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We are teachers of International Law

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CURRENT LEGAL DEVELOPMENTS

‘We Are Teachers of International Law’

MATTHEW CRAVEN, SUSAN MARKS, GERRY SIMPSON, AND RALPH WILDE*

Abstract

In the general debate prior to the onset of war in Iraq, we made public our view, in a letter to the *Guardian* newspaper, that the war could be justified neither by reference to earlier UN Security Council resolutions nor by way of the doctrine of self-defence. In this article we reflect on some of the anxieties we experienced both before and after that ‘intervention’ in terms of the vision of international law we might unwillingly promote, and in terms of the role we appeared to assume for ourselves, and our professional colleagues, in public debate. Despite our efforts to prevent legal issues from dominating, we came to be viewed as the defenders of an anti-hegemonic legality – resisting the erosion by an opportunistic coalition of the principles of sovereignty, non-intervention, and collective security. We were concerned that this made us appear champions of international law in a way with which none of us was entirely comfortable. On the other hand, in contesting that, we seemed in danger of valorising a politics of expertise that gave international lawyers a privileged position within the debate. We reflect, then, on the consequences, intentional or otherwise, of our intervention, and explore the dilemmas associated with it. The problem with which we finally grapple is whether the relationship between critical scholarship and the techniques associated with it (anti-formalism, complexity, and indeterminacy) is such as to preclude strategic intervention in the effort to stop a war.

Key words

crisis; formalism; history; ideology; indeterminacy; international crimes; Iraq; self-defence; sovereignty; war

This is a story about a letter by a group of legal scholars to the British Prime Minister Tony Blair and the *Guardian* newspaper, written in March 2003. It is about what happens when people who teach international law confront impending war, and about the questions that are brought into focus at such a time. What is the public role of a teacher of international law? Can war be resisted through legal argument? How does an anti-war intervention in the media relate to academic debates about international law? How does activism relate to critique?

By mid-February 2003 a second war on Iraq was becoming increasingly likely. In the United Kingdom, debate about whether or not to go to war was being conducted primarily at two levels: prudential (or strategic) and ethical. The media was

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awash with bishops condemning the proposed intervention on religious grounds, strategists explaining how necessary it was, political theorists reinventing 'just war' doctrine in support of Blair and US President George W. Bush, and op-ed writers warning of the Armageddon to come. Meanwhile, the British public was on the march. A million people demonstrated in central London on 15 February. Opposition to the war was becoming a major political issue for the government, with dissent from both outside and within. In the midst of such mobilization, criticism quickly gave way to strategizing. Alongside the prudential and ethical debates, a legal debate was beginning to emerge, and it suddenly seemed important and urgent for those with specialist knowledge in the field to intervene. A letter to a national newspaper was an obvious way of doing so.

The idea for our letter arose from a series of conversations among friends. The proposed text was then circulated, negotiated, and finalized by e-mail. It was published on 7 March 2003, with 16 signatories. This is what we wrote:

We are teachers of international law. On the basis of the information publicly available there is no justification under international law for the use of military force against Iraq. The United Nations Charter outlaws the use of force with only two exceptions: individual or collective self-defence in response to an armed attack and action authorized by the Security Council as a collective response to a threat to the peace, breach of the peace or act of aggression. There are currently no grounds for a claim to use such force in self-defence. The doctrine of pre-emptive self-defence against an attack that might arise at some hypothetical future time has no basis in international law. Neither Security Council resolution 1441 nor any prior resolution authorizes the proposed use of force in the present circumstances.

Before military action can lawfully be undertaken against Iraq, the Security Council must have indicated its clearly expressed assent. It has not yet done so. A vetoed resolution could provide no such assent. The Prime Minister's assertion that in certain circumstances a veto becomes 'unreasonable' and may be disregarded has no basis in international law. The United Kingdom has used its Security Council veto on 32 occasions since 1945. Any attempt to disregard these votes on the ground that they were 'unreasonable' would have been deplored as an unacceptable infringement of the UK's right to exercise a veto under United Nations Charter article 27.

