

Preventive Attack

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I wish to address three issues:

1. Whether the Iraq war was a 'crime of aggression' (which is the 'worst of crimes');
2. Whether the way in which the war was conducted involved the commission of 'war crimes', and;
3. Whether the subsequent occupation of Iraq involved, and continues to involve, the commission of 'war crimes', 'crimes against humanity' and other illegal acts.

Before addressing these themes, I wish to put these matters in the context of a changing international legal order.

There is no doubt that the world has changed post 9/11. And no doubt too that international law has been central to that change. Much of the debate about the wars in Afghanistan and Iraq, and the so-called 'war on terror', revolves around questions of legality. It is plain that the neocons and Bush and Blair wish to restructure international law to make it weaker but more flexible, and less concerned with the peaceful resolution of disputes. Who can counter this fundamental challenge to all those who are concerned with peace, and that international law should underpin and support an absolute legal commitment by all member states that the use of force is, and should remain as, the option of last resort? It is my view that the World Tribunal on Iraq should have this fundamental ideological struggle in its sights. It can make those responsible for the Iraq war accountable, and it can be part of a global struggle in response to the Bush/Blair agenda on international law.

The crime of aggression

International Law is surprisingly clear and easy to understand on whether the Iraq war was lawful. First, war was abolished by the adoption of the UN Charter in 1947. Thereafter, contracting states entered into a compact. In return for giving up their right to wage war, each

vested the right to use force in the collective security provisions of chapter VII of the UN Charter. Second, Article 2 (4) of the UN Charter provides that:

‘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 any other manner inconsistent with the purposes of the United Nations’.

This has been described by the International Court of Justice as a peremptory norm of international law, from which states cannot derogate. Thus, the effect of articles 2 (3) and (4) is that the use of force can only be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN’s purposes. Third, there are two limited exceptions to the requirement not to use force. The first enshrined in Article 51, preserves states’ rights to self-defence. As this was not an exception relied upon by the United States or United Kingdom, I need not dwell on it. The second is where the Security Council has authorised the use of force under Article 42 of the Charter. That is the only relevant debate here.

A consensus of international lawyers did not accept that such an authorisation existed here, or that the United Kingdom and the United States were entitled to revive Resolution 678 (November 1990) from the start of the first Gulf War. The UK and US argued that the wording of Resolution 1441 (8 November 2002) allowed them to rely on Security Council Resolution 678, as they were entitled to interpret Iraq’s behaviour post 1441 as constituting a further ‘material breach’ of Resolution 678 (Article 1) in circumstances where Iraq had been given its ‘final opportunity’ to disarm (Article 2), and was warned of the ‘serious consequences’ of non-compliance (Article 13). This is referred to as the revival doctrine. Not surprisingly, that is not the way international law works post the UN Charter. If the Security Council wish to authorise force, they do so in clear terms, latterly using the phrase ‘all necessary means’ or ‘all measures necessary’

One example of that consensus is a letter from 16 international law professors and teachers from the United Kingdom, which made headline news on 7 March 2003. It warned that:

‘Before military action can lawfully be undertaken against Iraq, the Security Council must have indicated its clearly expressed accent. It has not yet done so... A decision to undertake military action in Iraq without proper Security Council authorisation will seriously undermine the international rule of law.’

If there was no Security Council authorisation, does it necessarily mean that the war was illegal? If it was illegal, was it automatically a ‘crime of aggression’ and thus a ‘crime against peace?’

Professor Philippe Sands tackled this question head on during an interview for the Australian Broadcasting Corporation. He said:

‘... Most people now realise that the war on Iraq was illegal and under international law, an illegal war amounts to a crime of aggression...’

Others have said the same. Here is the 18 March 2003 resignation letter of Elizabeth Wilmshurst, Deputy Legal Advisor to the Foreign Office, who resigned

because she did not believe the war with Iraq was legal:

‘I cannot in conscience go along with the advice...which asserts the legitimacy of military action without such a [Security Council] Resolution, particularly since an unlawful use of force on such a scale amounts to a crime of aggression...’

