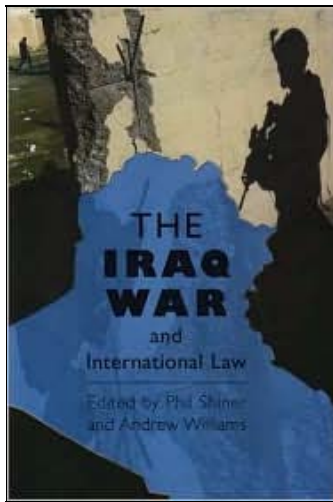




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THE IRAQ WAR AND INTERNATIONAL LAW, by Phil Shiner and Andrew Williams (eds). Oxford: Hart Publishing, 2008. 358pp. Hardback. £30.00/ \$63.00. ISBN: 9781841136691.

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A frequently rehearsed story tells of an encounter between the venerated Chinese Prime Minister, Zhou En-Lai and a worldly Westerner. When reportedly asked for his thoughts on the French Revolution, the Eastern sage answered “it’s too early to say.” That observation needs to be taken to heart by International Lawyers for whom the 2003 invasion and occupation of Iraq, and the measures taken to suppress the resulting insurgencies and strife currently appear as momentous “game changing” events. If, looking back a century from now these events are seen to have successfully migrated from the hyperbole of journalistic front-page stories into that realm inhabited by the likes of the French Revolution, it is likely to be, not because of the uniqueness of the violent overthrow of a “Third World” potentate and his depleted third rate army by the skilled military, political and economic might of two of the most technologically advanced and coordinated post-industrial states of our time, not because of the duplicitous and/or manufactured reasons for going to war, not because of the use of falsified or manipulated “intelligence,” not because of the hyperactive media propaganda and hysteria about the existential threat to humanity supposedly presented by an unchecked recalcitrant “rogue” regime erroneously said to be sneakily and illegally in possession of weapons of mass destruction, not because of the depth of destruction, human sufferings and misery visited on an already blighted country, and especially not because of the apparently infinite capacity and hubris of imperial states to persuade themselves and their citizens of their innate altruism and ability to bring peace, happiness, justice and “civilization” to other societies; prior historical examples of all of these are too numerous in the West’s encounters with the rest for the Second U.S.-Iraq War and its aftermath to be anything but another illustration of axiomatic realities. If this Second “Gulf War” is to afford a more or less unique didactic legacy, it is as likely to be found in the ways that international law discourse shaped or has been shaped by that war. *THE IRAQ WAR AND INTERNATIONAL LAW*, edited by Phil Shiner and Andrew Williams, constitutes the engagements of twelve international lawyers in such a discourse.

The thirteen essays collected in the volume (Williams has two contributions) cover a broad range of issues including rehash of some of the debates over the legality under International Law of the grounds officially advanced for the attack on Iraq; the impact of the war on the jurisdiction of English courts and the European Court of Human Rights to engage in the substantive review of the field activities of British military [*526] personnel; the legal obligations of the United Kingdom under various international agreements that are implicated in her conduct of the war; treatment of possible claims of violations of International Human Rights and Humanitarian laws; the intersections of both sets of laws and the application of extraterritorial concepts in their spheres; emerging trends in the extra-treaty regulation of the proliferation of so-called “weapons of mass destruction” (what Daniel H. Joyner in his contribution terms “counter-proliferation”). The central themes of the contributions, however, indisputably revolve around the legal

obligations of the United Kingdom under International Law for her participation in the waging of the war against Iraq and the subsequent occupation of that country.

The investigations, Andrew Williams says in his introductory chapter, are best organized under three themes: international legal constraints on countries going to war – so-called “*jus ad bellum*,” the regulation of the manner in which war is fought (*jus in bello*), and the obligations that occupiers have in the temporary administration of conquered territory (p.9). The relevant legal material are ably presented and competently discussed. A teacher of International Law who is looking for a compact volume of essays that intelligently critiques the Tony Blair Government’s participation in the war can do a lot worse.