A decision to undertake military action in Iraq without proper Security Council authorization will seriously undermine the international rule of law. Of course, even with that authorization, serious questions would remain. A lawful war is not necessarily a just, prudent or humanitarian war.

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1. *Guardian*, 7 March 2003.

I.

Underlying the letter was a range of diverse (and not always mutually consistent) preoccupations and concerns. From one perspective, what was distressing above all was the prospect of international law being flouted. Without clear Security Council authorization, there could be no plausible legal justification for going to war. From another perspective, the disturbing development was, on the contrary, that the necessity of a 'second' Security Council resolution had become too much of a fixation in public debates. Why should a single resolution of that institution make all the difference? And if it does, should that not rather invite critical scrutiny of international law? From yet another perspective, provocation came from the way in which international law had become entangled in New Labour spin. The government had consistently stated its intention to act within the bounds of international law. But the public was not getting the full story: the assurances that ministers and other senior government officials were offering as to the legal rectitude of any eventual military action were far too glib. From a further perspective, the point was simply to contribute to efforts to stop the war in whatever way one could. Here, the government's media manipulation was actually rather welcome. Assurances yielded valuable rhetorical mileage, inasmuch as they could be used as the basis of a demand that the government adhere to its own professed commitment to comply with international law.

Among those who signed the letter, by no means everyone identified with all of these perspectives. But all identified with at least one (and, more commonly, more than one). Most importantly, all shared the sense that this was a moment when a teacher of international law had to speak out.

But speak out in what terms? One consequence of the letter's multiple authorship was a very narrow and constrained analysis. A number of the more nuanced legal debates were elided; the wider institutional and legal critique fell away; and reference to problems under international humanitarian law disappeared. Thus, we simply stated that the war would be illegal because there had been no Security Council resolution authorizing it, and because the coalition could not justify such an intervention under even relatively broad notions of self-defence. Of some controversy was the addition of the final sentence to the effect that even a lawful war would not necessarily be a 'prudent, just or humanitarian' one. For the proponents, the inclusion of such a clause seemed especially significant. Among other things, it offered an exit route for criticism of the war project in the event of a 'second' Security Council resolution being adopted. It also demonstrated that we were alert to the wider world of ethics and politics (though clearly it did so in a somewhat ambiguous fashion, to the extent that our formulation appeared to presume – and hence confirm – that the lawyer's 'normal' posture is detachment from that world).

Once the text of the letter was finalized, it was circulated for signature. The circulation list was largely limited to those within the letter-drafters' own institutions, or at any rate, their own cities. With war by this point imminent, and crucial parliamentary debates likely to be held the following week, wider participation was not

sought; speedy publication seemed more important than a long list of signatories. The letter was sent initially to *The Times*, which declined to publish it, and then to the *Guardian*, which was interested. Faxed to 10 Downing Street, the letter could now be the basis of a front-page story about international lawyers warning the Prime Minister that there was ‘no case for war’. The story ran, and the letter appeared in the paper’s letters page, on 7 March 2003.

So we had made our intervention. We had defended international law against those who would degrade it. We had reasserted the centrality of the prohibition on the use of force in international relations within the contemporary legal order. What we had *not* done, however, was to give expression to our critical voice, our sceptical sensibility. How was it that we were now international law’s earnest champions? Had not some of us based our work on the effort to knock international law off its pedestal, and expose its darker dimensions? Had we not routinely criticized sovereignty as purely formal, frequently oppressive, and lacking explanatory power? Yet here we found ourselves invoking international law, and with it state sovereignty, in defence of Iraq. More than that, we found ourselves replicating in the process the same Manichean structure of argument we sought to challenge. They had hegemony; we had sovereignty. They had the axis of evil; we had the sovereign equality of states. They had politics; we had law. But then, with key figures in the US administration so apparently cynical about international law, and with their supporters in Britain and elsewhere so focused on spin, didn’t law really need championing? Surely this was a moment when loyalists were required, not critics. We couldn’t let Bush and Blair speak the language of a corrupted legalism to us. It was time to reclaim the public space for serious international legal argument by serious international lawyers.