The controversy over the legality of the war, at least from the UK Government’s perspective, flared up again in June 2005. This time the row focused on a number of leaked and secret memoranda between members of the UK Government and top officials detailing what had been agreed between Tony Blair and President Bush and Condoleezza Rice as early as March 2002. In particular, the following needs some explanation if the UK Government is to continue to protest that it went into Iraq because of the threat of weapons of mass destruction, rather than for regime change:

‘We spent a long time at dinner on Iraq. It is clear that Bush is grateful for your [Blair] support and has registered that you are getting flak. I said that you would not budge in your support for regime change but you had to manage a press, a Parliament and a public opinion that was different from anything in the States. And you would not budge either in your insistence that, if we pursued regime change, it must be very carefully done and produce the right result. Failure was not an option.’

Thus, we are dealing with the crime of aggression. And let us remind ourselves of the enormity of that crime. This is the opening speech of Mr Justice Robert Jackson at the Nuremburg Tribunal:

‘It is not necessary among the ruins of this ancient and beautiful city with untold members of its civilian inhabitants still buried under its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes.’

In his opening speech, he also described aggressive war as ‘the greatest menace of our time’, and made it clear that if international law ‘is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.’ He also said:

‘This trial represents mankind’s desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world’s peace and commit aggressions against the right of their neighbours.’

Accountability for the crime of aggression and proportionality

But how can the actions of the United States and the United Kingdom in committing the worst of crimes be made accountable to international law, and specifically the International Criminal Court (ICC)? There are two routes that the ICC Prosecutor can take which would give him jurisdiction to examine the legality of the Iraq war notwithstanding that the United States has de-ratified the International Criminal Court Statute, and that the ICC will not have jurisdiction over the ‘crime of aggression’ until the necessary Elements of Crime have been agreed, which may not be for several years.

Here is how the first argument goes. If the coalition forces had used force

against Iraq pursuant to a Security Council Resolution, that Resolution would have set the parameters of the authorisation both in dictating lawful military objectives, and over time. The authorisation would have been carefully targeted, using a phrase such as ‘all necessary measures’ focused on the threat of weapons of mass destruction. Accordingly, decisions about military objectives, and thus crucially, in considering whether the use of force as exercised constituted ‘war crimes’, and judgments as to whether the force used was proportionate to those objectives, should have been taken within the framework of a Security Council authorisation tailored to eliminating the threat to international peace and security of Iraq’s weapons of mass destruction. However, in the absence of such an authorisation, and with the Coalition’s un-stated objectives of regime change coming into play, these crucial decisions about military objectives and proportionality became very different. It is arguable, for instance, that using a ‘bunker buster’ bomb on a restaurant in a civilian residential area cannot be justified on the ground that Saddam Hussein was believed to be dining there. It is arguable also that, leaving aside the inherently indiscriminatory nature of cluster munitions, if the military objective pursued was the threat of weapons of mass destruction, it is hard to see how their use in urban and residential locations could be justified or proportionate. Further, the British Armed Forces Minister, Adam Ingram, declared during an interview with the BBC that cluster weapons had been used against concentrations of military equipment and Iraqi troops in and around built-up areas in the vicinity of Basra, Iraq’s second largest city. For the United States, General Myers confirmed that cluster munitions were used against ‘many’ military assets in populated areas.

These are important concerns which the International Criminal Court Prosecutor must address, and he has been urged to do so in a report from eight leading international law professors submitted to the Court Prosecutor by Peacerights, on 20 April 2004, following the London Tribunal which supports this inquiry. This is how the report summarised the Professors’ concerns:

‘Were methods of warfare or weapons systems used, or locations of attacks chosen, such that ...

- Impermissible military objectives were excluded, for example, those concerned with “regime change” rather than the elimination of any existing weapons of mass destruction;
- The proportionality requirement was at all times respected and in particular all feasible precautions were taken to avoid and in any event minimise incidental loss of civilian life, injury to civilians and damage to civilian objects ...’

The second route into the examination of the crime of aggression is through joint criminal enterprise and the context of any International Criminal Court investigation. Again, this is a matter already put to the Court Prosecutor by the London Tribunal. The International Criminal Court has jurisdiction over individuals who are nationals of state parties, and the United Kingdom ratified the International Criminal Court Statute on 4 October 2001. In addition to those who perpetrated the crimes, the International Criminal Court also has jurisdiction over those who may have ordered, solicited, induced, aided or abetted or otherwise

assisted in their commission or attempted commission. So the relationship between the United States and the United Kingdom in the coalition does need to be determined, and questions answered as to the criminal responsibility of United Kingdom nationals of acts jointly committed with the United States. In particular, did United Kingdom nationals have prior knowledge of any internationally wrongful acts? The Peacerrights Report records that the panel had concluded:

‘The evidence presented (that United Kingdom commanders were informed by the United States of their military activities, and the selection of targets, and that they were concerned about the use of cluster bombs) suggests that the United Kingdom did have knowledge of the circumstances of the internationally wrongful act.’ (Para 3.8)

This leads us to the prospect of senior members of the United Kingdom Government being criminally responsible before the International Criminal Court for the commission of international crimes through joint criminal activities with individuals from the United States, and this takes us into the illegality of the war.

