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Iraq 2003

America's war on Iraq in 2003 was its third illegal war in just under four years. Each one was a bloody horror, but the Iraq war distinguished itself both for its bloodiness and for the flagrancy of its illegality. It was virtually *certified* as illegal by a defeat at the Security Council so unspinnable that President Bush had to back down from his boast to make the members 'show their cards' by forcing a vote.¹

The illegality of the Iraq war was not due to some lawyer's technicality. The reasons for it (explored later in this chapter) were the same as the reasons for the defeat at the Security Council: the failure of the United States to demonstrate one decent moral justification for resort to war, with all the death and destruction that were sure to follow. The United Nations weapons inspections had turned up nothing, and, despite crude attempts by the Americans and the British to discredit the inspectors before the war with phony intelligence - 'risk assessment *enhancement*' as the American comic strip *Doonesbury* called it² - they themselves would do no better when they scoured the country afterwards. There was admittedly no threat of Iraq attacking the United States or its allies, so there was no plausible claim of self-defense. Those few who believed that the war would be about 'freeing' Iraqis were rapidly disabused of this when, with the regime of Saddam Hussein overthrown, the Americans made it clear that the Iraqis would have a hard time ever freeing themselves from the American military occupation. Nor could concern for Iraqi human rights be taken seriously as a motive from a country that had punished Iraqis for twelve years with an inhuman sanctions regime.

And where was the humanity to be found in a war that had destroyed so many human lives? Iraq Body Count, an international research group dedicated to documenting scientifically the Iraqi civilian casualties, estimated the number of those killed in the war and occupation (as of August 2003) at between 6,100 and 7,800, with 20,000 wounded.³ Most of these people, about 4,100 to 5,200, had been killed during the invasion. A *Los Angeles Times* survey of Baghdad hospital records counted 1,700 civilians killed in the battle for Baghdad alone.⁴ The same records showed 8,000 injured. 'Injured' included losing both your arms and suffering deep burns to 35 per cent of your body, not to mention having your father and mother killed, like twelve-year-old Baghdad! Ali Ismail Abbas. While the war deaths of American and UK soldiers were carefully counted at 164, with 569 injured, the number of Iraqi soldiers killed and wounded would probably never be known.⁵ Estimates ranged from 2,300 to *tens* of thousands.⁶

The killing didn't stop with the overthrow of the Iraqi regime. What the Americans called the 'bitter enders' immediately started a guerrilla war against the occupation, attacking American soldiers and many other targets daily throughout 2003. American deaths from these attacks - about 200 in the period from 1 May to 1 December - sent shock waves through the US. But about 3,000 Iraqi civilians were killed during the same period, whether as bystanders in the attacks on Americans or in the inevitable counterattacks, or in other violence related to the occupation. Jittery American soldiers shot dead five members of the same family on 13 June, then nine Iraqi police and three civilian bystanders on 12 September, and all five occupants of a farm truck carrying chickens on 11 November. The August truck bomb attacks against United Nations headquarters in Baghdad and a Shia Mosque in Najaf took the lives of over 100 Iragis, as well as those of UN operations chief Sergio Vieira de Mello and top cleric Avatollah Mohammed Bakr al-Hakim. When attacks against Americans reached a crescendo in November with the shooting down of four American helicopters and about 70 US combat deaths, America responded with 'Operation Iron Hammer,' and the bombing war had essentially re-commenced. This is war,' said a US Major-General on 19 November. 'We're going to use a sledgehammer to crush a walnut.' 7 On that day and the next, the Americans killed ten Iraqi 'insurgents,' and another ten Iraqi civilians died in bomb blasts in three separate cities. Three were children killed in an explosion at a school, and it wasn't known whether

the bomb had been placed there or one of the children had been playing with 'unexploded ordnance.' 8

Compounding the violence was the fact, soon evident, that the US had done virtually no planning for actually administering Iraq after it had been conquered. A country reduced it to a fifth of its pre-1991 productive capacity by more than a decade of sanctions quickly descended into the chaos of looting, violent crime and sabotage. Not only the treasures of the Baghdad Museum, but the hospitals, schools and power plants were stripped of everything that wasn't bolted down. The murder rate soared, and oil, water and electricity systems remained a shambles throughout 2003. Already in June, with anti-American discontent and guerrilla attacks steadily rising, US ground forces commander Lt. Gen. David McKiernan had concluded that 'Iraq will be a combat zone for some time.' ⁹

In early 2003 a global anti-war movement the likes of which had never before been seen demonstrated in its millions to show that the world did not believe the revolving justifications the Americans kept serving up for the war. A poll released by the American Pew Research Center on the day before the war showed opposition in every country surveyed except for the United States, including America's main ally Britain, where opposition ran at 51 to 39 per cent. Opposition was massive not only in opposing countries like France (75 percent opposed to the war, to 20 percent in favour), Germany (69 to 27 percent) and Russia (87 to 10 percent) but also in 'Coalition of the Willing' countries Italy (81 to 17 percent), Spain (81 to 13 percent), Poland (73 to 21 percent) and Turkey (86 to 12 percent). 10 The world was convinced that this was not a war fought because of some new realities of terrorism, weapons of mass destruction, much less for 'freedom,' but rather for the old familiar reasons of empire: private wealth and public strategic power. Iraq had the secondlargest oil reserves in the world, a source of both, and it was clear that the Americans wanted to be the ones in charge, not only of Iraq, but of the whole, increasingly unstable region. 11 '[W]hy does the administration seem unconcerned about an exit strategy from Iraq once Saddam is toppled? Because we won't be leaving. Having conquered Iraq, the United States will create permanent military bases in that country from which to dominate the Middle East.' 12 The ancient coinage of empire, 'credibility,' was at stake: 'Every ten years or so, the United States needs to pick up some small crappy little country and throw it against the wall, just to show the world we mean business.' 13

The world's representatives at the United Nations and on the Security Council, prodded by opinion on the world's streets, scrutinized America's trumped-up claims that some legitimate collective interest or human good was at stake and rejected them. Despite the enormous pressure it could wield as the richest and most powerful country in the world, the United States was able to muster only four votes for war out of the 15 on the Security Council, the body entrusted by the 191 members of the United Nations (including the US) with the duty to decide matters of war and peace.