But what would that ultimately mean? Could we seize the legal ground without simultaneously being imprisoned within it? How were we to understand what was going on? Was this a case of critical sensibilities dulled by political thrill-seeking? A temporary and strategic embrace of the doctrinal? Or legalism’s united front threatening to dissolve in self-doubt?

2.

In the period after 7 March, the British government began to get increasingly defensive about the consistency of the proposed war with international law. On 17 March the UK Attorney General (chief government law officer) took the unusual step of issuing a public statement (in the form of a written parliamentary answer) setting out a legal justification for the war.² The statement was based on a more detailed document that was itself, as is usually the case, kept confidential. This was big news, and for a time the question of legality was in the foreground of the war debate. The statement was reportedly used by the government whips in an attempt to win round uncertain members of parliament in a House of Commons vote on the war. It was also cited by outspoken cabinet member Clare Short as one of the factors that

2. *Parliamentary Debates*, Commons, Vol. 41, Part 364, Cols. 515W–516W, 17 March 2003.

persuaded her to stay with the government at that time. (Short later resigned, citing concerns about the plans for postwar reconstruction and the apparent sidelining of the United Nations.)

Among the signatories to the letter, the question of whether a 'response' to the Attorney General's statement should be made was raised. Three of the group met and prepared a draft, rebutting the points made in the statement. At this point, then, we contemplated expanding our involvement from a one-off intervention to something more sustained. Our rebuttal would turn the process into a conventional adversarial debate, in this case between academics and politicians: our letter – the Attorney General's statement – our response.

As one would expect, the reaction from the group as a whole was mixed. Just as people had different, sometimes mutually contradictory, reasons for signing the original letter, so that views on the merits of a second letter seem to reflect contrasting positions about international law and the role of the legal academic in public discourse. Those united in their reluctance, for example, were divided in their underlying reasons for adopting this view. For some, there was no point entering into the debate; our point had been made. Whether to intervene depended on whether anything that had been said originally needed clarification or elaboration. For others, the very notion of having made an intervention had been troubling from the start, and with the debate now becoming relatively complex, we risked becoming even more embroiled in a process of argumentation about which we remained doubtful. Moreover, insofar as the recourse to formalism had somehow been conscionable when war was being contemplated (on the basis that it might somehow contribute to efforts to stop the war), now that war was inevitable such a strategic reason fell away. Context was key, and the moment had passed.

We decided not to proceed with a collective response. Like the original decision to write a letter (and, perhaps, because of it) this decision was itself a form of intervention. Having placed ourselves as participants in the debate, our silence now resonated and became something about which to speculate. We were asked whether we had been won round by the arguments of the statement. One correspondent, assuming this had in fact been the case, commented bitterly that 'Short's syndrome' seemed to be infectious.

If we were reluctant to write again, our initial impulse to letter-writing was clearly shared by some of our colleagues. On the heels of the Attorney-General's statement came a letter to *The Times* from Professors Philip Allott and Alan Dashwood at Cambridge, who wrote that

the present imbroglio in the Security Council is liable to lead some people to conclude that the UN is now irrelevant. This risk has been increased by what some international lawyers who should know better are saying about the UN Charter rules on the use of force ... Responsible international lawyers should see it as their task, not to rush to simplistic and out-dated judgements, but to do all they can to make a new and very dangerous international reality conform to the precious spirit and purpose of the Charter system.³

3. *The Times*, 19 March 2003, Features, 23.