It seems clear that the United States and United Kingdom Governments, and thus senior members of both as individuals, acted with a common purpose in waging aggressive war against Iraq.

In simple terms, it is not necessary here that the participation of UK nationals be an indispensable condition, or that the International Criminal Court Prosecutor needs to be satisfied that the attacks or incidents would not have occurred at all without their participation. Instead, the question is: were the UK nationals at least a cog in the wheel of events? The London Tribunal members answered this question in the affirmative.

Building on this, the concept of ‘joint criminal enterprise’ is now well accepted in international criminal law and is particularly useful in examining issues of liability when one of the parties in the joint criminal enterprise goes beyond what was originally agreed, even if the other party did not have full knowledge of this, provided that the act was a necessary and foreseeable consequence of the agreed joint criminal enterprise. And of course, the joint criminal enterprise we are most concerned with here is that of waging aggressive war.

It does, however, need to be stressed as the London Tribunal did that, in examining these issues, in the context of aggressive war, it is not that the International Criminal Court would be attempting to actually hold any person accountable for that crime, as it must be recalled that the Elements of Crime have not yet been agreed. Instead, ‘it would merely be reaching the view that the criminal enterprise of waging aggressive war had been committed as a preliminary circumstance to the prosecution of criminal acts over which it may exercise jurisdiction - namely, Crimes against Humanity and War Crimes.’

Other issues of war crimes and the use of force

In the above section I have touched upon issues concerning the use of an indiscriminate weapons system such as cluster munitions in residential areas; the risk that impermissible military objectives related not to the threat of weapons of

mass destruction might have led to war crimes being committed because attacks were not justified (according to military objective) or were disproportionate; and lastly, the link between the ‘crime of aggression’ and joint criminal enterprise. There are other issues arising from the use of force (rather than the occupation, which I deal with below). They all arise from the London Tribunal and thus, the Peacerights Report. I summarise them below with their references:

1. The use of United Kingdom bases for the launch of US air attacks involving cluster munitions, or otherwise (para 2.1.3).
2. Attacks on media outlets (paras 2.2.2, 2.2.3).
3. Attacks on civilians and civilian, not military, objectives (paras 2.2.4, 2.2.5 and 2.2.7).
4. Attacks, other than ones involving cluster munitions, which did not discriminate between civilians and combatants (para 2.2.5).
5. Deliberate targeting of civilian infrastructure and, in particular, electricity supplies (para 2.2.6).

The illegality of the occupation policy

I do not intend to focus on whether the UN Security Council had the power to give the Coalition Forces the legal status of occupying powers, as it purported to do by Security Council Resolution 1483. Although we now see the use made of Security Council Resolutions to undermine and disengage fundamental human rights protections, it seems that, on balance, on the narrow question – was the UN Security Council entitled to give *de jure* authority to the United Kingdom and United States as occupying powers - the answer remains, it was.

Thus, the focus of this section is on the illegality of the policy and acts that took place during the occupation. I want to explore briefly two matters. Both involve United States and United Kingdom troops. The first is deaths and torture in detention, and the second is unlawful killings during policing operations.

We are aware of the abuses by US troops at Abu Ghraib Prison. Who could forget the outrageous photographs of prisoners on a leash, being attacked by dogs or sexually humiliated? But how many are aware of more widespread and similar abuses by US troops at other facilities including Mosul and Camp Bucca? And who knows how many other atrocities have been committed by US troops at other facilities. To make it clear that these are torture allegations, I read below extracts from statements of two of my clients. First, an engineer aged 46;

‘...I saw a young man of 14 years of age bleeding from his anus and lying on the floor. He was Kurdish and his name was Hama. I heard the soldiers talking to each other about this guy; they mentioned that the reason for this bleeding was inserting a metal object in his anus. I suspected that this was caused by a sexual assault but could not confirm it.’

