

SADDAM HUSSEIN: MY PART IN HIS DOWNFALL¹

HILARY CHARLESWORTH²

I. INTRODUCTION

The theme of this symposium in honor of Richard Bilder, the relationship between the practice of international law and the conduct of foreign relations, has prompted me to reflect on my confused reaction as an academic to the invasion of Iraq in March 2003. The lead up to the invasion and the response to it made international lawyers everywhere feel as though they were at the heart of the action. We were relevant at last, because of the unusual public interest in whether or not the invasion was legal. For a time at least, the press, colleagues, students, and even my family seemed interested in my views and those of international lawyers generally. I joined a group of Australian international lawyers to write a letter questioning the legal basis for war that was both praised and denounced in the press and in the Australian Parliament.³ This thrill of attention and relevance, of speaking law to power, was however tainted by a sense of deepest irrelevance. Whatever the views of most international lawyers that the invasion was illegal, the members of the ‘Coalition of the Willing’ proceeded to invade Iraq on the basis of what seemed to be very weak, perhaps even ironic, legal advice. Never before had I experienced the gap between the practice of international law and the conduct of foreign relations so keenly.

¹ With apologies to Spike Milligan, author of the book and play, *Adolf Hitler – My Part in his Downfall* (1972), recounting the travails of his military training at Bexhill in the United Kingdom during the Second World War.

² Professor, Regulatory Institutions Network, Research School of Social Sciences and Professor of International Law, Faculty of Law, Australian National University.

³ The letter was published in Melbourne under the title *Howard must not involve us in an illegal war*, THE AGE, Feb. 26, 2003, at <http://www.theage.com.au/articles/2003/02/25/1046064031296.html>, and under the title *Coalition of the Willing? Make that War Criminals*, THE SYDNEY MORNING HERALD, Feb 26, 2003, at <http://www.smh.com.au/articles/2003/02/25/1046064028608.html>. Responses included Don Greig, *War, Legality and Iraq*, CANBERRA TIMES, Mar. 17, 2003, at 11 and *The Case for a Legal Attack*, THE AUSTRALIAN, Mar. 18, 2003, at 15 [hereinafter Australian Letter].

In this paper, I first try to understand my own particular predicament in the context of some of the perennial anxieties of international lawyers about the status of our discipline. I then sketch some of the available accounts of the relationship between international law and foreign policy and consider how these theories apply in the case of the 2003 invasion of Iraq.

II. PERENNIAL ANXIETIES

A sense of insecurity dogs international lawyers. In the academy we tend to be considered purveyors of a rather suspect form of legal reasoning and incapable of distinguishing between true law on the one hand and politics on the other. The role of international law in the academic curriculum is thus endlessly debated – is it central or peripheral to the core business of a law school?

Detlev Vagts well described one aspect of the dilemma over twenty years ago. In a response to two journalists' claim that there were no "complete" international lawyers any more because of the vast area covered by the discipline and the consequent imperative to specialise, Vagts wrote of the problem within American law schools of "a great pressure to be 'practical', as students conceive of that adjective."⁴ He said:

Since international law is not a required subject save at a handful of law schools, courses in that area must survive in the competition of the elective system. At large schools the instructor may find a small, but dedicated, audience of students interested in exploring the overall structure of the international legal system. Elsewhere it is hard to find students in the 1980's who do not view course selection as a purely pragmatic proposition. The instructor is under an irresistible pressure to serve up offerings that will be seen as readily translatable into what is in demand by commercial law firms. As a result, more and more law schools offer solely 'international transactions' courses that begin, as it were, on the firing line, with the nuts and bolts of a foreign distributorship or licensing agreement. Only a bit of

⁴ Detlev F. Vagts, *Are There No International Lawyers Anymore?*, 75 AM. J. INT'L L. 134, 136 (1981).

general theory is smuggled in here and there by the more ingenious teachers.⁵

Vagts's editorial concluded by calling on practitioners to support academic attempts to teach general courses on international law, and on teachers to do better in devising comprehensive courses that would attract those students who had a "strong leaning towards the practical."⁶

This idea that 'the firing line' or 'coal face' of legal practice is commercial legal work suffuses many academic defences of international law. The virtues of international law thus require emphasis: it is presented as a civilizing influence, with an illustrious history; the modern day equivalent of the Grand Tour to Europe for an eighteenth or nineteenth century gentleman. This type of defence depends on a distinction between hard commercial subjects and the 'soft' contours of international law.