Whereas this letter's message about international law was somewhat difficult to grasp (was this a defence of the planned action in Iraq? or was the concern merely that we had been insufficiently sophisticated?), its condescending view of those lawyers who took a contrary position was plain. And if the opaque nature of the substantive message might lead one to uncertainty about which individuals were the target of criticism, the conclusion that it was those setting out the anti-war case, including the *Guardian* letter signatories, was inescapable. The chiding remarks called into question both expertise ('should know better ... simplistic and out-dated judgements') and integrity (referring to the 'task' of 'responsible international lawyers'). As well as addressing the general lay audience and invoking professional expertise as we ('teachers of international law') had done, the letter also pursued a certain form of academic critique aimed at professional colleagues. In this letter and others like it, we were accused of a naive textualism in relation to the Charter. We had failed to see how much the world had changed since 1945, 1989, or perhaps 2001. Good lawyers interpreted the Charter instrumentally and purposively; we had embraced a dullard's literalism. This controversy resembled, of course, virtually every debate anyone had ever had about the use of force under the Charter. The sense of déjà vu was overwhelming – the temptation to fall into nostalgic reminiscences about previous doctrinal battles over Entebbe (what was 'political independence' anyway?) or Panama (a right to pro-democratic intervention?) was easily resisted, but it was hardly cheering to realize that instead of having transcended the debate we were embroiled in it ... and as 'positivists'.

Things were becoming more complicated. Initially, the identity of the participants, the association with particular positions, and the location of the interventions were to be contrasted in a binary fashion: academics writing in newspapers, government politicians issuing official statements. Now academics were arguing among themselves, and in the same medium. Moreover, the impulse to participate spread outside the narrow, and relatively formal, medium of newspaper correspondence to the news media more generally, as various international lawyers, including some of the *Guardian* signatories, gave interviews and took part in television and radio debates.

Although we were now placed in the same position as everyone else engaged in the public anti-war debate – politicians, activists, and so on – in espousing a particular view within a broader expert community, our professional expertise led us to be treated as a special case. Lawyers, of course, are not only popularly presented as the guardians of a set of rules unknowable to the lay person – an idea on which our claim to have something worth reading about had been based – we are also often presented as opportunists capable of holding different, mutually contradictory positions depending on the strategic needs of the time. Invocations of the old cliché about asking several lawyers the same question and getting different answers from each accompanied the shift in the public presentation of the question of law and the war from 'lawyers claim war is unlawful' to 'lawyers disagree about war against Iraq'.

Such challenges seemed to require that we embrace formalism even more tightly. By setting out a legal case, our original intervention had presupposed the validity

of law's claim to determinacy; now we had to argue that a multiplicity of expert views on the subject did not reflect international law's ability to mean all things to all people. The law was clear, and those who disagreed with us were wrong.

At the same time, however, just as indeterminacy assailed us from the outside, ambivalence was corroding our certainties from the inside. Like Robert Frost's liberals, we were finding it difficult to take our own side in an argument. Invited on to panels to give an anti-war legal view, we repeatedly disappointed our hosts and the anti-war sections of the audience who had put their faith in us as exponents of the case for an anti-hegemonic international law. Understandably enough, we were expected to maintain and carry forward the legalist challenge, to rebut authoritatively the Attorney General, and to express our general disquiet at the Bush administration's subversion or denigration of international law (noting in passing the US rejection of the Kyoto Protocol, its repudiation of the Anti-Ballistic Missile Treaty, and its resistance to the International Criminal Court). That we did not do so – or at least, not in the expected manner – seemed to leave those listening profoundly perplexed (had the right person been invited?).

In one such debate, one of us confessed to feelings of ambivalence about whether in retrospect it had been right to oppose the war (by then under way), only to be challenged by a member of the audience for 'seeming awfully sure about his ambivalence'. Images of mass graves, cheering crowds, and falling statues were beginning to confirm earlier doubts. But perhaps we had now swapped one form of certainty for another. In another debate, panellists were invited to provide an assessment of the 'damage to international law' caused by the military action in Iraq. Questioners wanted to know how the integrity of international law could be restored. Through what arguments could the Attorney General's statement be refuted? By what means could legal challenge be mounted against the coalition? In what fora could Bush and Blair be criminally prosecuted? When one of us expressed misgivings about the implicit vision here of international law as a redemptive force which could save the world if only it was allowed (or made) to operate properly, no one wanted to know. Likewise, the idea that, in depicting the war as the work of evil men who should be punished, the anti-war activists were mimicking the logic of those they sought to oppose, simply substituting Bush and Blair for Saddam Hussein and Osama bin Laden, had no resonance. Had we been hoist by our own petard?