Second, the statement of an agricultural engineer;

‘They have shown me in that room photos of certain people whom I knew and I was

asked to make certain confessions against them. Once they placed a detainee on a chair in front of me and asked me to say certain words that indicated that I had confessed against him. They brought a man I knew who was fully dressed with a can of coke and some food in his hand, they pointed out that if I would confess I would be in pleasant status like that man. I insisted that I had nothing else to say and I was innocent. Then they advanced the chair I was sitting on very close to a wood fire that they lit which left burns on my leg (photographed) ... They inserted some strange objects into my anus and asked me to take very humiliating positions while they messed with me and moved these objects in different directions. They were calling these positions some names, which I did not understand. They took many photos while I was in these positions, they were laughing and enjoying it. There was also a male and a female soldier who sat behind me; they were messing with each other. Their game was that the male soldier would aim at my injured and swollen leg with a piece of rock, as soon as he hit his target and I scream of pain she would reward him by letting him kiss her or fondle her. The stronger my pain was and the louder my scream was, the more he would get from her.'

We know now of the US efforts to redefine torture and, in particular, the memorandum of 1 August 2002, from Jay S Bybee, head of the Justice Department Office of Legal Counsel in which he wrote;

'We conclude that for an act to constitute torture . . . it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions or even death.'

We know also of the US interrogation techniques involving unusual methods designed not to leave marks. What we do not seem to fully appreciate is how closely UK interrogation techniques resemble those of the United States. This is not rhetoric. I am acting in three cases where UK troops have tortured Iraqi civilians to death, ten other torture-in-detention cases, and additionally for nine victims of abuse and torture at Camp Breadbasket. The statements of these victims make it clear that, like the United States, members of the UK Armed Forces engaged in practices of sexual humiliation and systematic humiliation of male Muslims, routinely using women to sexually excite male detainees, devised games and routines to humiliate and disorient detainees, used methods of abuse designed not to leave marks, and, in fact, did everything we now know US troops did, save for the use of bright lights and loud music. To make this explicit, I read an extract from one of my client's witness statements from a successful High Court case of 14 December 2004. His name is Kifah Taha al-Mutari. He gives evidence about the death in detention of his colleague, Baha Mousa, as well as the torture that he suffered which led to acute kidney failure. He says:

'7. Baha appeared to have much worse ill treatment than the others. Two or more soldiers would beat him at a time whereas the rest of us were beaten by one soldier. Baha may have been punished more than the others in an act of revenge. Baha's father, who witnessed the arrest, had informed the officer in charge that he had seen the soldiers stealing money from the hotel. Baha received much more beating than myself and the other detainees. He was not able to stand up and the soldiers continued beating him even

while he was on the floor. The soldiers used particular sharp jabbing movements into the area beneath the ribs, which was particularly painful.

8. We all had another hood put on top of the first hood. We were given water by it being poured over the hood so that we had to lick droplets that seeped through the hood. Freezing water was poured on to us and this was very painful as the temperatures in detention were 40 degrees plus. We were given one meal a day consisting of rice with extremely spicy soup, which we could not eat...

11. Soldiers took turns in abusing us, at night the number of soldiers increased, sometimes to eight at a time. We were prevented from sleeping throughout the three days as soldiers introduced the “names game”. Soldiers would mention some English names of stars or players and request us to remember them, or we would be beaten severely.

12. One terrible game the soldiers played involved kickboxing. The soldiers would surround us and compete as to who could kick box one of us the furthest. The idea was to try and make us crash into the wall.

13. During the detention, Baha was taken into another room and he received more beatings in that room.

14. On the third night Baha was in a separate room and I could hear him moaning through the walls. He was saying that he was bleeding from his nose and that he was dying. I heard him say, “I am dying... blood... blood...”. I heard nothing further from him after that.

15. On the morning of the third night, the other detainees and I were woken up from the only two hours sleep we had been allowed in three days. One soldier asked us to dance like Michael Jackson.’

Unfortunately, there is much more to come, and worse. In the Camp Breadbasket incident a Court Martial heard evidence to explain the background to the taking of 22 photographs, publicly available now, of abuse and humiliation of Iraqi civilians. The UK Government’s position was that the victims of the abuse could not be found, and that what happened was that a few ‘rogue soldiers’ took too seriously the order to ‘work hard’ some Iraqi looters inside a food depot. One man was photographed strung up on the forks of a forklift truck. The evidence to the Court Martial was that soldiers had been playing around, and had moved him out of the sun, and it all got out of hand.