Another form of vindication of international law is to assert its place on the 'hard' side of a hard/soft dichotomy. There is a nice pictorial representation of this on the cover of Michael Byers' edited collection of essays *The Role of Law in International Politics: Essays in International Relations and International Law*.⁷ Pictures of lawyers consulting tomes in a library are overlaid with a photo of a military aircraft, as if to suggest that poring over cases has a very active element and can lead directly to the unleashing of the use of force. An alternative reading of the cover montage is that military aircraft will go about their business whatever the law books say.

Outside the academy, in the sphere of organized politics, international lawyers suffer from different types of image problems. They can be styled as hopelessly idealistic and naïve, championing abstract principles that have no connection with reality, members of what Australian politicians are pleased to call the chardonnay-sipping chattering classes. Another form of political representation of international lawyers is that they have no common core of principle and endlessly debate and disagree. For this reason, one argument can be presented as just as valid as

⁵ *Id.* at 136-7

⁶ *Id.* at 137.

⁷ THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers ed., 2000).

another. Thus, Australian Prime Minister John Howard was able to dismiss the criticism of the invasion of Iraq by international lawyers on the basis that “you know what lawyers are like, they do tend on occasions to argue.”⁸ He went on to emphasize that the critics of the invasion were “learned professors” while the Australian government’s legal advice was from a practitioner of international law.⁹

III. SPEAKING LAW TO POWER

The various types of existential insecurity of international lawyers have launched many missions to define a plausible account of their role. The literature typically draws a distinction between the role of government, international lawyers, and academics. Over forty years ago, the focus of our symposium, Richard Bilder, wrote an influential paper on the way the U.S. State Department lawyers influenced the conduct of foreign affairs. He argued that the government’s international lawyers exerted a ‘major influence’ on the views and policies of the U.S. government and that their work was indispensable to the conduct of foreign affairs.¹⁰ Bilder sustained this argument through a detailed examination of the work of the State Department in drafting treaties and in dealing with Congress. Bilder’s own experience in the Office of the Legal Adviser convinced him of:

the reality of international law—an acute awareness of the extremely meaningful and generally effective role that international law actually performs in regulating the conduct of nations and making the international community work. The attorney becomes particularly aware both of the vast web of legal obligations which bind nations together and of the fact that these obligations are generally respected and observed. As a consequence, the practice of international law takes on the character of a very serious and vital business with stakes of great consequence.¹¹

⁸ *John Howard Interview with Kerry O’Brien* (Australian Broadcasting Corporation television broadcast, Mar. 18, 2003).

⁹ *Id.*

¹⁰ Richard Bilder, *The Office of the Legal Adviser: The State of Department Lawyer and Foreign Affairs*, 56 AM. J. INT’L L. 633 (1962).

¹¹ *Id.* at 679.

