligations have been voluntarily accepted by states and that until the law is changed it remains binding. Another is to ensure that misinformation is publicly and appropriately corrected, for example no state has a legal right to a judge on the Court as a permanent member and indeed the Statute of the ICJ, article 2 states that judges are to be "elected regardless of their nationality." Further, although religion is an irrelevant factor in selection of judges, there are Jewish judges which accords with the principle of diversity. Further the long practice of ensuring the presence of a Judge from each of the Permanent Members of the Security Council on the Court ensures the presence of an American Judge. Third, civil society groups can work to counteract challenges to the legitimacy of such bodies. For example there has been recognition that the independence of the international judiciary is not secured, for example there is no international code of conduct for international judges. An important response has been through civil society – A Study Group of the International Law Association and the Project on International Courts and Tribunals has drafted such a Code, has had it adopted by the plenary session of the ILA – a prestigious body of international law and now seeks to have it widely disseminated and adopted. If international judges were visibly independent from national pressures and acting in compliance with such objective standards such attacks would be harder to sustain. Similarly NGOs can act in conjunction with international institutions, for example to strengthen their local knowledge, their information base and to disseminate their findings.

However, at the same time as the powerful denounce international law as failing to respond to their needs, the less powerful see it as an illegitimate instrument of the powerful, sustaining their interests and failing to redress gross inequalities. International institutions – epitomized by the UN – are currently between a rock and a hard place. They are faced by demands for institutional reform and for change in the substance and processes of international law – but from both sides. In such circumstances, it is vital that such changes are not created through a 'knee-jerk' response to the current crisis, or solely at the behest of US demands for what has been termed legal creativity based on factual realism. In a decentralized system where the practice of states constitutes international law, law-breaking behaviour can become revised international law unless there is protest. Those that resist such change are seen as defending an irrelevant, even dangerous system. Although states are the formal actors for protest, non-state

initiatives and legal challenge can also register and militate against an assumption of acquiescence. International law – like all law – has a hybrid identity. It is both a means for helping those resisting oppression but it can also be used to support oppression. We must somehow attempt to balance these dualities so that legal change is the negotiated results of policies that take account of both sides of the equation – a daunting task. An example might however be the negotiation of the Rome Statute for an ICC in 1998 in which NGOs formed alliances with like-minded states. The establishment of the ICC was a significant step in the development of international criminal law and in asserting individual accountability in place of impunity for gross violations of human rights. It was also a model for negotiated change in international law and procedures.

It is quite clear that that legal opinions do not provide any guarantee of appropriate response; they may be ignored, alternative legal opinions are sought or there may be attempts to discredit the decision. However I would end on an optimistic note. International law has always been discounted by states when they think that there are higher imperatives, or that they can escape censure. In this country we need only think of Suez. What I think to be different now is the level of civil society response. I will finish by quoting a fellow international lawyer:

> What, then is the proper role for the lawyer? Surely it is to stand tall for the rule of law. What this entails is self-evident. When the policy-makers believe it is to society's immediate benefit to skirt the law, the lawyer must speak of the longer-term costs. When the politicians seek to bend the law, the lawyers must insist that they have broken it. When a faction tries to use power to subvert the rule of law, the lawyer must defend it even at some risk to personal advancement and safety. When the powerful are tempted to discard the law, the lawyer must ask whether someday … we may not need the law. … the role of the lawyer is … to help design the framework of rules, procedures, and institutions within which persons and peoples can live productively at peace with one another.

Civil society provides the vigilance, processes and procedures for these tasks.

The David Head Memorial Lecture

David Head, who died in 2003, was a founder member of the Institute for Law and Peace and of the World Court Project. Over the years he has provided faithful support for both organisations.

Charlotte Kilroy, barrister and member of Matrix Chambers

Is the government subject to legal control?

Imagine a situation:

A small Central Asian state called Novistan, which regularly issues vehement denunciations of the US and other Western countries, is discovered to have been in communication with Iraqi insurgents. Intelligence reports which are far from conclusive suspect that Iraqi insurgents may have been passing material to Novistan which could be used to make a dirty bomb.

Following the Iraq war, the Security Council is deadlocked and cannot reach agreement on US and UK proposals to order air strikes on Novistan.

The leader of the UK government, which has a large majority in Parliament decides to launch a nuclear attack on Novistan. He states that he has concluded on the basis of the intelligence that there is an imminent threat to the world and to the UK and that he has been advised by the Attorney-General that if that is his conclusion on the basis of the evidence before him, then the use of nuclear force is permitted by Article 51 of the UN Charter. He proposes to use the Royal Prerogative and not to put the matter to the vote in Parliament.