That there is complete consensus among the contributors as to the illegality of the war is neither surprising nor a poignant criticism of the collection, even if a token representation of British officialdom would have been welcomed. (We are told that an adviser to the Blair Government had agreed to pen a contribution for the collection but failed to do so) (p.14, n.16). The writers all are lawyers, and in many cases regular practitioners steeped in the art of advocacy: purporting to present the opposition’s claim before demolishing it. The legal doctrines on the use of force – especially with regard to *jus ad bellum*, and almost equally so in the case of *jus in bello* – are now so reasonably familiar that it is no stretch to call them boringly conventional. The writers thus present no genuinely controversial arguments, when relying on many of the disclosures unearthed since March, 2003, they demonstrate that the attack and invasion of Iraq could not be justified under any of the standard legal arguments for the lawful use of force by one state – or group of states – against another. Although extensively discussed and presented in Chapters 2, 4, 5, 7, 8 and 9, Sir Nigel Rodley’s contribution in Chapter 12 succinctly and with creditable dispassion confidently shows why, under International Law, as it now exists, no genuinely tenable legal argument can be advanced by the United Kingdom or United States for their use of force against the territorial integrity of Iraq or to suppress the political independence of that country. The typical arguments of “self defense” (even when extended to encompass “preventive” (or, as it is more commonly termed “preemptive”) war, when properly understood), Security Council authorization and even “humanitarian intervention” (assuming the last to be a valid gloss on the exceptions to the prohibition of the use of force), were simply unavailable. [*527]

The pedagogical core of the collection exists not in the now pedestrian arguments about the proper interpretation of Security Council Resolution 1441, nor the scope of the self-defense exception to the provisions of Article 2(4) of the United Nations Charter, but in the claims about U.K. legal liabilities for her conduct of the war and her participation in the occupation of Iraq. Because U.K. policies and actions charitably can be viewed as sidekicks of those of the U.S., the material here is potentially useful not only for the exploration of the scope and reach of international rules on the waging of war and the administration of conquered territories, but more significantly for investigating the status under International Law of shared responsibility in these areas. Within domestic or national legal orders, questions of “joint or several liability” for conspiracies, complicity, common actions, common purposes, joint enterprises, as well as vicarious, secondary and/or derivative liability in similar circumstances pose some of the thorniest issues in fashioning and assigning culpability for wrongful conduct where two or more actors are involved. At core, culpability tends to be premised on the existence of some notion of fault, and while intentional behavior may provide the clearest illustration of fault, deterrence policies often aim for a broader sweep. One might say, the idea is to put on an actor a duty not only to scrutinize her own behavior, but to provide her with an incentive for scrutinizing the conduct of a co-participant in the venture. If this is an area that has been extensively explored in national laws, its investigation in the international legal order is very much embryonic. This doubtless is in part because of the relative newness of the coming of age of International Law (at least as a practitioner engagement), but it is also surely a result of the nature of International Law as primarily “consent based.” In the case of the Iraq War and occupation, the ordinary complexities are compounded by the ambiguous roles played by the Security Council – first in refusing to adopt a “war authorizing” subsequent Resolution to 1441, and then in accepting a “successful” invasion as a *fait accompli*, and seemingly seeking to impose terms and conditions for the occupation and administration of Iraq, notably in Resolutions 1483 and 1511.

Considerations of co-participant liability by the United Kingdom for policies and actions crafted primarily in Washington are especially interesting because of the lack of symmetry between British and American commitments to and undertakings in International Law. In particular, the British like the vast majority of their European neighbors, and unlike the United States, have signed onto most of the newly fanged institutions and policies that have given a

genuine bite to the barks of International Law. British officials, contend some of the writers, face the real possibility of being hurled before the International Criminal Court, and their policies challenged and invalidated by the European Court of Human Rights under the European Convention on Human Rights. (See contributions by William Schabas, Christine Chinkin, Rabinder Singh, Keir Starmer and Bill Bowring.) Similarly, the U.K.'s accession to several other treaties to which the U.S. is not a party may create additional legal hazards for her (Stefan Talmon, p.203). An exceptional (one [*528] might say uniquely interesting) discussion relates to possible liability by British officials for the conduct and policies of the Coalition provisional Authority. This was an administrative body set up to run defeated Iraq. But as the United States and the rest of the world learned, the toppling of the statue of Saddam Hussein, far from being indicative of a "mission accomplished," launched Iraq into internecine conflict that progressively got worse until at least January, 2008. Meanwhile, the CPA, under the leadership of the American viceroy, Paul L. Bremer, was charged with running Iraq's affairs until the nominal "return of sovereignty" to Iraqis in June 2004. United Kingdom officials, and indeed the nationals of over 29 other countries were employed by the CPA, a body that seemed *sui generis* in International Law. Thus, an interesting issue in International Law is the extent to which its activities and those of its employees can be attributed to the likes of the United Kingdom (or even the United Nations) that provided support but had little say in the making of the policies of the CPA.