Bilder acknowledged that much of the work of the Office of the Legal Adviser crossed over from a purely legal domain into issues of substantive policy, but he observed that the lawyers' views nevertheless had influence.¹² The basis for a lawyer's influence on policy was, first, the result of the lawyer's "personal prestige and his client's respect for his general judgment and knowledge of the subject matter;" second, the lawyer's "professional skills of analytic ability and articulateness;" and finally the depth of a lawyer's knowledge of an area compared to that of the "frequently rotated policy officers."¹³

Richard Bilder considered the realist charge that too keen an adherence to international law would be both impractical and dangerous for the United States. He responded that respect for international law was more than a moral position and that it was "indispensable to the general establishment of conditions necessary to the protection of our own citizens abroad, the effective conduct of international relations, and the ultimate achievement of the kind of world in which the people of this country wish to live."¹⁴

A second response offered by Bilder to the realist scepticism about international law was the "strongly moral and legal tradition of the "American people" and "this country's national predisposition to think and conduct its activities in terms of law" that would restrain the conduct of international relations on a non-legal basis.¹⁵ At the same time, Bilder rejected the claim that adherence to international law would result in a legalistic or Utopian foreign policy. International lawyers, he wrote, were pragmatic and well aware of the limits of their discipline. However, he notes:

What a policy of respect for international law does mean is a seriously undertaken national dedication to compliance with existing law even when such a policy entails the risk that national freedom of action may thereby be limited to some degree, and a conscious decision that a continuing

¹² *Id.* at 655.

¹³ *Id.*

¹⁴ *Id.* at 656.

¹⁵ *Id.* at 656, 679.

effort be made toward broadening wherever practicable the area of international conduct subject to that law.¹⁶

While such a policy was no substitute for good quality foreign policy decisions and diplomacy, respect for international law, he wrote, can promote “the gradual development of agreed international techniques for dealing with more and more areas of such problems in ways and through rational procedures which do not threaten the disruption of international society.”¹⁷

Richard Bilder saw academic international lawyers and government legal advisers as affected by different time pressures—an assumption he may have since learned to regret! Government lawyers, he wrote, had “little leisure for concentration on many of the deeper issues and long-range problems of international law, or for such necessary tasks as informing and educating the public as to the nature of a need for international law.”¹⁸ This was a natural task for the academy. He seemed to accept, however, that the two types of international lawyers were engaged in a similar enterprise.

Oscar Schachter’s much-cited article *The Invisible College of International Lawyers*¹⁹ further developed the relationship between government lawyers and the academy. The professional community of international lawyers, for Schachter, “constitutes a kind of invisible college dedicated to a common intellectual enterprise.”²⁰ The college allowed a *pénétration pacifique* of ideas from the academy (whose concern was objective knowledge) into government (whose concern was advocacy) and vice versa.

Schachter unpacked the aim of objectivity of international law scholars. He noted the problem of apparent indeterminacy and relativism in international legal argument, where “any side of an issue in dispute can find support in authoritative principles.”²¹ The way around this impression, he argued, is “though a

¹⁶ *Id.* at 657.

¹⁷ *Id.*

¹⁸ *Id.* at 684.

¹⁹ Oscar Schachter, *The Invisible College of International Lawyers*, 72 N.W. U. L. REV. 217 (1977).

²⁰ *Id.*

²¹ *Id.* at 220.

disciplined and reasoned application of competing principles, including those expressing fundamental values, validated by evidence of practice and consensus in international society.”²² Although Schachter was keen to support the idea of international law as a unified discipline, he discerned different roles for what he terms an independent or academic lawyer and a government lawyer. The former can aspire to a type of objectivity, while the latter may well be constrained by the exigencies of advocacy. However, his concept of *dedoublement fonctionnel* (the interchange of official and non-official roles in an international lawyer’s career) allows the creation of some type of consistent understanding of legal principles, a universal *conscience juridique*, or common sense of justice.²³ Indeed, for Schachter, translating *la conscience juridique* into specific meaning and effect may be “the noblest function of our invisible college.”²⁴

The literature thus presents a pervasive image of international lawyers as speaking law to power. The notion of law in this context is often conflated with the idea of truth and thus it gains moral force from association with the classic image of Sir Thomas More, speaking the truth of God to King Henry VIII’s power.