In technical terms this was a war of 'aggression' - the legal word for a war that does not fall within the narrow confines of the right of self-defense and has not been authorized by the Security Council as absolutely necessary in the collective interest of international peace and security. What does it mean for a country to wage a war of aggression? If we judge it by the standards laid down by the Nuremberg Tribunal that judged the Nazis after World War II, it is the *supreme international crime*. The first count against the Nazis in the Nuremberg Charter was the 'crime against peace ... namely planning, preparation, initiation [and] waging of a war of aggression, or a war in violation of international treaties' - international treaties just like the Charter of the United Nations. The judges of the Tribunal came from the four victorious powers America, Russia, Britain and France. In one of the best-known passages from the judgment of the Tribunal they declared:

War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.¹⁴

So according to this foundation judgment of all international criminal law, the Americans, and that means their leaders - Messrs. Bush, Rumsfeld and Powell, General Franks, Ms. Rice, etc., and

their associates Messrs. Blair, Hoon, Straw, et al. - are guilty of having committed the supreme international crime in Iraq, the one that contains within itself the accumulated evil of the whole. But even more than this: these leaders are also guilty for every act of violence with which this war was pursued. In the words of the American Chief Prosecutor at the Tribunal, the much-venerated American Supreme Court Justice Robert H. Jackson:

Any resort to war - any kind of war - is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive war illegal is to strip those who incite or wage them of every defense the law ever gave, and to leave the war-makers subject to judgment by the usually accepted principles of the law of crimes.¹⁵

In other words, President Bush and his colleagues are legally guilty of the murder of many thousands of people, not to mention the grievous assault of many tens of thousands more and so on down the list of the most serious crimes in the criminal codes of every country of the world. It's the kind of thing that, when done on a fraction of the scale in the Bush family's Texas, gets you a one-way ticket to the lethal injection chamber. And it doesn't matter that the war was authorized by the American Congress, even if that made it legal according to American law, because the fact that a war is legal according to the law of the country that launches it is irrelevant to international law. The Nazi war was legal according to Nazi law. International law is about international norms and international treaties, like the Charter of the United Nations (to which, all appearances to the contrary, the Americans are still parties) that made the war unquestionably illegal. According to Principle II of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed that act from responsibility under international law.' 16 Principle III adds: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.'

But the President isn't headed for Death Row, he's not even going to court. Because, for all we hear about war crimes and international criminal courts, there isn't one that has any jurisdiction over these supreme criminals for their supreme crimes. There is a brand new International Criminal Court at The Hague that is supposed to try people for war crimes, but, in order not to offend the Americans - who aren't even parties to the Court - it doesn't have jurisdiction over the supreme crime of starting an illegal war in the first place, only the lesser ones, crimes against the so-called 'laws and customs of war.' It's as if there were no law against murder, only murdering without reasonable regard for the safety of bystanders. Think of it as a loophole.' One Nuremberg prosecutor wrote at the time that, since the laws and customs of war are typically violated by both sides, they are 'at best a fragile barrier between the violence of war and its victims ... [A] modern war, no matter how chivalrous, involves so much misery that to punish deviations from the conventions without punishing the instigators of an aggressive war seems like *a mocking exercise in gentlemanly futility.'* 17

It's because of this 'loophole' that there was so much talk during the Iraq war about the Geneva Conventions and the 'laws and customs of war' but nothing about the crime of starting the war itself. When the attack was launched, stern warnings were issued to all the 'belligerents' by Human Rights Watch, Amnesty International and groups with lesser prominence, reminding them of their duties under the laws and customs of war. ¹⁸ But neither said a single word about the illegality of the war itself or the supreme criminal responsibility under international law of the leaders of the countries that had started it. During the war, too, an enormous amount was said about the lesser crimes. The US was very vocal about the mistreatment of American prisoners of war, who were, according to the

US, subject to 'humiliating and insulting circumstances designed to make them objects of public curiosity' contrary to Article 14 of the Third Geneva Convention. Amnesty International agreed that questioning US prisoners on Iraqi TV was wrong, but pointed out that the Americans were violating the very same proscriptions, not only with respect to Iraqi prisoners, but also the steady stream of prisoners it had sent and was continuing to send to Guantanamo Bay, which it had unilaterally declared a Geneva-Conventions-free zone.¹⁹

The Department of Defense also complained about Iraq's alleged 'perfidy' in using fake surrenders and dressing soldiers as civilians, to draw the invaders into ambush. When a suicide bomber disguised as a taxi-driver blew himself up along with four American soldiers at a checkpoint, Human Rights Watch condemned it as 'perfidy,' distinguishable from permissible 'ruses of war' and even 'suicidal attacks by undisguised military forces' because 'they do not depend on taking advantage of an enemy's willingness to abide by the law protecting non-combatants.' Then an American tank opened fire at a car loaded with people at a checkpoint near Karbala and killed ten civilians, five of them children. There were conflicting accounts of whether there had been adequate warning, but the army spokesman Brig. Gen. Vince Brooks was quick to point to cases of 'perfidy' as the context.

General Brooks suggested that other checkpoints had been rushed by several Iraqi vehicles at a time; sometimes a car carrying civilians would precede others full of armed combatants. He would not say whether that had been the case on Monday.²²

At his press conference, General Brooks invoked the soldiers' 'inherent right to self-defense' and said, 'While we regret the loss of any civilian lives, at this point they remain unavoidable, as they have been throughout history.' ²³ Amnesty International was also critical of these 'perfidious' practices for the way they endangered civilians, but they also condemned the invading forces for the use of inherently indiscriminate cluster bombs and the bombing of a TV station. Amnesty also questioned whether the required precautions were being taken to protect civilians, and called for investigations into civilian deaths like those at the Karbala checkpoint and the shooting of demonstrators in Falluja.²⁴

But never once did Amnesty International, let alone Human Rights Watch, mention the fundamental reason why none of the these incidents really had to be investigated at all - namely that all of this death and destruction was legally, as well as morally, on the heads of the invaders, whatever precautions they claimed to take, because it was due to an illegal, aggressive war. Every death was a crime for which the leaders of the invading coalition were personally, criminally responsible. When General Brooks said the soldiers at the Karbala checkpoint were exercising their 'inherent right to self-defense' he was talking nonsense: an aggressor has no right to self-defense. If you break into someone's house and hold them at gunpoint and they try to kill you but you kill them first, they're guilty of nothing and you're guilty of murder. General Brooks got one thing right: civilian deaths *'remain unavoidable, as they have been throughout history.'* Which means that the people who started this war knew that precisely this kind of thing would happen. And that's why they're guilty of murder (see Chapter 2). The *best* they can say for themselves is that the thousands of dead were the *absolute minimum* that anyone could expect from the war they started.