Mass protests in the UK ensue. Protesters descend upon airfields and military bases suspected to have nuclear capability all across the UK, board and chain themselves to airplanes, barricade entrances, let down the tyres of military officers' vehicles and damage military property. There is some violence. They are arrested and charged.

Whistleblowers from MI6 reveal that the intelligence reports relied on by the UK government are fundamentally flawed. They are charged with breaking the Official Secrets Act.

Hundreds of soldiers and officers refuse to follow orders and are court-martialled.

Lawyers' organisations produce opinions signed by the vast majority of respected international lawyers in the UK stating that the war would be illegal as a matter of international law.

The nuclear attack is launched - a hundred thousand Novistanis die. The health of many more is seriously affected.

What can the courts do? I am going to answer this question in a roundabout way…. As you will see!

I have been asked to give this talk due to my involvement in the case brought by the Campaign for Nuclear Disarmament (CND) against the Prime Minister, the Secretary of State for Defence and the Secretary of State for Foreign Affairs in November 2002, in which CND asked the High Court for a declaration that Resolution 1441 did not authorise the UK to invade Iraq in the event of Iraq breaching that resolution.

Although that case does not set the parameters for this talk, it does encapsulate the essence of the problem which the war against Iraq has thrown into sharp relief: in what circumstances are decisions taken by the UK government in the area of foreign and defence policy subject to challenge in the courts?

This question can be answered from two angles: the domestic and the international. Indeed it is perhaps the fact that government actions in the areas of foreign affairs and defence of the realm do so clearly have implications in the international arena that makes this question so particularly sensitive at a domestic level.

This question is also about legal remedies. It is about whether the courts can issue declarations, quash decisions, and grant injunctions and damages in relation to actions taken by the government in the area of foreign affairs and defence of the realm, and if so which courts, at whose request and in what circumstances?

I will address first the international law backdrop.

The International Court of Justice is the court with the widest jurisdiction, firstly in the sense that it is open to all States, and secondly in the sense that it is the only international court which applies generally binding international law and is not limited to a defined treaty system or restricted to a specialised legal field - see for example the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (ICJ Reports 1996) in which the ICJ, following a request from the General Assembly, considered a wide range of sources of international law, including the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), the Treaty on the Non-Proliferation of Nuclear Weapons, and the body of international humanitarian law. The ICJ concluded, as many of you here may know, that:

> the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

The ICJ also has the power to issue decisions which are binding on the States which are parties to the dispute before it. Remedies available include declaratory judgments with all the legal consequences which flow from that declaration, an order for the performance of a specific act or a guarantee of the non-repetition of the violation of international law in question. If a party to a case fails to perform the obligations imposed on it by a judgment of the Court the Security Council may take steps to enforce the judgment.

However, only states may apply to the ICJ, not individuals, so unless another State party decides to bring a dispute before the ICJ, and the ICJ accepts jurisdiction, these remedies remain out of reach.

The International Criminal Court offers for the first time (since July 2002) a truly international basis for enforcing international criminal law. Although the ICC Statute makes it easier for states to instigate investigations into alleged crimes (under Article 14) individuals also have the option of providing information to the

Prosecutor under Article 15 which he may then investigate (with the authorisation of the Pre-Trial Chamber).

The ICC has jurisdiction over crimes against humanity, war crimes and genocide as defined in the Statute, which lists a broad and comprehensive number of crimes. Crimes against peace are as yet outside the jurisdiction of the ICC and will remain so until a definition has been agreed. While the ICC offers the possibility of strong independent prosecution and enforcement of criminal charges, it is weakened by the fact that not all State parties have signed the ICC Statute, most notably the US. Its jurisdiction is accordingly limited. Furthermore it is still in its infancy, and is likely to take time to gather the confidence to pursue investigations against state parties like the UK for actions which are a matter of huge political controversy. It is noteworthy that the first investigations launched by the ICC have been launched into situations in the Democratic Republic of Congo and Uganda, both at the instigation of those state parties themselves. Finally the ICC can only have a deterrent effect on future actions. No application can be made to prevent crimes taking place. So it does not solve the problem of what to do if you want to prevent an invasion taking place, or the use of a nuclear weapon for example.

I turn now to domestic law.

It is well established in the domestic jurisdiction that individuals affected by decisions of government may challenge those decisions by way of judicial review on the basis that they are unlawful, both before and after those decisions are implemented, and in certain circumstances even before the decision has been taken.