Since Richard Bilder’s landmark article, there has been a flowering of analysis of the role of government legal advisers. This has been encouraged by regular meetings of Legal Advisers in association with meetings of the United Nations’ Sixth Committee since 1990. A good example of this genre is the reflections of Hans Corell, a former Austrian Legal Adviser, and later head of the United Nations’ Legal Office.²⁵ He asserted the centrality of the role of the Legal Adviser to policy decisions by states.²⁶ Corell counseled Legal Advisers to play an active, rather than passive role, alerting their political masters to legal problems with proposed actions in a robust and firm way, but

²² *Id.*

²³ *Id.* at 225.

²⁴ *Id.* at 226.

²⁵ Hans Corell, *Cooperation Among Legal Advisers on Public International Law*, in *COLLECTION OF ESSAYS BY LEGAL ADVISORS OF STATES, LEGAL ADVISORS OF INTERNATIONAL ORGANIZATIONS, AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL LAW* 97 (1999).

²⁶ *Id.* at 105.

doing so “with special experience and tact” in order to retain the confidence of their Minister.²⁷ What happens if political decisions are made that are inconsistent with international law? Hans Corell advised Legal Advisers to be as creative as possible in devising approaches to international legal principle that accommodate policy choices. He nevertheless contemplated the possibility of resignation when a particular decision was “in clear violation of. . . international law,”²⁸ although he acknowledged the problem that a Legal Adviser’s resignation may simply lead to replacement by a more ‘flexible’ lawyer.²⁹ The image of Legal Advisers that emerges from the autobiographical literature is of an urbane, tactful and accommodating counsellor, but with a core commitment to international legal principle. The war against terror seems to have generated a different approach to the role of government’s international law advisers, with national loyalties taking priority over international standards. One of the U.S. Justice Department officials responsible for a controversial memorandum asserting that international prohibitions on torture did not bind the President argued that his position required giving policymakers “a view of the entire playing field” of legal argument.³⁰ He wrote:

A lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals. . . or to advance the cause of international human rights law. However valid those considerations, they simply do not rest within the province of the lawyer who must make sure the government understands what the law permits before it decides what it should do.³¹

Other perspectives are more circumspect about the role of international legal discourse in foreign policy. For example, Ian Johnstone’s study of the use of international law in United Nations Security Council debates over intervention in Kosovo in 1999 suggests that legal discourse does not determine policy, but

²⁷ *Id.* at 108-9.

²⁸ *Id.* at 109.

²⁹ *Id.* at 110.

³⁰ John C. Yoo, *A Crucial Look at Torture Law*, LOS ANGELES TIMES, July 6, 2004, at B11.

³¹ *Id.*

that it can constrain political action.³² In his book *From Apology to Utopia*, Martti Koskenniemi takes a different tack by arguing that international lawyers must have “a commitment to reaching the most just solution” in a particular dispute.³³ This would involve an economic, historical, sociological and political analysis of power.³⁴ For Koskenniemi, the best an international lawyer can offer to a specific problem is a contextual version of justice, making no claim to objectivity, and indeed, acknowledging its political basis. International lawyers should aim to be normative in the small rather than normative in the whole. The only non-negotiable values for international lawyers contemplated by Koskenniemi are the exclusion of imperialism and totalitarianism, but there is otherwise no escape from the painful task of making political decisions and choices.

A more recent meditation on the role of international lawyers, included as an epilogue to a collection of essays by Legal Advisers to Foreign Affairs Ministries, proposes two different professional moods, commitment and cynicism, between which Legal Advisers are doomed to oscillate.³⁵ Koskenniemi draws on David Kennedy’s scrutiny of the close association of international law and a reformist-internationalist political agenda. Kennedy notes that international lawyers “see themselves and their work favouring international law and institutions in a way that lawyers working in many other fields do not - to work for a bank is not to be for banking.”³⁶ For Koskenniemi, “Taking up international law as one’s professional career simultaneously seems to opt for a politics that favours global governance over national sovereignty, human rights over national jurisdiction, integration

³² Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT’L L. 437 (2003).