Despite all this, and despite the evidence of major coalition criminality against civilians reported by independent journalists such as Robert Fisk²⁶ and John Pilger,²⁷ when the time came for talking about prosecution, the only subjects were Saddam Hussein and his associates. In fact, because the Iraqi war crimes of 2003 were, after all, rather minor in the context, attention was turned to digging up the graves of all Saddam's crimes from the time of the first Gulf War. There would definitely be trials, it was just a question of where: in The Hague (with Slobodan Milosevic), in the US, or in American-run Iraq.²⁸ For reasons explored in Chapter 7, it was the last option that had been settled upon by the time of the capture of Saddam in December 2003. But the trials had been announced much earlier by the Bush administration - a few days prior to the war, in fact - and the point of the announcement was obviously not to commit America to trying Saddam - they were trying to *kill* him at that point - but to justify the illegal war.²⁹ Likewise for the war criminal provisions in the post-war

Security Council Resolutions, and indeed all the earnest pondering after Saddam's capture. No mention in any of this, of course, of the enormous complicity of the supreme criminals in these very crimes, and no question of their prosecution for the supreme crime they had just committed, not even for any of the lesser crimes. The Americans were boycotting the International Criminal Court, and when the famous Belgian 'universal jurisdiction' law was invoked by some Iraqis against General Tommy Franks for indiscriminate and even deliberate attacks on civilians, it turned out the law had just been changed so that the charges would now be sent for 'investigation' to ... the United States.³⁰

So here is the problem with international criminal law: it lets the Americans get away, not only with murder, but with the supreme international crime, and it punishes only the individual evils of the Americans' enemies - even though these are but the inevitable result of this supreme crime that 'contains within itself the accumulated evil of the whole.' It does this so regularly that it cannot be regarded as some minor kink that has to be worked out of the system. Despite international criminal law's banner commitment to 'ending impunity,' its operating principle is really one of *'selective* impunity.'

The question is, what is this war crimes business about that always winds up punishing only the 'usual suspects'? In an attempt to answer it, the rest of Part I explores the criminality of the Iraq war and the two illegal wars that preceded it, as well as the concepts of collateral damage, self-defense and humanitarian intervention. Part II examines the various species of international criminal law in action, especially the International Criminal Tribunal for the Former Yugoslavia, but also the new International Criminal Court and other types of 'universal jurisdiction.'

The Law and the War Against Iraq

The war against Iraq was denounced as illegal by a great many experts on international law throughout the world. They vastly outnumbered those few, mainly the protagonist governments and their hired guns, who defended its legality. You can pursue the details of these arguments from the sources themselves.³¹ It should be enough here to briefly outline the main points.

International law prohibits the use of military force by one state against another, except on one of two conditions: either it is pursuant to a valid authorization by the Security Council of the United Nations, or it is in the exercise of the narrowly defined 'inherent right of self-defense.' The first condition dates from the Charter of the United Nations of 1946, a treaty binding on all its members and the supreme document of international law. The second pre-dates the Charter but is preserved and limited by it. To these two accepted cases, it has been advocated (without much success) that there be added a third, namely 'humanitarian intervention.' The Americans tried to justify their war against Iraq by reference to all three criteria. Self-defense and humanitarian intervention are discussed in detail in Chapters 2 and 3 respectively, so they will be touched upon only briefly here. What needs some attention is the question of Security Council authorization.

Security Council Authorization

The Charter of the United Nations is essentially an anti-war document. Its very first words condemn war as a 'scourge':

We the Peoples of the United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind ...

The principles by which the Charter seeks to save us from war include these:

Article 2

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The Charter does not ban the use of force completely, but it creates a powerful presumption against it by concentrating the authority for its legitimate use in the Security Council. Even the right to self-defense is only temporary under the Charter, until the Security Council can intervene (see Chapter 2). The idea of concentrating this authority in the Security Council is to fulfill a fundamental objective of the Charter, namely 'to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest ... 32 The Security Council's quasi-monopoly over the legitimate use of force aims to ensure that it is used in the 'common interest' by the Council's representative nature. It is made up of 15 member states, ten of which are elected for two-year terms by a 2/3 vote of the General Assembly of all the 191 members of the United Nations, which represents virtually the entire population of the world. In March 2003, the elected members were Angola, Chile, Germany, Pakistan, Spain, Bulgaria, Cameroon, Guinea, Mexico, and Syria. In addition to these ten, of course, there are the five Permanent Members (the United States, Russia, China, France and the United Kingdom), each with a veto on any decision of the Council. While Resolutions of the Security Council can pass with nine affirmative votes, even 14 cannot act over the objection of one of the Permanent Members. This means that the Permanent Members cannot act without complete support from each other and substantial support from members elected by all the other members of the United Nations; but any one of the Permanent Members can defeat any action of the Security Council. The system is clearly less than perfectly democratic, but it doesn't take much reflection to see that it's better at ensuring force is used only in the 'common interest' than is the Americans acting alone, or even with their self-appointed 'Coalition of the Willing.'

Article 24 of the Charter gives the Security Council 'primary responsibility for the maintenance of international peace and security, and all Members agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.' But even the Security Council has limits on its power. The second paragraph of Article 24 provides that, '[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations' and within 'specific powers ... laid down in Chapters VI, VII, VIII, and XII.' What are these 'specific powers'? Chapter VI provides for the 'pacific settlement of disputes.' It requires that the parties to any dispute 'shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice' (Article 33). If they fail to settle the dispute on their own, Article 37 lays down the absolute requirement that 'they shall refer it to the Security Council.' Chapter VII - 'Action with respect to threats to the peace, breaches of the peace and acts of aggression' - is the part that provides the Security Council with authority to use coercive measures including armed force, but only as 'may be necessary to maintain or restore international peace and security.' It also has the power to 'make recommendations' (Article 39), or to employ 'measures not involving the use of armed force,' which 'may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.' Article 42 provides, finally, for the use of armed force:

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

The American mass media tried its best in early 2003 to portray the Security Council as some dubious, meddling, alien body imposing itself on the United States; but it can be seen from this that nothing is further from the truth. This is not the International Criminal Court that the US has never

accepted. The Security Council has been made the supreme international authority over war and peace by a solemn treaty, drafted, signed and still voluntarily adhered to by the United States, along with each of the 191 Member States of the United Nations. It is binding on all members as a condition of their membership: 'All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.' ³³

Hence the importance of demonstrating that the Security Council has authorized any given use of force. In his pre-war speeches of 6 March and 17 March 2003, President Bush made the issue of 'weapons of mass destruction' the central theme. But, according to Bush, possession of them by Iraq not only posed a threat to the United States, it also put Iraq in defiance of Security Council Resolutions, and these authorized the United States to go to war:

Under Resolutions 678 and 687, both still in effect, the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction. This is not a question of authority, it is a question of will. Last September, I went to the U.N. General Assembly and urged the nations of the world to unite and bring an end to this danger. On 8th November, the Security Council unanimously passed Resolution 1441, finding Iraq in material breach of its obligations and vowing serious consequences if Iraq did not fully and immediately disarm. Today, no nation can possibly claim that Iraq has disarmed. And it will not disarm so long as Saddam Hussein holds power.³⁴

Now, in fact, none of these Resolutions, taken singly or combined, can be made to read as authorizing military action by the United States - not on its own or with any number of allies, not in any imaginable circumstances in 2003 or at any time after 1991. You just have to read them to see for yourself.