At the same time, and not surprisingly, we were accused of defending a formalistic and a-historical sovereignty. In a public meeting convened days after the intervention began, political scientists derided our legalism, our failure to grasp the changing world around us and our blindness to the virtues of the Blair government's crusading humanitarian spirit. There was something touching, but also dangerous, about this bookish international law of ours. A week or so later, two respected doctrinalists slogged it out before London's 'great and good'. Again, the questions (bemused, world-weary, mildly exasperated), and indeed the introductory remarks ('when lawyers disagree, they get paid'), signalled that enough had been heard from the lawyers. All this bickering over vaguely worded 'law' was so familiar and so unhelpful. If for the *Guardian* letter-writers legal argument had seemed a way of avoiding the charge

of fiddling while Rome burns, now legal argument appeared to be exposing those involved to precisely that charge.

3.

Reflecting back on these events, it seems clear that, whatever value our letter may have had, it also carried dangers and prompted many, often uncomfortable questions. The various responses we received and our own experiences after publication of the letter helped to clarify these, even if not to resolve them. Although there are others, ten issues are worth highlighting.

3.1. Personal gratification

The letter's publication no doubt affected its signatories in diverse ways. Some spoke of ribbing by friends, parental pride, and the odd collegial lambasting ('who do you think you are?'). Many received congratulatory e-mails and an unwonted number of calls from the press. So was the letter in the end just about personal gratification, about promoting ourselves in the public domain, displaying expertise, acquiring a war story? Clearly it was in part about these things, but could we refute the accusation that this was a self-seeking enterprise by observing that self-promotion after all does not have to operate to the exclusion of strategy, and that our intervention was both? Or is that self-delusion? Does self-promotion in fact get in the way of effective action? At any rate, does the kind of self-promotion in which a critical lawyer might seek to engage – one that combines a desire for visibility with an identity based on marginality – get in the way of effective action?

3.2. Expertise

The legal analysis presented in our letter was prefaced by a declaration of our status as teachers of international law. Were we right to invoke authority in this way? On the one hand, one might say that people do in fact listen to what lawyers say about law, just as they would listen to what a palaeontologist says about a fossil. Each within their own sphere . . . On the other hand, isn't this precisely an example of the politics of expertise that we constantly criticize? Aren't we reinforcing here the idea that justice is something you know, and furthermore knowledge to which we have privileged access, as opposed to something that gets defined and redefined in the crucible of social struggle? Or can we again content ourselves with the thought that the politics of expertise was being turned here to 'good' strategic ends?

Moreover, precisely whose authority and expertise was being invoked? The letter was signed by academics at three elite universities – Cambridge, London, and Oxford – using academic titles (Professor, Dr) where applicable. A typical reaction in an e-mail from one colleague at a 'new' (former polytechnic) university in London thanked us for making the intervention, but asked why people from a broader range of institutions were not asked to sign. A question speculating on the reason for this – 'do new universities dilute the effect?' – serves as a reminder that our letter had not only appeared to assume the validity of a conceptual system that some of us

usually sought to interrogate; in the choice of signatories it also risked reinforcing institutional hierarchies within legal academia.

3.3. Formalism

What, then, was the strategy pursued through this letter? What could formalism achieve? At one level it seemed an obvious rhetorical tool. Since Tony Blair had promised in Parliament to act at all times consistently with international law, framing our arguments in terms of holding Blair to his own stated commitments just seemed to make sense as rhetoric. At the same time, however, there were some equally obvious dangers.

In the first place, a UN Security Council resolution authorizing the war might have been passed. We tried to reserve our position through the last paragraph of our letter, in which we stated that even a lawful war was not necessarily just, prudent, or humanitarian. But that was clearly weak. For those of us who believed that the military action then proposed was indeed unjust, imprudent, and anti-humanitarian, was it right to run the risk that our legal arguments might ultimately come to undermine our political goals?