³³ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 496 (1989).

³⁴ *Id.* at 485.

³⁵ Martti Koskenniemi, *Between Commitment and Cynicism: Outline for a Theory of International Law as Practice*, in *COLLECTION OF ESSAYS BY LEGAL ADVISORS OF STATES, LEGAL ADVISORS OF INTERNATIONAL ORGANIZATIONS, AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL LAW* 495 (1999).

³⁶ David W. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 329, 335 (1994). *See also* ANNE ORFORD, *READING HUMANITARIAN INTERVENTION* (2003).

over independence.”³⁷ The missionary endeavour of international lawyers is no doubt encouraged by the cosmopolitan language of the discipline. Koskenniemi contrasts this public faith with the private knowledge of international law as “a rather marginal professional technique and culture, at best a handmaid to the national political leader . . . with little connection to the philosophical tradition from which it claims to emanate or the academic theory that aims to articulate it as a system of general principles.”³⁸ Practising international law requires an uneasy straddling of public commitment and private cynicism— “a sentimental attachment to the field’s constitutive rhetoric and traditions. . . and a pervasive and professionally engrained doubt about the profession’s marginality.”³⁹ When writing as an academic, rather than as a sometime Finnish Legal Adviser, Koskenniemi gives a more positive account of the power of international law. He describes international law as limiting the exercise of naked power, capable of signaling that the weak must be heard and protected.⁴⁰ He writes, “International law’s energy and hope lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded.”⁴¹

International relations scholars have tended to overlook the Newstream international law scholars’ diagnosis of the deep personal and professional tensions implicated in the relationship between international law and foreign policy. They have embraced international legal projects as concrete, progressive outcomes. For example David Held’s cosmopolitan democracy includes the creation of a Human Rights Court with compulsory jurisdiction, the establishment of an effective and accountable international military force, the drafting of an international Charter of Rights and Obligations that would go beyond current human rights treaties addressed mainly to national governments to cover broader

³⁷ Koskenniemi, *supra* note 35, at 495.

³⁸ *Id.* at 496.

³⁹ *Id.*

⁴⁰ MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW* 502 (2002).

⁴¹ *Id.* at 516-17.

domains of political, social and economic power, a global parliament and the transfer of a large proportion of a state's coercive capacity to regional and global institutions.⁴²

IV. THE DEBATE ON IRAQ

How do the various images of the relationship of international lawyers to foreign policy I have sketched fit with the invasion of Iraq in March 2003? The legal justifications for the invasion proffered by members of the Coalition of the Willing at the time generally followed a common line, arguing that it was justified by the text of various existing Security Council resolutions.⁴³ Politicians often went further, invoking the brutal treatment of Iraqis by Saddam Hussein and the threat posed by his stockpiles of weapons of mass destruction.⁴⁴ By contrast, there was unusual unanimity among academic international lawyers about the illegality of the invasion of Iraq even before the collapse of the Coalition of the Willing's claims about the existence of weapons of mass destruction. Public letters setting out the modern international legal framework for the use of force were prepared by Australian, Canadian, UK and U.S. international lawyers.⁴⁵ This general consensus stood in sharp contrast to the international legal academy's diverse views on the legality of the

⁴² David Held, *Democracy and Globalization in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* 11 (Daniele Archibugi et al eds., 1998).

⁴³ See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003); The UK Attorney-General's advice is available at *Legal basis for use of force against Iraq*, (Mar. 17, 2003), 10 Downing Street, at <http://www.number-10.gov.uk/output/Page3287.asp>; the legal advice to the Australian government is published in Bill Campbell & Chris Moraitis, *Memorandum of Advice to the Commonwealth Government on the Use of Force Against Iraq*, 4 MELB. J. INT'L L. 178 (2003).