These and other "secondary liability" issues provide interesting insights into the international legal order that can and should be profitably exploited in the pedagogical setting of the class room. The extent to which the contributors have done so adequately in this volume is more debatable. The stance that one takes in no small measure depends on the extent to which one shares the view that International Law, as the vast majority of the contributors to the volume seem to view it, is primarily about its capacity to obtain correct behavior through the imposition of sanctions on wrongdoers.

This brings us to my first substantial problem with the volume. With one exception (of which more will be said shortly), the contributors appear to view the utility (if not conception) of International Law almost exclusively through the lens of judicially decreed enforcement of prescribed texts. And so we have the rather incongruous but far from unusual depiction of International Law as formal texts to be enforced by judges, and whose meaning is normatively self-evident to the contributors. Because this objective is ends-driven, the writers often overlook perfectly sensible debates about the proper distribution – at least in any functioning liberal democratic society – between rule by judicial oligarchies and the prerogatives of an executive branch that is accountable to an electorate. Moreover, this perspective seems to consciously ignore or significantly discount the potential for systemic harm to judicial institutions themselves, and to their intended primary beneficiaries, those who have suffered injury from the breach of reasonably narrowly defined legal rights. Two examples illustrate the point.

Phil Shiner and Rabinder Singh perhaps rightly praise the apparent emergence in English jurisprudence of a less categorical stance against judicial review in the foreign affairs arena, and a less deferential judicial attitude to executive branch assertions of legality, but the force of their arguments would have been significantly improved by indications of their awareness of some of the complexities the judicialization of these so-called "political questions" may raise. There is, for example, in the United States a rich literature born out of experience, and while my sentiments and [*529] those of other readers may well concur with theirs, I would feel a lot more comfortable recommending these contributions if they had taken on and debunked such rather obvious shortcomings as the manipulations, not only of the definition and scope of the concept of "political question," but even more radically, that of the concept of "standing" (or, as they say in international law, of "admissibility." While the trade-offs may not be susceptible to easy quantification, one cannot ignore the possibility that conceptually enlarging judicial intervention may erode the frequency and nature of the grant of relief, and the respect accorded such relief.

Similarly, in his contribution, Bill Bowring labors hard to sustain an argument as to why the United Kingdom might be called under the European Convention on Human Rights to account for its activities in Iraq by the European Court of Human Rights. Either discounting or overlooking outright salient prior rulings of the Court on the reach of the Convention to activities in Iraq (one of which, SADDAM HUSSEIN v. U.K. AND OTHERS, would seem to have telegraphed the views of the Court) (Chinkin, p.173; Talmon, pp.215-216), Bowring chose to anchor his analysis on the solicitude the Court has shown for human rights claims under the Convention against the Russian and Turkish Governments. But rather than using this opportunity as a gateway for investigating or pondering why the Court seemingly has treated the latter set of claims differently from those asserted against European member states of NATO for their alleged violations of the Convention in the Balkans (BANKOVIC v. BELGIUM), or against individual

European states for their alleged negligence in carrying out policing functions in the Balkans (e.g. *BEHRAMI v. FRANCE*, *SARAMATI v. NORWAY*), Bowring strains to make the quite incredulous argument that the Court's Russian and Turkish cases, rather than those of the Balkans are applicable to the United Kingdom. The quite implausible explanation offered is that the former cases involve "wars of colonialism or imperialism." Yet, there is not a single citation to the Court's opinions that indicate that the members of the Court view "colonialism" or "imperialism" (unlike extraterritoriality or the implied judicial review of Security Council policy decisions) as legal criteria to be taken into account in its jurisprudence, let alone whether the Court would consider U.K. participation in the Iraq War as falling into the "colonial" or "imperial" category. The more plausible explanation for the arguments advanced in the essay is that having written a paean to the Court's activism in seeking to make Russia account for her policies in Chechnya, Bowring simply saw the unpopularity of the United Kingdom's participation in the Iraq war as a vehicle for lauding and encouraging the Court's decisions on Russia. But that activism has not been an unqualified success. Among other consequences, Russia has effectively paralyzed the work of the Court by refusing to ratify fairly minor procedural changes that all agree would enhance the efficiency with which the Court carries out its work. Perhaps the Court's activism is worth whatever roadblocks to justice it has generated for the ordinary petitioners seeking relief – Russian and non-Russian alike – but at least it behooves writers to consider such trade-offs, [*530] rather than as here blithely ignoring their existence.