Resolution 678 of 29 November 1990 explicitly, if euphemistically, authorized the unilateral use of force, but it did so only for very specific purposes, none of which had any relevance to the war of 2003. Resolution 678 was the one that authorized the first Gulf War. It was a brief Resolution, following eleven previous ones dealing with the crisis that started with Iraq's invasion of Kuwait on 2 August 1990. It said that the Security Council

- 1. Demands that Iraq comply fully with Resolution 660 (1990) and all subsequent relevant Resolutions, and decides while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;
- 2. Authorizes Member States co-operating with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned Resolutions, to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant Resolutions and to restore international peace and security in the area ...

Resolution 660, the one that the 'necessary means' were supposed to enforce, was relatively short and had essentially two operative paragraphs. They said that the Security Council

- 1. *Condemns* the Iraqi invasion of Kuwait:
- 2. *Demands* that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990 ...

Resolution 678 said that all necessary means could also be used to enforce 'all subsequent relevant Resolutions/ but this could only help the United States in 2003 if it meant all *future* Resolutions (a rather reckless blank check, it might be thought, for the Council to write). In fact, the phrase specifically refers to the ten listed Resolutions passed between 2 August and 28 November 1990, specified in the preamble to 678 as 'the above-mentioned subsequent relevant Resolutions.' All of these Resolutions had only one object: ending the invasion of Kuwait and all the behavior associated with it. Even the 'restoration of peace and security in the area' was specifically restricted

by the preamble: 'Determining that there exists a breach of international peace and security *as regards the Iraqi invasion of Kuwait.'* It did not authorize any state to militarily and unilaterally enforce peace in the Middle East (which might be bad news for Israel).

The main thing to notice about Resolution 678 is that it specifically authorized both 'all necessary means' and their unilateral deployment by individual member states (such as the US). Many protested in 1990-1 that war was not necessary in the circumstances, meaning either that the use of force was invalid under the Resolution, or the Resolution itself was invalid as a breach of the Council's duty under the Charter to exhaust peaceful means. But nobody could doubt, and nobody has doubted, that 'all necessary means' *could* include military force. The next thing to notice about Resolution 678 is that the authorization was expressly for a specific purpose: to eject Iraq from Kuwait. And since Iraq had definitively quit Kuwait (and was declared 'liberated' by President Bush Sr.) on 27 February 1991, the Resolution obviously had not the slightest relevance to justifying the war of 2003.

The third thing to notice is that neither Resolution 678 nor any of the prior eleven said a word about 'weapons of mass destruction.' That was up to Resolution 687 of 3 April 1991, the second Resolution mentioned by President Bush in March 2003. Resolution 687 indeed imposed major disarmament obligations on Iraq, but it did not even suggest that any member state could enforce them through the use of force. Not 'all necessary means,' not any means whatsoever. Quite the contrary, it said that a ceasefire would go into effect as soon as Iraq notified the UN of its acceptance of the terms of the Resolution. Paragraph 33 declared that 'upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the above provisions, a formal ceasefire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with Resolution 678 (1990). ³⁶ Iraq promptly gave this official notification, by letter of 6 April 1991 from its Permanent Representative at the UN to the President of the Security Council and the Secretary-General of the United Nations. The letter detailed Iraq's (rather wellfounded) objections to the Resolution, but it ended with an unequivocal: 'Iraq ... has no choice but to accept this Resolution.' ³⁷ The ceasefire then went into effect. By paragraph 34 of the same Resolution, the Security Council decided 'to remain seized of the matter and to take such further steps as may be required for the implementation of the present Resolution and to secure peace and security in the region.' Whence the inspections regime and the many other measures of the Resolutions that followed, all of them lacking any hint that any member state could use military force in the event that Iraq did not comply.

So neither 678 nor 687 could possibly be read to authorize the use of force in 2003 by the US and the UK. That leaves 1441, of 8 November 2002. Resolution 1441 made a lot of demands on Iraq, many completely unreasonable, given that the US and its client state Israel vastly out-gun Iraq in weapons of mass destruction, however defined, and that Israel has vastly out-defied Iraq in the matter of Security Council Resolutions. But Resolution 1441 did not say or even imply that any state or group of states could attack the country for failing to comply with any of those demands.

Resolution 1441 said that the Security Council 'Decides that Iraq has been and remains in material breach of its obligations under relevant Resolutions, including Resolution 687 (1991),' and that it 'Decides ... to afford Iraq, by this Resolution, a final opportunity to comply with its disarmament obligations under relevant Resolutions of the Council; and accordingly decides to set up an enhanced inspection regime ...'It also said that non-compliance 'will be reported to the Council for assessment' and directed the Security Council 'to convene immediately' on receipt of the weapons inspectors' report 'in order to consider the situation and the need for full compliance with all of the relevant Council Resolutions.' Resolution 1441 further 'Recalls, in that context, that the Council has repeatedly warned Iraq it will face serious consequences as a result of its continued violations of its obligations.' (The Resolution did not actually warn of those consequences itself, as President Bush and the press repeatedly misinformed the public.) All these words were carefully chosen after alternative versions were picked over between 2 October 2002, when the Americans submitted their first draft, and 8 November, when the final very different draft was passed. Their meaning is all too plain: the Security Council was serious about Iraqi compliance with its disarmament requirements, but it was the responsibility of the Security Council to decide whether

and to what extent there had been compliance, and what to do about it. That means the Security Council as an institution, all 15 members voting according to the rules written into the Charter of the United Nations, which require a majority of nine for any action, with no vetoes from any of the five Permanent Members.

What Resolution 1441 lacked, in other words, was any hint of authorization of unilateral military action, much less the explicit 'authorizes member states to use all necessary means' found in 678. This was no slip. These very words were in the draft submitted by the US to the members of the Council on 2 October 2002:

10. Decides that false statements or omissions in the declaration submitted by Iraq to the Council and failure by Iraq at any time to comply and cooperate fully in accordance with the provisions laid out in this Resolution, shall constitute a further material breach of Iraq's obligations, and that such breach *authorizes member states to use all necessary means* to restore international peace and security in the area.³⁸

But this draft was rejected, and the final, italicized words were nowhere to be found in 1441.³⁹ The Americans came back on 25 October with a formulation that omitted the objectionable words and concluded with 'shall constitute a further material breach of Iraq's obligations.' ⁴⁰ Even that was rejected by the other members of the Council, who insisted that the words 'and will be reported to the Council for assessment' be added, making it clear that the Council itself would decide the consequences of any 'material breach.'