But, where the decision is taken under what is known as the royal prerogative the matter is not so simple, as I can see has already been highlighted in the briefing for this morning's session. It used to be the case that such acts were not reviewable by the courts. Decisions under the royal prerogative include those relating to the making of treaties, the defence of the realm and the prerogative of mercy. However this is not the case any longer as was made clear in the important case of *Abbasi*, where the Court of Appeal, following a review of the recent case-law on the susceptibility to review of acts under the prerogative concluded that "justiciability depends not on any general principle but on subject matter and

suitability in the particular case". In other words, there is no absolute bar to review, but where decisions are taken under the prerogative the court will consider carefully whether the challenge is one which it is suitable for it to consider.

So in the case of *Abbasi* itself the Court of Appeal looked at the failure of the foreign office to make representations to the US government over the detention of Mr Abbasi at Guantanamo Bay. The court concluded that even though the subject of the claim concerned foreign policy, and while the Secretary of State was free to give rein to all foreign policy considerations which were not themselves subject to review, that did not render the whole process immune from judicial scrutiny. In that case Mr Abbasi had a legitimate expectation, based on policy statements made by the UK government that the Foreign Office would consider making representations to the US government. The court was entitled to examine whether the Secretary of State had met that expectation, and whether he had in considering whether to make representations thrown all relevant factors into the balance, including the gravity of the injustice suffered. The court stated that if the SoS reached a conclusion which was irrational or in breach of the legitimate expectation the decision was reviewable.

Now this conclusion clearly does not mean that the courts can review the government's substantive policy on making diplomatic representations to the US government, but it does provide some gateway in appropriate cases for ensuring that decisions which affect the rights of individuals can be reviewed even if they have a tangential effect on foreign policy considerations.

The CND case which I mentioned above is an example of where the court declined to intervene. It was argued before the court that the remedy sought - a declaration as to the meaning of international law, was eminently within the court's competence, and that although it related to foreign policy and defence matters, the court was not being asked to adjudicate on the policy decision to go to war but simply to provide a declaration as to what the law was, so that this policy decision could be taken against a correct understanding of what the law was in full knowledge of the legal implications.

The court rejected this argument for a number of reasons. These reasons were based firstly on the question of whether international law issues could be decided in domestic courts. Simon Brown LJ explained his position as follows:

> Should the court declare the meaning of an international instrument operating purely on the plane of international law? In my judgment the answer is plainly no. All of the cases relied upon by the applicants in which the court has pronounced upon some issue of international law are cases where it has been **necessary to do so in order to determine rights and obligations under domestic law….there is nothing here susceptible of challenge in the way of the determination of rights, interests or duties under domestic law to draw the court into the field of international law… .** (emphasis added)

Simon Brown LJ's second reason for rejecting the application was that to make the declaration would be damaging to the national interest in the field of international relations, national security or defence (see paragraph 47). Simon Brown LJ reached this conclusion on the basis of a witness statement submitted by the defendants attesting that the conduct of international relations with regard to Iraq would be adversely affected and the UK's hands would be tied in any negotiations with Iraq if the government were required to commit itself publicly to a definitive view of the legal effect of Resolution 1441 (see paragraphs 41-43).

Maurice Kay J agreed with Simon Brown LJ and added that he also refused the application on the grounds of non-justiciability, stating that foreign policy and the deployment of the armed forces remain non-justiciable. Richards J agreed with both judgments.

This decision seemed to put the lid on any arguments that courts could make declarations on the meaning of international law where not expressly called upon to do so by means of a domestic law statute or where the rights and obligations of individuals were not directly in issue before the courts, or that since the question which the applicants sought to resolve was a pure issue of law it could be addressed by the court despite the fact that it touched on defence and foreign policy issues.

In February the following year, however, the eminent barrister David Pannick QC indicated that this might not necessarily be the end of the matter in an article written for the Times newspaper. He said of the CND case:

> The Divisional Court concluded that it had no jurisdiction to consider the issue of international law. It was plainly correct to do so as a matter of constitutional law….
>
> But should the courts refuse to entertain such a complaint? The Divisional Court gave three main reasons why the courts decline to be involved, none of them very persuasive. The first was the evidence from the Foreign Office that if the Government were obliged to answer international law arguments, it may undermine the

prospects of a diplomatic solution to the crisis, "damage our relations with the US" and "give comfort to the Iraqis."

But the Government would be responding on issues of law, not policy or strategy. Indeed, the court could not require the Government to comply with international law, since the decision on how to deploy troops is non-justiciable in the courts. If a court ruling on the interpretation of international law were to give comfort to our enemies, and annoy our allies, then we should recall that the role of the institutions of a democratic society is to express independent views, however inconvenient this may be.