Second, there was the danger of valorizing the currency. Why were we encouraging faith in international law as an agent of justice and peace when we know that it helps to legitimate oppression and justify violence, and we devote a considerable portion of our energies to showing how? One response to this might be that there is surely not a coherent, unified currency here. International law also has the potential to help those trying to resist oppression and curb violence. In other words, it works in more than one dimension, and so therefore must we. Or is this just rationalization?

Finally, there is the question of the effects of a turn to formalism for ourselves, our identity and solidarity as critical scholars, and our capacity for solidarity and co-operative activity with others. Were we talking down to the addressees of our remarks, and failing to share with them our insight that international law is not necessarily the beneficent force they take it to be? Or could we assume they already had their own grounds for scepticism about international law, and just wanted to be better informed about how it could be used to help stop the war in Iraq?

3.4. Anti-formalism

Once the war began, our attention turned to the question of how international law had been used to justify it. We started to talk about indeterminacy and ambivalence and ambiguity. We reflected on all the various legal arguments that had been advanced for and against the war and tried to analyze what had made some kinds of legal argument more popularly compelling than others.

We also tried to theorize what was going on, and to retrieve the political within the technical: we spoke in critical terms about the law which governs the conduct of warfare, about the way in which concepts such as proportionality, military necessity, and distinction, not to mention the very term humanitarian law, belong with the

larger processes through which war gets sanitized and brutality condoned. Later on, once the war had ended, we also talked about international law's constitutive role in relation to the colonization of Iraq, about how the Fourth Geneva Convention worked in various ways to legitimate the profoundly undemocratic processes of reconstruction by then under way, and so on.

What was striking, however, was that no one seemed to want to hear this. If we had been unsure before as to whether people had exaggerated faith in international law, now it seemed absolutely clear that they did. Were we reaping what we had sown? Or were the activists and others with whom we were discussing these matters right to keep us focused on international law's emancipatory potentials?

3.5. Civil disobedience

People who had been charged with criminal damage in connection with efforts to stop military action then approached us with a request to act as expert witnesses as to the illegality of the war. Some of us have agreed to this. Should we have done so? On the one hand, why not? No one is forcing us to choose between making arguments in terms of international law and opposing the idea that international law provides answers to the problems we face. On the other hand, and especially in the light of the experiences just mentioned, were we simply failing to learn our lesson?

3.6. War crimes

At the same time, the air was thick with talk of criminal proceedings of a very different sort: trials for crimes against humanity committed by Saddam Hussein and other Iraqi officials and trials for war crimes committed by American and British officers and even by the two leaders Bush and Blair. What attitude were we to adopt to these proposals? In an immediate sense, as noted above, there is an obvious and disturbing symmetry between the activists' call to try Bush and Blair and the rhetoric used to justify the war in the first place: in both cases the central idea is that this is all about the actions of an evil clique, or even a single evil man.

More broadly, there are all the questions that perplex us generally about war crimes trials: what purpose is served by such trials? Do they just give the accused an exceptionally strong platform from which to tell his or her self-justifying story? Do they privatize and individualize responsibility for that which should rather be seen as public and systemic? By establishing criminal responsibility for some forms of violence, do they help to sanctify the idea that other forms of violence and suffering are acceptable, or at any rate unavoidable? In the end, then, should we not view international criminal justice much as some view national criminal justice, as more a matter of discipline than of justice, more a matter of asserting authority and monopolizing virtue than protecting people and reducing insecurity? Or are those seeking punishment right? We might squirm at the activists' moral certainty and righteous indignation, but what if that too should be understood in strategic terms? Could it be that absolutism is the price of effective action?

3.7. The end of international law?

For every letter to the paper arguing that the war was legal or illegal, there was another arguing that might makes right: international law is simply irrelevant. This is, of course, a longstanding theme of both left and right commentary. For example, Chomsky has consistently argued that for the United States 'Diplomacy and international law have always been regarded as an annoying encumbrance.'⁴ Does the 2003 Iraq war then mark the point at which a US administration, with help from the British, finally managed to shrug off diplomacy (in the shape of the United Nations) and international law? Or is this just what Richard Perle and others would like us to think?