Before the Court Martial concluded three victims asked my firm to act for them. Their evidence, which they wanted to put to the Court Martial, was compelling and put a completely different light on events. This included that the victims had lawful authority to be in the camp, that the abuse included torture, that women and sexual humiliation were involved, that officers were involved, and that the camp was being used as a detention centre. Further, the Iraqi photographed in the forklift truck had lawful authority to be at the camp and was being punished for refusing an order to sever the finger of a fellow Iraqi. When I tried to have the victims’ evidence heard, the Court Martial decided to ignore it and the Attorney General threatened me with contempt of court proceedings if I attempted to alert the public and media as to what had happened.

Additionally, I have complained to the United Kingdom Attorney General that there is clear evidence that the UK had a systematic torture policy, which requires

investigation. The Attorney General has refused to recognise the importance of the issue and refused an investigation.

Both the United States and United Kingdom Forces have been responsible for large numbers of civilians deaths whilst carrying out policing functions. It is important to emphasise that there is a different set of legal rules during an occupation, as compared to a war, and both the United States and United Kingdom were bound by Geneva Convention IV which protects civilians. Further, both had legal powers of policing through Security Council Resolution 1483 and the Coalition Provisional Authority (CPA). The Coalition Provisional Authority passed a huge amount of legislation during the period 22 May 2003 and 28 June 2004 through 11 Regulations (R1-11), 97 Orders (O1-97), 14 Memoranda (M1-14) and 11 Public Notices (PN1-11). These included weapons control (M5, O3).

I have about thirty cases of deaths at the hands of UK troops during policing functions. The following points can be made:

1. The soldiers killed civilians, some in their homes, whilst operating under rules of engagement, which should have been changed from the war to the different circumstances of the occupation.
2. The soldiers appear not to have been trained in the basic elements of Iraqi civil society. For example, people were killed after the customary discharge of guns at funeral parties were mistaken for gun battles.
3. In virtually all cases the Commanding Officer concluded on the basis of the soldiers' evidence only that there had been no breach of the rules of engagement, which remain secret.
4. That no soldier, let alone officer, has been charged with any of the detention incidents, let alone these unlawful killing cases.
5. That there appears to be a large number of civilian deaths at the hands of UK troops during the period May 2003 to January 2004.

As for US troops' actions during the occupation, much of what they have done is hidden from view because of the role of the media. I want to focus on events in Falluja to give some legal input. It seems from what we know that US troops engaged in acts of collective punishment towards the civilian population of Falluja from at least April 2004 onwards. Some of the few eyewitness accounts that exist are now emerging. One of the few reporters to reach the city is American Dahr Jamail of the Inter Press Service. He interviewed a doctor who had filmed the testimony of a 16-year-old girl:

'She stayed for three days with the bodies of her family who were killed in her home. When the soldiers entered she was in her home with her father, mother, 12-year-old brother and two sisters.

She watched the soldiers enter and shoot her mother and father directly, without saying anything. They beat her two sisters, then shot them in the head. After this her brother was enraged and ran at the soldiers whilst shouting at them, so they shot him dead.'

Another report comes from an aid convoy headed by Doctor Salem Ismael. He was in Falluja in February 2005. As well as delivering aid he photographed the dead, including children, and interviewed remaining residents. He reports:

‘The accounts I heard...will live with me forever. You may think you know what happened in Falluja, but the truth is worse than anything you could possibly have imagined.’

Doctor Ismael relates the story of Hudda Fawzi Salam Issawi from Falluja:

‘Five of us, including a 55-year-old neighbour, were trapped together in our house in Falluja when the siege began. On 9 November, American Marines came to our house. My father and the neighbour went to the door to meet them. We were not fighters. We thought we had nothing to fear. I ran into the kitchen to put on my veil, since men were going to enter our house and it would be wrong for them to see me with my hair uncovered. This saved my life. As my father and neighbour approached the door, the Americans opened fire on them. They died instantly. Me and my 13-year-old brother hid in the kitchen behind the fridge. The soldiers came into the house and caught my oldest sister. They beat her. Then they shot her. But they did not see me. Soon they left, but not before they had destroyed our furniture and stolen the money from my father’s pocket.’

Naomi Klein has also produced evidence about what she sees as the US Forces laying siege to Falluja ‘in retaliation for the gruesome killings of four Blackwater employees’. She speaks of hundreds of civilians being killed during the siege in April 2004, and of a deliberate tactic of eliminating doctors, journalists and clerics who focused public attention on civilian casualties previously.