⁴⁴ See, e.g., Prime Minister John Howard, Address at the National Press Club (Mar. 14, 2003) (transcript available at <http://www.pm.gov.au/news/speeches/speech74.html>).

⁴⁵ See Australian Letter, *supra* note 3. See the Canadian Letter written by Henry Micheal, *Canadian Law Professors Declare US-led War Illegal*, (Mar. 22, 2003), at <http://www.wsws.org/articles/2003/mar2003/lawy-m22.shtml>. Also see the UK Letter, *Letter: War would be illegal*, THE GUARDIAN, Mar. 7, 2003, at 29. For a discussion of the background and reaction to the UK letter by four of its signatories see Matthew Craven et al., *We are Teachers of International Law*, 17 LEIDEN J. INT'L L. 363 (2004).

North Atlantic Treaty Organization's [NATO] intervention in Kosovo in 1999.⁴⁶

The major features of the academic international lawyers' position were, first, that the Coalition of the Willing had not followed the processes for a lawful use of force set out in Chapter VII of the UN Charter. The argument was that an explicit Security Council resolution authorising the use of force was necessary. The second common thread in the various public letters was a rejection of the Coalition's contention that existing Security Council resolutions constituted a 'continuing authorisation' of the use of force against Iraq if it failed to destroy weapons of mass destruction. Some statements also countered the Coalition claim that the invasion could constitute an act of humanitarian intervention and the United States' suggestion that it was an act of 'pre-emptive self-defence.'

Of course, there were some dissenting voices amid the legal opponents of the Iraq invasion. An eminent Australian international lawyer, Ivan Shearer, argued that the critics were clinging to an outmoded view of the UN Charter.⁴⁷ In the United States, Ruth Wedgwood emphasized the humanitarian necessity of deposing Saddam Hussein and the legal mandate provided by Security Council resolutions 678 and 687 adopted in the first Gulf war.⁴⁸ Michael Glennon took the more radical line that any legal system that could not justify the actions of the superpower did not deserve to survive.⁴⁹ In the United Kingdom, Christopher Greenwood⁵⁰ and Phillip Allott and Alan Dashwood⁵¹ spoke publicly to support the legality of the war. Ed Morgan in Canada

⁴⁶ See, e.g. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824 (1999).

⁴⁷ Letter to the Editor, SYDNEY MORNING HERALD, Mar. 12, 2003, at 1-2.

⁴⁸ *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576 (2003).

⁴⁹ Michael Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16 (2003).

⁵⁰ See, e.g., Christopher Greenwood, Professor of International Law, London School of Economics, Lawyers' Alumni group at the London School of Economics: Iraq: Was It Legal? (November 18, 2004), <http://www.lse.ac.uk/collections/alumniRelations/events/20041004t1729z001.htm>.

⁵¹ Phillip Allott & Alan Dashwood, *Conflict over Legality of Launching an Attack Against Iraq*, THE TIMES, Mar. 19, 2003, at 23.

argued that the doctrine of humanitarian intervention could justify the intervention.⁵² Anne-Marie Slaughter took a more complex position arguing that the invasion should be understood as formally illegal but legitimate in a policy and moral sense. She predicted that UN approval would ratify the step retrospectively if significant stocks of weapons of mass destruction were found or if the Iraqi people welcomed the liberation and the Coalition of the Willing immediately called on the UN to rebuild Iraq.⁵³ But overall, the dissenters on the issue of legality were few and far between. Later in 2003, some United States power brokers were willing to acknowledge that international law had been violated by the invasion, but they argued that this was not important politically or morally. White House insider, Richard Perle, said simply that ‘international law stood in the way of doing the right thing.’⁵⁴

The legal debates around the invasion of Iraq tattered the image of international lawyers sagely speaking law to power. The tactful, urbane and influential figure of the international legal adviser described by Richard Bilder and Hans Corell is not recognizable in this context and Oscar Schachter’s *conscience juridique* seems to have been completely corrupted. The disappearance of the voice of truth/law in the maw of politics over Iraq left many in the discipline feeling stranded. A sense of crisis infuses much of the legal commentary. Proposals to counter the marginalization of international law in the invasion of Iraq included the creation of more law, better tuned to deal with the age of terrorism, as well designing as a better, savvier, sales pitch for

⁵² Ed Morgan, *Use of Force against Iraq is Legal*, NAT’L POST, Mar. 19, 2003, at A20.