Clearly the US and UK governments have in fact been careful to explain their conduct in international legal terms, and have put considerable energy into Security Council negotiations. Are people like Chomsky falling for an ideology that characterizes the UN and international law as ineffectual, as a means of ensuring that they become so? Alternatively, are such people falling for an ideology that characterizes the US as *desirous* of ensuring that international law becomes ineffectual? Given that power is never sustained by force alone, but always through processes of legitimation and co-optation, it seems difficult to imagine a better way of securing hegemonic power than through a system premised on the formal equality of states. What, then, if the dark secret at the heart of the Bush administration is that the leading figures within it are international law's most ardent supporters and patrons?

3.8. Historicity

To those who argue that the 2003 Iraq war (or indeed some earlier event) marks the point at which international law was finally shrugged off, history is a series of tests which international law either passes or (as in this case) fails. From another perspective, the reverse is the case: international law is itself the test of history. Quite clearly, both positions are problematic, inasmuch as both forget or at any rate obscure international law's own historicity. We need to resist this reifying gesture and sustain a sense of the character of international law as dynamic and contestable.

We mentioned earlier the risk that a UN Security Council resolution authorizing the war might have been passed, and asked whether we were right to run this risk. The real question is perhaps why, instead of making the arguments we did, we did not invite public reflection on the fact that all it would have taken to make the war legal was Security Council authorization. In fact, as indicated earlier, that was one of the concerns behind the letter. Some of us were worried about the way the issue of whether the war was legal was eclipsing the issue of whether the war was a good idea. We wanted people precisely to consider the possibility that, if all it took was Security Council authorization to make the war legal, perhaps there was something wrong with international law. How then are we to understand the process through which this aspect got lost?

4. N. Chomsky, *Deterring Democracy* (1992), 3.

3.9. Crises

In an article on the Kosovo crisis Hilary Charlesworth makes some valuable observations about the preoccupation which international legal scholars have with crises.⁵ Our conferences, discussion groups, articles, and books are mostly concerned with extraordinary events, outbreaks of violence, international incidents. As Charlesworth explains, this promotes attention to so-called high politics or dramatic accidents, and encourages us to neglect long-term trends and structural problems. Poverty, lack of access to clean water, excessive military spending, HIV/AIDS, and violence against women are among the principal crises of our times, yet these remain at the margins of our scholarly debates. In intervening as we did in the Iraq 'crisis', were we fuelling this process by which the scandals of everyday life get normalized and even removed from view? Could we console ourselves with the thought that we *also* write about poverty and the rest? Or does this again not work?

3.10. Lessons for critical practice

Crises, then, are problematic, but one thing that this experience brought home to us is that context counts. The procedures of a critical practice cannot be specified abstractly or in advance, because what is ideological in one context is not so in another. So, for example, the arguments made to justify the war were that international law is indeterminate, that international law on this matter is very complex, and that international law should not be approached with excessive formality.

Indeterminacy, complexity, and anti-formalism seem rather familiar from critical scholarship, but this is surely a reminder that we cannot regard them as having some critical essence any more than we can regard their antitheses as having some ideological essence. As Slavoj Žižek puts it in his work on ideology: 'When some procedure is denounced as "ideological par excellence", one can be sure that its inversion is no less ideological.'⁶ He goes on to show how ideology can work through arguments from both necessity and contingency, both simplicity and complexity, and so on.

Yet if formalism can be critical too, that does not, of course, make the dangers we have highlighted go away. Commenting on the danger that, depending on events in the Security Council, our legal advocacy might end up being turned against our political goals, some interlocutors wondered whether that was not after all the point of the whole critical enterprise in the first place. Maybe. Or does the distinctiveness of the critical enterprise lie in the fact that it raises these issues, it prompts these anxieties, but precisely does not resolve them?

5. H. Charlesworth, 'International Law: A Discipline of Crisis', (2002) 65 *Modern Law Review* 377.

6. 'Introduction', in S. Žižek (ed.), *Mapping Ideology* (1994), 1, 4.