All of the above acts are arguably ‘crimes against humanity’ (defined by section 7 International Criminal Court Statute) as ‘murder’ (Article 7 (1)(a)), ‘extermination’ (Article 7 (1)(b)) or ‘other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health’ (Article 7 (1)(k)). Further, they may be ‘war crimes’ (defined by Article 8 of the International Criminal Court Statute) as a ‘wilful killing’ (Article 8 (2)(a)(i)), ‘wilfully causing great suffering, or serious injury to body or health’ (Article 8 (2)(a)(iii)) or ‘intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities’ (Article 8 (2)(b)(i)), or ‘intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’ (Article 8 (2)(b)(iv)).

As for the latter, questions need to be addressed as to military objectives and proportionality. If the force used was ‘clearly excessive in relation to the concrete and direct overall military advantage anticipated’ then it would be disproportionate and unlawful. However, it must be remembered that this was a lawful occupation authorised by Resolution 1483. In its recitals, this recognised ‘the specific authorities, responsibilities, and obligations under applicable

international law of [both] states as occupying powers under unified command'. The United Kingdom and United States had to respect Geneva Convention IV. Thus decisions about military objectives and proportionality cannot be approached as if this were a time of war. But even if they could, it is hard to see how the United States could possibly justify these acts, if proven. Further, liability does not stop with the United States. I have already set out the arguments about joint criminal enterprise and thus the responsibility of the United Kingdom for the acts of the United States. Legally, these arguments as to joint responsibility are enhanced during the occupation. Not only were both states acting under *de jure* authority as occupying powers but they were also senior partners within the Coalition Provisional Authority, and thus responsible for all the legislative and administrative functions I have noted above. Thus, a legal analysis of the issue of accountability for incidents such as these from Falluja, which may involve 'war crimes' and 'crimes against humanity', must begin by recognising, first, the lawful authority of the United States and United Kingdom to both occupy and administer Iraq, and second, recognising the protection of civilians through international humanitarian law, specifically Geneva Convention IV, and international human rights law, especially the International Covenant on Civil and Political Rights and the European Convention on Human Rights. It is also critically important to appreciate that any proper accountability is entirely dependent upon a lawful independent investigation being conducted. That is the importance of the protection given to the Right to Life (ECHR, Art2; IICPR Art 6) by the requirement to hold such an inquiry. For example, if states know at the outset that killings and torture during an occupation will be investigated independently, then this knowledge should be reflected in improved training for Armed Forces and thus more human rights compliant behaviour. Further, the requirement for independence is not met by the military investigation. It is only when such an independent investigation unearths who is responsible that one gets to deal with questions as to who, if anyone, should be charged with 'crimes against humanity' or 'war crimes'. Accordingly, one sees that it is pre-judging the issues arising from the incidents in Falluja to say that those responsible in a few incidents were acting within the rules of engagement and using proportionate force.

The United States and United Kingdom should have been proceeding on the basis that a lawful approach to international humanitarian law and international human rights law relevant to the protection of civilians in an occupation would be expected of them and rigorously enforced by the international community through, for example, if appropriate, critical Resolutions of the Security Council. But it is not too late for accountability, and this Tribunal may be part of a future process that leads to it.

Conclusion

The Iraq war and occupation challenges us all to face the threat to international law by the actions of the United States, the United Kingdom and other members of the coalition. We must be resolute in our determination to make international

law stronger and more concerned with peace. There must be accountability for the dreadful numbers of Iraqi civilian casualties in this aggressive war and bearing in mind the use of indiscriminate methods of attack. There cannot be impunity for the acts of torture in detention – and in some cases deaths – nor the wanton killing of civilians during the occupation. In so far as US and UK interrogation techniques violate Article 1 of the United Nations Convention on Torture, it cannot be acceptable that there be impunity. Accountability – rather than impunity – rests on two building blocks:

1. That there be an independent investigation to establish who is responsible for what acts and how far up the chain of command should responsibility lie. That is the importance of the positive obligation of Article 3 of the European Convention on Human Rights, and thus the critical importance of UK cases that attempt to establish that the Convention did apply during the occupation.
2. That the International Criminal Court Prosecutor fulfils its functions to make those responsible for these ‘war crimes’ and ‘crimes against humanity’ accountable through principles of individual criminal liability. In decisions over the next few months as to how, if at all, to investigate and prosecute these matters, it is important that he recognise the fundamental duty he has to uphold the rule of law.