⁵³ Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33.

⁵⁴ Oliver Burkeman & Julian Borger, *Bush in Britain : War critics astonished as US hawk admits invasion was illegal*, THE GUARDIAN, Nov. 20, 2003, at 4. Richard Clarke’s account of White House discussions in the wake of the Sept. 11, 2001 attacks on the United States echoes this approach. In *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR*, Clarke reports a conversation between Secretary of Defence Donald Rumsfeld and President Bush: “When Rumsfeld noted that international law allowed the use of force only to prevent future attacks and not for retribution, Bush nearly bit his head off. ‘No,’ the President yelled, ‘. . . I don’t care what the international lawyers say, we are going to kick some ass.’” RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* 24 (2004).

the discipline. For example, the editors of the *American Journal of International Law* saw the situation in Iraq as holding the potential for a “fundamental transformation, or possibly even destruction, of the system of international law with respect to the use of force.”⁵⁵ Anne-Marie Slaughter, writing as President of the American Society of International Law, argued that:

[W]e are at a fork in the road regarding the continuation of a basic commitment to try to address global problems through global rules and institutions. . . . [T]his commitment requires that the politics and the law go hand in hand. Political calculation must provide the support needed not only to create the law but also to value and observe it.⁵⁶

Tom Franck presented perhaps the most despondent view of the state of international law in the wake of the war in Iraq. The U.S. lack of interest in providing even a fig leaf form of legal justification led him to declare the last rites for the UN Charter’s prohibition on the use of force.⁵⁷ In such bleak times, the role of the international lawyer is simply to “stand tall for the rule of law,” and to draw attention to the long-term costs of flouting legal principle “even if at risk to personal advancement and safety.”⁵⁸ Franck counselled international lawyers to distance themselves from those in power and “zealously guard their professional integrity for a time when it can again be used in the service of the common weal.”⁵⁹

More optimistic commentary read the invasion of Iraq as preserving the normative function of the Security Council in framing the collective international will, if not its enforcement functions.⁶⁰ The apparent violation of the Charter framework

⁵⁵ Lori F. Damrosch & Bernard H. Oxman, *Editor’s Introduction*, 97 AM. J. INT’L L. 553 (2003).

⁵⁶ *Notes from the President*, AM. SOC’Y INT’L L. NEWSL. (The Am. Soc’y of Int’l Law, Washington, D.C.) 6 Nov./Dec. 2003.

⁵⁷ Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L., 607, 608 (2003).

⁵⁸ *Id.* at 620.

⁵⁹ *Id.*

⁶⁰ Carsten Stahn, *Enforcement of the Collective Will after Iraq*, 97 AM. J. INT’L L. 804, 805-6 (2003).

regulating the use of force, it was said, could prompt the development of new mechanisms to respond to the use of force. It also highlighted the “interactive processes of discourse and collective decision-making” implicated in lawfulness.⁶¹

V. RECASTING INTERNATIONAL LAWYERS

International lawyers specialize in crises. Our sense that we are living through a momentous period in history is permanent. We will always feel as though there is something peculiarly challenging and significant about *this* moment in international law and that the core of our discipline is somehow under threat. The exceptional nature of each new situation provides a stimulating sense of danger. How then can we understand the relationship between international law and foreign policy after the searing experience of the invasion of Iraq? Is it good news or bad news for international law and its practitioners? The options proposed by international lawyers include:

- Vigorous restatement of the basic principles of the UN Charter and retention of the moral high ground, awaiting the day when they will again attract politicians;
- Developing legal principles that are better attuned to political agendas to increase the chance that they will be observed;
- Exploring (and celebrating) the informal amendment of the cumbersome structures of the UN Charter relating to the use of force; and
- Accepting and living with the intellectual and emotional pendulum between commitment and cynicism inherent in the practice of international law.