There was an attempt to make something out of the words 'material breach' as they appear in an earlier part of 1441: '[The Security Council] *Decides* that Iraq has been and remains in material breach of its obligations under relevant Resolutions, including Resolution 687 (1991).' Since 687 was the ceasefire Resolution, some lawyers argued that the declaration in 1441 that Iraq was in 'material breach' had the effect of releasing the United States from its ceasefire obligations under 687, as if it were a treaty. One big problem with this theory is that for a material breach to suspend a *multilateral* treaty, 'unanimous agreement' by all the parties is required. The ceasefire of 1991 was not just between Iraq and America but between Iraq and *all* the forces aiding Kuwait, a coalition of 34 countries, among them many vocal opponents of the 2003 war, such as France, Germany, Saudi Arabia and Syria. Nobody heard any of them saying that they wanted to rescind the ceasefire. ⁴¹

An even bigger problem with this theory is that it depends on an obviously willful misreading of Resolutions 1441 and 687. Resolution 1441 doesn't say that Iraq has been in material breach of the *ceasefire conditions* of 687, but rather its *disarmament obligations* under 687. The ceasefire conditions were quite distinct from the disarmament obligations themselves. They consisted only of the *notification of Iraq's acceptance* of the disarmament obligations. Ongoing compliance with the actual obligations was not made a condition of the ceasefire. This may sound like a quibble, but it is actually very important. The American argument depends on reading 687 to mean that a resumption of hostilities was to remain perpetually at the discretion of any party to the ceasefire, if they didn't think that Iraq was living up to its disarmament obligations. But 687 says the ceasefire will go into effect the moment Iraq says it agrees to the terms, and leaves it to the Security Council as a body to police those terms. The 'material breach' theory wants us to assume that the Security Council used the wrong language to describe what it really wanted, namely to give any party the unilateral right to re-start the war at any time, thus renouncing Council control over the question of war and peace. But the Security Council acts through Resolutions and we have the authority of no less a figure than George W. Bush himself for the importance of giving their words 'merit and weight':

This is not only an important moment for the security of our nation; I believe it's an important moment for the Security Council itself.... And the fundamental question facing the Security Council is, will its words mean anything? When the Security Council speaks, will - will the words have merit and weight?⁴²

Well said, Mr. President, but to give the Security Council's words 'merit and weight' means

concluding that 678, 687 and 1441 could not possibly be read as authorizing America's war.

In fact, even the last, ill-fated Resolution introduced by the US, UK and Spain in February 2003 could not be read as authorizing force, since it merely referred back to 1441 and declared, rather melodramatically, that 'Iraq has failed to take the final opportunity afforded to it in Resolution 1441 (2002). 43 But everybody knew what the Americans were going to try to do with these words if the Resolution passed, and since the inspectors were calling for more time to carry out the job the Council had given them, France and Russia declared they would veto the Resolution if it came to a vote. The sponsors then desperately tried to get a majority of the Council to agree, pretending the veto was unimportant. This, even though America exercises the veto more than all the other Security Council members put together: 76 out of a total of 138 vetoes since 1966.⁴⁴ Without the American veto, Israel would have been sanctioned long ago for violating dozens of Security Council Resolutions over its 36 years of occupation of the Palestinian territories. Without the American veto, Boutros Boutros-Ghali would not have been replaced by the more US-friendly Kofi Annan as Secretary General. 45 But not only did a majority in the Security Council elude the Americans on this Resolution; when they finally backed out of the 'card-showing' contest, the three sponsors had only been able to add Bulgaria to their list, for a grand total of four votes out of 15, and only two out of five veto-bearing permanent members.⁴⁵

The Americans are well known to international lawyers for trying 'to distort the words of Resolutions ... in order to claim to be acting on behalf of the international community.' ⁴⁷ Even before the war of 2003, they and the UK had been bombing Iraq, and killing Iraqis, for a decade to enforce self-declared 'no-fly' zones in Iraqi territory under the supposed authority of Resolution 688 of 5 April 1991. But all that Resolution did was innocently 'appeal' to 'all Member States and to all humanitarian organizations to contribute to ... humanitarian relief efforts' being undertaken by the Secretary General. The American and British forces expanded this to the right to bomb any facilities capable of threatening their military flights over Iraqi territory. It was widely acknowledged that those attacks had no basis in the Resolution, and the Bush administration strikes of early 2001 were protested by European NATO members. 48 All humanitarian pretext for this was dropped in the leadup to the 2003 war when, as the inspections were being carried out, the bombing was clearly designed to 'soften up' Iraqi defenses for the impending war, well before even the United States had declared that its 'diplomatic efforts' had been exhausted. 49 The Americans engaged in the same Resolution twisting in Afghanistan in 2001 (see Chapter 2) and, before that, in Kosovo in 1999 (see Chapter 3). In 1998, after obtaining a Resolution on Iraq that clearly stopped short of authorizing the unilateral use of force to back up weapons inspections, they simply said, 'We think it does' and bombed away. 50 But where the law is concerned, it doesn't matter what they 'think,' it's what the Resolution actually says that matters.

Everything turns on the elemental difference between means and ends. The Charter gives the Security Council a number of options short of military force to get its Resolutions put into effect. In its Resolutions the Council (always with the vote of the veto-wielding Americans) very carefully delineates not only the ends but also the means. Then the Americans come in and argue that, whatever the means chosen by the Security Council, the US is free to use military force. They even write it into their domestic law, though they themselves take care to be very specific about means: The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to ... enforce all relevant United Nations Security Council Resolutions regarding Iraq.' ⁵¹

And they do this pretending concern for the 'credibility' of the Security Council.⁵² Of course, if this were indeed the law, any other country would have the same entitlement as the US to use military power, but, naturally, only to the extent they had it. Presumably, that's why the Americans like this theory so much more than everybody else does. The new American doctrine of self-defense holds similar attractions.

Self-Defense

In the absence of authorization from the Security Council, the United States had to try and

squeeze its war into the 'inherent right of self-defense,' a right that, under Article 51 of the UN Charter, allows the use of military force without Security Council approval. Bush put it simply in his press conference of 6 March:

Secondly, I'm confident the American people understand that when it comes to our security, if we need to act, we will act, and we really don't need United Nations approval to do so.... when it comes to our security, we really don't need anybody's permission.⁵³

The right of self-defense was central to the American justification for war in Afghanistan and is discussed in detail in Chapter 2. The problem with its use in the war against Iraq is that the notion of self-defense in international law, similar to the ordinary criminal law of any country, depends on there being an 'armed attack,' either actual or demonstrably imminent, so that there is no alternative but to respond with force. Furthermore, the United Nations Charter, while preserving the right of self-defense, limits it to cases where the Security Council has not yet intervened and taken measures to restore international peace and security, the idea being that international disputes are to be settled peacefully if possible, and that it is up to the Security Council to seek those peaceful alternatives. The reasons for these limits are moral: self-defense can justify the taking of life only where demonstrably necessary to save life. If there is a non-violent alternative, it must be taken. Hence the role of the Security Council. The law only allows self-help where there is no time to seek a collective peaceful solution.