Lord Justice Simon Brown also found convincing a second argument for non-intervention. For English judges to "presume to give an authoritative ruling" on international law would be "regarded around the world" as "an exorbitant arrogation of adjudicative power". But English judges already give their interpretation of international law instruments, such as the Geneva Convention on Refugees. There is nothing presumptuous about this. The institutions of other countries may be persuaded by the force of the reasoning. They may not.

The third reason given by Lord Justice Simon Brown for non-intervention by the courts was that the Government "has access to the best advice not only from law officers but also from a number of distinguished specialists in the field".

He asked, "why should it be thought that the advice obtained is likely to be wrong?" But in no other context is this a justification for refusing judicial review on an issue of law. The advice given to government is often wrong. That is why the content of the law is decided by judges, not by the executive.

There is a strong countervailing policy reason why these issues of international law should be argued and decided in court. The Government has to take a difficult and momentous decision on whether to bomb Iraq. Lives are at stake, not just those at both ends of the firing line in Iraq in the next few weeks, but also those who will be at risk in the future from aggression by Saddam Hussein.

It is difficult to think of a more important role for the courts in a country that values the rule of law than to hear arguments, and give judgment, on whether the Government would be acting in accordance with law, domestic or international…..

The Divisional Court's refusal to consider the substance of the case was correct on the existing precedents. But it is time for legal policy to be reconsidered. In a 1941 dissenting judgment in the House of Lords on detention powers during wartime, Lord Atkin suggested that "amid the clash of arms, the laws are not silent". We should allow our judges a voice on the content of international law.

The subsequent statement issued by the Attorney General on 17 March 2004 in which he stated that the invasion of Iraq was lawful on the basis of arguments which were widely dismissed by international lawyers - a statement which was relied on by MPs in voting on the war on 18 March 2003 - has only highlighted the

need identified by David Pannick QC for there to be some impartial and authoritative source of views on international law.
On the current state of the law, however, obtaining such an authoritative view from the courts is unlikely to be possible in circumstances similar to those considered in CND.

But that is not the end of the matter.

In a number of prosecutions brought against protesters against the Iraq war for aggravated trespass and conspiracy to cause criminal damage, the protesters raised various defences open to them under criminal law statutes that they had acted as they did to prevent crimes - the crimes they were speaking of were crimes of aggression and war crimes under the International Criminal Courts Act 2001. They argued that the CND judgment did not preclude them from doing so because in their cases, unlike in CND, there were individual rights and obligations at stake - namely their own criminal liability, and furthermore the defendants submitted that the argument advanced by the Crown Prosecution Service that the court was not entitled to examine the question of whether they were acting to interrupt the commissions of crimes because those crimes were carried out in the context of foreign and defence policy which would effectively grant the executive immunity from criminal law.

In one of the cases which has been considered by the Court of Appeal, *Jones and Milling, and Olditch and Pritchard,* the court concluded as follows (paragraphs 13-14):

> …The defendants submit that unlike the CND, they are not asking for a declaratory judgment, but are seeking to obtain the court's ruling on matters which affect their rights or duties under domestic law. It is accordingly necessary for the court to enquire into the lawfulness of the Government's actions in declaring war; or to be more exact, it will be necessary for the judge to direct the jury as to the ingredients of the international crime of aggression, which is the basis of the defendant's contention that the Government's action was unlawful, so as to enable the jury to determine whether or not the defendants' beliefs as to the facts justify the conclusion that that crime was about to be committed. It is further submitted that to assert that that enquiry was non-justiciable on the grounds that it related to the exercise of the executive's undoubted prerogative powers in relation to foreign affairs and the disposition of armed forces would be, in effect, to grant the executive

> immunity from the criminal law…..
> 14. There is, it seems to us, considerable force in the argument that the CND case does not, in itself, provide the answer to the issue of justiciability in the present case for both of the fundamental reasons advanced by the defendants….

Despite this statement which indicates that the question of the lawfulness of the decision to go to war is justiciable where raised in the context of a defence to a crime, the question of justiciability was not in fact decided in this case because the Court decided the crime of aggression was not sufficiently well defined at international law to constitute a crime within the meaning of the statute on which the defendants sought to rely. However both parties have now been granted leave to appeal to the House of Lords - so this is definitely a case to watch.

Conclusion

So I come back to the question - is the government subject to legal control?

It seems to me, maybe because I am a hopeful lawyer, that even on the current state of the law, while there are clearly areas in which individuals may not challenge government decisions such as the decision to deploy the armed forces where those decisions are plainly contrary to international law, or do involve the commission of crimes, there will in one way or another, be legal consequences for the government, and the domestic courts may yet be asked to consider the question, as these criminal cases show. That seems to me to suggest a qualified answer of “Yes” to the question - is the government subject to legal control?