I want to suggest that the long term significance of the dissonance between international legal principle and political action in the case of the invasion of Iraq is the puncturing of the myth of the reasoned effectiveness of international lawyers. The search for a causal link between international law and political action can be seen to be unproductive and the image of speaking law to power a conceit. The invasion of Iraq may lead us to describe a more complex role for international law: it can have a powerful

⁶¹ *Id.* at 813.

impact, but not in the ways we are taught to expect or acknowledge.

One way to better understand the relationship between international law and foreign policy is through the idea of “extraventricular projects” proposed by David Kennedy.⁶² This requires studying the dark, non-progressive side of international law to challenge the dominant narratives of progress and development in the discipline. Kennedy points to the standard focus of international lawyers on humanitarian objectives – the protection of human rights or the environment, for example. He argues that it may be more useful to ask what international law offers to people who want to violate international law and to investigate how international law is implicated in the problems we have set out to solve.

Extraventricular projects can assist us to see the way that principles of international law may work to obscure injustices. In the case of Iraq, for example, we might ask how international law was deployed to construct Iraq as an appropriate place to invade. How did the international law of sanctions, of no-fly zones, and oil for food programs contribute to the creation of Iraq – the problem? A Security Council resolution explicitly authorizing the use of force against Iraq would have met the requirements of Chapter VII of the UN Charter and rendered the invasion legal in a formal sense, although the resolution may have been the product of economic coercion of some of the non-permanent members of the Security Council. The sense that action can be legal but illegitimate prompts the question of why international law pays so little attention to economic disparity between states and insists on a fiction of equality as international actors.

A related strategy would be to consider principles of international law from the perspective of their objects. For example, claims of humanitarian intervention could be studied from the viewpoint of the people on whose behalf the intervention took place. The international interventions in Kosovo, East Timor, Afghanistan and Iraq would take on a more complex hue when examined from inside the ‘rescued’ communities. The pattern of

⁶² David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 475-76 (2000).

association of humanitarian intervention with economic subjugation of the saved group would become clearer.⁶³ This type of inquiry would destabilize the stock of images deployed in international law, such as the third world as chaotic and uncivilized and the west as a scion of democracy.

International law could be productively studied as myth and ritual in the international community and within nation states: what are its codes and its fetishes? Why is intervention typically understood as having a military form? What other forms of intervention are possible? Anne Orford draws attention to the fantasy realm that lies behind international law. She proposes moving beyond international law's juridical model of power and investigating how its narratives affect our imaginations and emotions.⁶⁴ What professional and personal performances are involved in the practice of international law?⁶⁵ Invocation of international law can often more effectively galvanize civil society than the makers of foreign policy, and understanding the hopes and desires woven into the fabric of international law can help explain this.

The deep sense of disquiet held by many international lawyers about the invasion of Iraq may lead to a new disciplinary self-image, a recognition of the dark sides of humanitarian impulses.⁶⁶ Instead of seeing ourselves as wise and sometimes heroic counsellors speaking truth/law to power and hoping that one day we will be heard and that our advice will be taken, we should realise that we will only ever have a minor direct impact on the generation of foreign policy. At the same time, we have considerable power in shaping the way problems are identified, categorized and resolved at the international level. We are active participants in intensely political and negotiable contexts and we must confront this responsibility without sheltering behind the illusion of an impartial, objective, legal order.

⁶³ ORFORD, *supra* note 36, at 180-81.

⁶⁴ *Id.* at 77.

⁶⁵ Kennedy, *supra* note 62, at 337.

⁶⁶ DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* 327-357 (2004).