Now the Americans knew that the accepted doctrine of self-defense under international law posed a problem for them if they wanted to invade Iraq, so as part of their war preparations they elaborated a new doctrine, which they called 'anticipatory' and 'pre-emptive,' but which Noam Chomksy has correctly pointed out is really *preventive*.⁵⁴ This was first publicly elaborated in a speech given by President Bush in June 2002 to the West Point Military Academy graduating class. In that speech, Bush claimed the right to respond militarily to threats before they 'fully materialize':

If we wait for threats to fully materialize we will have waited too long ... And our security will require all Americans to be forward looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.⁵⁵

In other words, not attacks, not even mere *threats* of attacks, but threats that haven't even fully materialized: *potential* threats. In September 2002, when Bush started to beat the war drums in earnest, the doctrine was elaborated in the so-called 'National Security Strategy of the United States':

Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination ... And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction - and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.⁵⁶

In his war speech of 17 March, Bush said:

The danger is clear: Using chemical, biological or, one day, nuclear weapons obtained with the help of Iraq, the terrorists could fulfill their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country or any other.... In one year, or five years, the power of Iraq to inflict harm on all free nations would be multiplied many times over. With these capabilities, Saddam Hussein and his terrorist allies could choose the moment of deadly conflict when they are strongest. We choose to meet that threat now where it arises, before it can appear suddenly in our skies and cities. The cause of peace requires all free nations to recognize new and undeniable

realities.... Terrorists and terrorist states do not reveal these threats with fair notice in formal declarations. And responding to such enemies only after they have struck first is not self-defense. It is suicide.⁵⁷

Not only did Bush provide no evidence that there was any action underway by Iraq to attack the United States or help others do so, or any plan to do so, he never even *claimed* this was the case. He claimed only that the fact that Iraq had such weapons made it a potential threat: 'one day, with the *help* of Iraq, the terrorists *could* fulfill' - 'in one year, or five years' - 'these *capabilities'* - 'could choose.' Of course evidence for the existence of the weapons was non-existent as well; the inspectors and the US army turned up *nothing*. But even that was beside the point because international law has never accepted and could never accept the legally and morally nonsensical doctrine Bush elaborated.

There are two decisive reasons for this. Above all, the doctrine would justify the deliberate infliction of death and destruction on a massive scale where no evidence had been produced to show that this was necessary to prevent any broadly equivalent tragedy from befalling the people doing the inflicting. That would mean treating the lives of the people of the country attacked as less worthy of protection than the lives of the people of the attacking country, because it would displace all the risks onto them: to counter an unsubstantiated risk to the people of the attacking country (here the US), the people of the attacked country would be sentenced to death and destruction. You can imagine that international law cannot proceed on that assumption, even when the lives subject to the unsubstantiated risk are so precious as American lives. Secondly, the Bush doctrine is a disguise for the doctrine of Might Makes Right so thin that a child could see through it, because it would also theoretically give every country the right to attack the US, but no means to do so. The US has threatened the world with weapons of mass destruction for about 60 years now, since it dropped the atomic bombs on the civilians of Hiroshima and Nagasaki. It has the world's largest cache of weapons of mass destruction, however you care to define them. In the wildest delusionary fantasies of the American administration, the capabilities of Iraq to threaten anybody were infinitesimal compared to the threats the US brandishes every day. There is no law or morality without 'universalizability' which means the US would have to recognize the right of any country to act preventively against the US itself, and you won't find that in any of President Bush's speeches. So self-defense was not available here.

Humanitarian Intervention

Though 'Iraqi Freedom' gave the 'Operation' its name, the object of freeing Iraqis came a distant third in the arguments of President Bush for the invasion. In his penultimate war speech of 6 March, Bush said 'The world needs him to answer a single question: Has the Iraqi regime fully and unconditionally disarmed, as required by Resolution 1441, or has it not?' ⁵⁸ Bush did *not* say, 'Has the Iraqi regime stopped oppressing its people?' On the other hand he pledged, in the event of war, to protect innocent lives, bring food and medicine and, finally, to 'help that nation to build a just government after decades of brutal dictatorship. The form and leadership of that government is for the Iraqi people to choose. Anything they choose will be better than the misery and torture and murder they have known under Saddam Hussein ... We will be changing the regime of Iraq for the good of the Iraqi people.' In his 17 March speech Bush promised Iraqis:

We will tear down the apparatus of terror and we will help you to build a new Iraq that is prosperous and free. In free Iraq there will be no more wars of aggression against your neighbors, no more poison factories, no more executions of dissidents, no more torture chambers and rape rooms. The tyrant will soon be gone. The day of your liberation is near.⁵⁹

Despite its low ranking in pre-invasion justifications for war, after the occupation turned up no evidence of weapons of mass destruction the 'liberation' of Iraq became the main *ex post facto* argument for war. When mass graves dating from the first Gulf War started to be uncovered.

Thomas Friedman wrote in the New York Times:

As far as I'm concerned, we do not need to find any weapons of mass destruction to justify this war. That skull, and the thousands more that will be unearthed, are enough for me. Mr. Bush doesn't owe the world any explanation for missing chemical weapons (even if it turns out that the White House hyped this issue). It is clear that in ending Saddam's tyranny, a huge human engine for mass destruction has been broken. The thing about Saddam's reign is that when you look at that skull, you don't even know what period it came from - his suppression of the Kurds or the Shiites, his insane wars with Iran and Kuwait, or just his daily brutality.⁶⁰

When Tony Blair, under attack at home for misleading the British public on the weapons question, journeyed to Washington to be honored by the US Congress, his fallback was the same:

Can we be sure that terrorism and weapons of mass destruction will join together? Let us say one thing: If we are wrong, we will have destroyed a threat that, at its least, is responsible for inhuman carnage and suffering. That is something I am confident history will forgive.⁶¹

'Humanitarian intervention' by military force was an important theme in the 1999 Kosovo war, and its legal status is discussed in detail in Chapter 3. To briefly anticipate that discussion, the main reason a claim of humanitarian intervention could never succeed in the Iraq war is that, as usual, what the Americans were claiming was a *unilateral* right of humanitarian intervention, whereas, if the right exists at all in international law, it exists only as a *collective* right; that is, one that can only be authorized by the Security Council, and, as we've just seen, the Security Council did not authorize this war. The obvious reason for restricting military intervention for humanitarian reasons to cases authorized by the Security Council is to give some assurance that it is not being abused to disguise aggressive war, which is exactly the use the Nazis made of it to justify the invasion of Poland that launched World War II. The drafters of the UN Charter had this and many other examples before their eyes when they gave the Security Council the exclusive responsibility for authorizing non-defensive wars.