The approach to the treatment of International Law as "hard law" by insistence on adjudication is not infrequently paralleled by a competing tendency to undermine the strength of the claim by situating it within a setting which, while flattering to the normative preferences of the writer, does so by ignoring the realities of politics and power in the international order. Thus, despite copious citations to formal legal documents, the commentators in the main present their claims and arguments in hypothetical (if not illusory) terms. William Schabas' suggestion that British officials might be prosecutable under the Rome Treaty for the crime of aggression, while facially less plausible than most of the other supposedly legal claims advanced here, is in fact representative of the tenor of the arguments. Many of the contributors simply conflate the prescriptions of international law with their preferred normative international legal order. Remarkably absent from these engagements is any serious effort to confront realistically the trade-offs between formal legal rules and socio-economic and political realities that decision-makers juggle. This is not to say that the writers are unaware of these trade-offs, but they studiously avoid having to confront them, and in the process, they impoverish the ample raw material that is otherwise at their disposal. International Law, in this volume, is treated entirely as an autonomous and self-contained activity. The concern of the writers is to demonstrate how international actors, especially British officials, have fallen short of legal prescriptions, and to explain how they can be or should be chastised for their shortcomings. For those who find the core failing of International Law to be the problem of "impunity," this kind of argumentation is doubtless morally satisfying. For those who are concerned about the interplay between International Law and other societal forces such as military power, economic resources, media culture and technocratic expertise, just to name a few, the practice of International Law, if it is to be taken seriously, must transcend the ritual rehearsal of normative preferences and prescriptive rules.

Andrew Williams, in his introduction, suggests the existence of at least five approaches to or outlooks on International Law. These he identifies as follows: First, those who place "reliance on international law as though it were a fully formed rule system." Second, those who "look to reconcile international law with new world circumstances" by "reconcil[ing] it with practice while retaining the basic tenets of the law." Third, "those who look to a fundamental reformation of international law, making their starting assumption that international law, or some of its significant components, is critically flawed and requires reform." Fourth, those engaged in "tactical resistance" to International Law "by using international law and its institutions as well as domestic processes of law, advocacy networks and civil society activism in all its multiple forms." Finally, "we might consider the development of a project of rebellion. This encompasses those determined to rebel against international law and its institutions by framing action both inside and outside its parameters, establishing alternative methods for resolving [*531] conflict and achieving justice" (pp.4-6). This is a rich and inviting menu for a book on International Law, and if the collection came anywhere close to delivering these offerings, even if ultimately unsuccessful, this would be a terrific book indeed. Unfortunately, with one exception, the constellation of essays falls at most within the first two approaches. It is true that Phil Shiner, in his contribution, does invoke litigation by "peace" activist groups (such as the Campaign for Nuclear Disarmament) to press his arguments about changing attitudes towards justiciability in English courts (presumably vindicating Williams' fourth approach), but the arguments are so steeped in the formal application of conventional international legal doctrines that they overwhelm the claimed innovative methodology of "tactical resistance" by "civil society."

The one contribution that seriously attempts to take the reader outside Williams' realm of those who view International Law "as though it were a fully formed rule system" is placed at the back-end of the collection. This placement, whether intended or otherwise, symbolically serves to underscore the marginalization in contemporary International Law of the views espoused by the contributor, Jayan Nayar. For its distinctiveness, Nayar's views are worth a few inches in this review.