There are indeed some proponents of a unilateral right to military intervention for humanitarian reasons, but, as the discussion in Chapter 3 will show, they are few and on virtually non-existent legal ground. And even these proponents lay down conditions that the Americans could never have hoped to meet in the case of Iraq. First there is the question of motivation. The US made it very clear that it would never have invaded Iraq purely to defend the human rights of its people. This was stated explicitly in the speeches of George W. Bush, and most succinctly by Secretary of Defense Donald Rumsfeld during his Iraq victory tour: 'Our coalition came to Iraq for a purpose - to remove a regime that oppressed your people and threatened ours.' 62 In other words, Saddam Hussein could have gone on oppressing his own people forever as far as the Americans were concerned, as long as he was not regarded as a threat to the American people, or, more frankly, their interests. Now, according to the advocates of unilateral humanitarian intervention, mixed motives are acceptable, as long as the non-humanitarian ones don't interfere with the humanitarian ones: 'collateral nonhumanitarian motives... should be such as to not impair or reduce the first paramount human rights objective of the intervention.' 63 But there is plenty to show that the non-humanitarian motives for this war overwhelmed any incidental humanitarian ones. In the first place, the US and the UK seem to have made no plans whatever to actually care for the needs of the Iraqis once they had conquered the country. Though they made sure everything having to do with the oil industry and the secrets of the regime was secure, they evidently couldn't have cared less about the plundering of infrastructure and heritage that occurred 'under their noses.' Robert Fisk reported the following from Baghdad:

After days of arson and pillage, here's a short but revealing scorecard. US troops have sat back and allowed mobs to wreck and then burn the Ministry of Planning, the Ministry of Education, the Ministry of Irrigation, the Ministry of Trade, the Ministry of Industry, the Ministry of Foreign Affairs,

the Ministry of Culture and the Ministry of Information. They did nothing to prevent looters from destroying priceless treasures of Iraq's history in the Baghdad Archaeological Museum and in the museum in the northern city of Mosul, or from looting three hospitals. The Americans have, though, put hundreds of troops inside two Iraqi ministries that remain untouched and untouchable because tanks and armoured personnel carriers and Humvees have been placed inside and outside both institutions. And which ministries proved to be so important for the Americans? Why, the Ministry of Interior, of course - with its vast wealth of intelligence information on Iraq - and the Ministry of Oil. 64

One month after the war was declared won, the press was echoing human rights groups and reporting a 'descent into lawlessness' and 'chaos,' and the 'plundering of government property, often under the eyes of American soldiers ... most government ministries have been gutted.' 65 According to the advocates of unilateral military humanitarian intervention, 'the final test will be whether human rights have been effectively restored as a result of the intervention.' 66 But as the occupation wore on, it seemed that human rights had actually been worsened by the invasion, even taking into account the end of the Saddam Hussein regime. In the war's immediate aftermath, UNICEF reported that child malnutrition in Baghdad had almost doubled since before the war. 67 Iraqi doctors were reporting an increase in infant mortality from the lack of clean drinking water, due to the unrestored electricity. 68 In one ghastly event, a nuclear power facility was looted for barrels by thirsty villagers who dumped their radioactive waste and used them to carry drinking water. 69 In September, the Iraqi Governing Council said it would be two years before electricity was back to pre-occupation levels if someone came up with 8 billion dollars. And even that did not take into account the sabotage that was still blacking out the country in November. And electricity, 'as one Baghdad merchant pointed out, 'means safety. It's-the chain of life.' 71 In Baghdad the murder rate appeared to have increased to ten times its pre-war level - even before the car bombings started. 72 A Gallup poll of September 2003 reported that 94 per cent of Baghdadis still considered the city 'a more dangerous place than before the invasion.' 73

Another reason the Iraq war would fail as a humanitarian intervention is because of the premium naturally placed by the theory (tendentious as it is) on the right of self-government ('Did the intervenor seek to dominate the target state in some way unrelated to humanitarian concerns?' 74). President Bush had promised that 'the form and leadership of [their] government is for the Iragi people to choose. Anything they choose will be better than the misery and torture and murder they have known under Saddam Hussein.' But that promise was quickly broken. As soon as the extent of opposition to the occupation became clear, plans for elections of an interim government were replaced by 'consultations' for an appointed 'Governing Council,' ultimately 'chosen' by the 'staff of American 'civil administrator' L. Paul Bremer III, also referred to in the press as 'viceroy,' who would have veto powers over any significant decisions.⁷⁵ In calling a halt to even local elections, Bremer declared that he was 'not opposed to [self-rule] ... I want to do it in a way that takes care of our concerns.' ⁷⁶ The question of how long the coalition would stay in Iraq depended only 'in part on how quickly the Iraqi people can write and approve a constitution. The Governing Council quickly proved to be a farce that, most importantly, failed to give any legitimacy to the occupation, the Americans decided to dump it and demote the constitution-writing process to an 'interim' one. Instead, there would be an Afghanistan-style assembly in June 2004, which would 'elect' a provisional government, but there would be no actual elections, and the Americans would have an effective veto, via the Governing Council, over the choice of delegates to the assembly. The plan, immediately denounced by the Shiites, was explicitly part of a longer, not shorter, exit strategy and any new government was expected to 'invite' the US troops to stay. 78

Also relevant in judging this war as a humanitarian intervention was American *complicity* in the oppressiveness of the Iraqi regime. ⁷⁹ Complicity argues against a right to humanitarian intervention on a number of grounds. It speaks to the sincerity of the motives, and above all it speaks to the crucial question of the necessity of the intervention. If the Americans were a big part of the problem, then non-military means of improving the lives of Iraqis were in their own hands. Thus, the relevance of all the reminders during the build-up to the war of how much the US had to do with what Iraq had become, starting with its support for the disastrous Iran-Iraq war of 1980-8. America

played both sides of that war to some extent, but mainly kept it going by being a very helpful ally to the regime of Saddam Hussein, providing crucial economic, military and diplomatic support. The costs to both sides were enormous: a median estimate is about 800,000 dead.80 The atrocities that have since been laid at the feet of Saddam Hussein - the wartime gas attacks against Iran and the Anfal campaign against the Kurds - now fatuously used by presidents and journalists to justify the war of 2003, were committed when the US was Saddam's good friend and benefactor, with a younger Donald Rumsfeld as the US emissary.81 In those days the American attitude was 'It was just another way of killing people - whether with a bullet or Phosgene, it didn't make any difference. 82 The Iran-Iraq war was followed by the probably pretextual and certainly wildly excessive Gulf War. 83 A median estimate puts the Iraqi dead at 80,000 to 85,000, including about 3,000 civilians.84 Civilian life support systems (water, energy, sewerage, agriculture, industry and transportation) were devastated. Then came the separatist uprising of Kurds and Shia, famously encouraged but not aided by the Americans, which led to brutal reprisals, the results of which were being unearthed in 2003 as justification for the latest war. This was followed by the pseudohumanitarian bombing campaign of the US and the UK, with its regular toll of civilian death, lasting through three American presidencies.85

Above all, there were the sanctions. Unlike the bombing, the sanctions had the explicit authorization of the Security Council, having been put in place before the attack that expelled Iraq from Kuwait. But they were maintained for twelve years by the veto power of the United States and enforced by its military and economic muscle. Though they gave the appearance of being renewed periodically by consent of the whole Security Council, what were actually renewed were the timelimited exceptions that allowed Iraq to sell some of its oil for food and other humanitarian supplies. Without these renewals, the blanket sanctions imposed in 1990 would have sprung back into effect. It was the US alone that was responsible for the maintenance of the sanctions regime. 86 Already in 1991, then Secretary General Perez de Cuellar, in an often-guoted speech on 'humanitarian intervention/ was warning that the 'primary victims' of economic sanctions in developing countries are the most vulnerable sections of the affected population - women and children, the poor and the infirm.' 87 In Iraq it was the children who were hit hardest. In 1996 UNICEF reported that 4,500 children under the age of five were dying monthly in Iraq from malnutrition, polluted water and lack of medicine, all traceable to the destruction that occurred during the war and the sanctions that made it impossible to restore sanitary and health services. 88 The UNICEF report put pressure on the US to ease the sanctions somewhat to allow a limited 'oil for food' program in which Iraq was allowed to sell a small amount of its oil. But even with these limits eased, the devastation of the Iraqi economy by the sanctions was such that UNICEF reported a rate of infant mortality in 1999 that was still double what it had been before the war. The death rate for children under five had risen to 131 per 1,000, from 56 per 1,000 before the economic sanctions. Infants less than one year old were now dying at a rate of 108 per 1,000, up from 47 per 1,000.89 By 2001, America's NATO allies were publicly stating their disgust at the sanctions. 90 Tariq Ali wrote of them in 2000: 'Clinton and Blair are personally responsible for deaths of hundreds of thousands of small children, callously slaughtered to save their joint "credibility" ... Since without America and Britain, the blockade would have been lifted long ago, the role of other Western leaders, craven though it is, need not be reckoned.' 91 The US and the UK tried to blame the effect of the sanctions on the spending habits of the government -'Saddam's palaces' - but even those who believed that the 'primary responsibility for this disaster is Saddam's' had to admit that 'the UN, an increasingly divided UN we should add, has become a secondary perpetuator of it.' 92 In this case 'divided' meant the US and the UK against the rest. And the simple fact is that, without these sanctions, those children would not be dead. The American-led embargo, wrote John Pilger in opposition to America's humanitarian war of 2003, was 'every bit as barbaric as the dictatorship over which Iragis have no control.' 93

The first act of the Iraqi Governing Council 'chosen by Bremer's staff was to declare the American overthrow of the Saddam Hussein regime a national holiday. Even those who opposed the occupation - the great majority of Iraqis by every indication - even some of those who opposed it violently, were happy to see Saddam gone; and if not Saddam, then at least the sanctions. But, given American complicity in the brutality of this regime, to justify the invasion on this account would

be like the guy who hit his head with a hammer because it felt so good when he stopped. If America really had the human rights of Iraqis at heart and did not merely want, as Pilger argued, 'a more compliant thug to run the world's second greatest source of oil,' it would have done things very differently. It would have worked through and not against the United Nations, and its first order of business would have been to lift the sanctions and end Irag's isolation. It would have sought peaceful means to rebuild prosperity and human rights in Iraq on the basis of the country's enormous natural wealth and advanced level of development; this is called 'engagement' when there is no ulterior motive for going to war. It is difficult to imagine how military action could ever sincerely have been thought useful to the people of Iraq, given the horrifying costs and the 'quagmire' that had to be entailed by the sudden overthrow, by foreign armies, of a strong government firmly based in the country's traditional ruling group (Arab Sunnis, with about one quarter of the total population) - even if that government was hated by the rest of the country. 'No problem of political and social structure, in the Middle East or elsewhere, can be resolved by a war.' wrote Italian journalist Rossana Rossanda the day after the attack on Italian military headquarters that left 19 Italians and 13 Iraqis dead. To the contrary. It can only make matters worse.' 96 This simple proposition is so widely understood that the US would not have had a prayer making the case for war to even its own people, let alone the UN, if it had argued on exclusively humanitarian grounds beforehand. But a sincere 'humanitarian war,' if such a thing were even imaginable, would have been rather more painstakingly prepared, one imagines, with a view to ensuring that post-war Iraq was indeed a better place to live for the Iraqis who survived it. It would have to have been a whole lot better to justify these costs. Even the legal ideologists of humanitarian war say it should be permissible 'only in the face of ongoing or imminent genocide, or comparable mass slaughter or loss of life/ something nobody claimed was the case with Iraq. 97 In other words, a humanitarian war would not have squandered tens of thousands of lives to punish a regime for atrocities far in the past or as an exercise in wishful thinking for the future. Irag is a good example of why the law does not accept unilateral humanitarian intervention under any circumstances, a matter explored fully in Chapter 3.

That America's war on Iraq was a flagrant violation of the Charter of the United Nations was implicitly corroborated by the pundits who thought it appropriate to conclude from it that the fundamental legal prohibitions in the Charter on making war were no longer valid: 'It is hard to avoid the conclusion that the Charter provisions governing use of force are simply no longer regarded as binding international law.' ⁹⁸ But what would that leave of a treaty whose very first commitment is 'to save succeeding generations from the scourge of war'? So others have concluded that it is the United Nations Charter itself that is no longer valid, that it has gone the way of the Covenant of the League of Nations. ⁹⁹ Pentagon guru Richard Perle drew this conclusion and 'thanked God' for it. ¹⁰⁰

This may all be a bit premature, of course, and even wishful thinking on the warmongers' part; but even if it were true, it would take nothing of significance away from the supreme criminality of this war or America's other aggressive wars. The Nuremberg judgment pre-existed the Charter and it was based on a moral logic that cannot be refuted by the mere fact of supreme criminals going unpunished. Murder is still murder, even if America manages to get away with it. What the meaning is of an international criminal law that systematically *lets* them get away with it is a more complicated question.

Endnotes

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- 13. Remark attributed to Michael Ledeen, holder of the Freedom Chair at the American Enterprise Institute, by his friend and colleague, *National Review* editor Jonah Goldberg, 'Baghdad Delenda Est, Part Two/ *National Review Online*, 23 April 2002 www.nationalreview.com/goldberg/gold
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