Nayar contends that "indeterminacy prevails" in contemporary International Law, and in support of the claim identifies three distinctive schools of thought. There are the lawyers who will argue over the legality of the Iraq war by scrutinizing "the texts of relevant international treaties and varyingly determine whether such and such an act falls within the ambit of the permissions, prohibitions, discretions and obligations therein enshrined" (p.329). (This is clearly the dominant, indeed excepting Nayar, exclusive school represented in this volume). Among such lawyers, whom Nayar calls "UN Charterists," some will find "hope" in the debate over the legality of the Iraq War because the debate suggests the relevance of international norms in constraining behavior, while others will despair because of the failure of those norms to restrain seemingly illegal behavior. The differences between these two groups is in fact not about the existence of rules, but the extent to which those rules determinately can be pressed into the service of particular ends such as "power" or "justice" (pp.333-334).

An alternative entry into International Law discourse is provided by the so-called "Third World Approach to International Law" ("TWAIL"). According to Nayar, "TWAIL-ian perspectives are grounded on a general critique of the past and continuing, colonial/imperial foundations of international law" (p.335). Proponents of TWAIL are said to have three objectives: First, "to understand, deconstruct, and unpack the issues of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions;" , to construct and present an alternative normative legal edifice for international governance; and third, to eradicate the conditions of underdevelopment in the Third World "through scholarship, policy, and politics." While sympathetic to TWAIL's deconstructive and critical projects, Nayar trenchantly (and I think [*532] correctly) points out that TWAIL has fallen significantly short of realizing its constructive and programmatic projects as outlined in its second and third objectives. Nayar is in fact doubtful that these objectives can ever be realized in no small measure because proponents of TWAIL, despite their desire to create a transformational international legal order, are bound up both by training and placement within that legal order. Their critiques may be on the mark, and their rhetoric vigorous, but their proposals amount to little more than changing the arrangement of the seats on the deck, and here, they will find that other competitors possess more resources with which to order the seating arrangements.

Nayar then offers up as a third alternative "Cosmopolitan Subaltern legality." This is "law from below" supposedly rooted in "a people's movement orientation to international law which seeks to reflect and articulate voices of the dispossessed and marginalised, out of 'absence' into 'emergence' as it were" (p.342). It is law that requires that "suffering" be taken seriously. And it is offered as a response to "imperial" and "hegemonic" International Law. The claims of this "law" are said to be grounded in such postulates as: "[w]e exist within a global system, not an international system. Any decolonisation imagination must therefore delink from the state/international duality that presupposes much political framing;" "what is traditionally regarded as international law now falls increasingly within an encapsulating global law regime where, contrary to the international legal precept of state sovereignty as the primary determinant of law, it is the global law precept of devolved management which defines the statist division of the world into legal zones of control. Any decolonisation imagination must therefore delink from the national law/international law duality that presupposes much legal framing;" and "[t]he global law system is constructed and put into effect by global legal actors," notably "the new coordinated networks of regulation policed by national regulatory authorities," and "the transnational regimes of global social domains exemplified by the new *lex mercatoria*" (pp.343-344). What this means, argues Nayar, is that International Law as a state-based regime must be rejected, apparently because the state cannot be decolonized or separated from its subservient function as the transmitter and enforcer of hegemonic interests. Legality becomes (or perhaps emerges) from the internecine struggles of "the people" against the state, and their rejection of the claimed "civilizing" mission of law (pp.345-346). The role of international lawyers, says Nayar, is to recognize and affirm the legitimacy of that struggle (p.347).

I think there is much with which to quarrel in this portrait, not the least of which is the vagueness of the affirmative program prescribed. But that is not the purpose of this review. That purpose is to point out the differences between

Nayar’s arguments and those advanced elsewhere in the collection.

What then to do with this volume? Much has been written about the Iraq War, and international lawyers, as much as any other recognizable group (with the possible exception of fighting soldiers and self-exculpating politicians) have done their fair share in the wanton [*533] destruction of forests to make self-serving claims. Yet, the collection does gather in a single volume competently written essays that explore from the vantage point of British liberal legal internationalists (or, in Nayar’s phrasing “UN Charterists”) the miscues and potential liabilities of their Government in going to war in Iraq. While, as might be expected, the quality of the essays is uneven, and while none is spectacular, many – especially those that seek to address co-participant liability in International Law – provide rich material for class room discussions. I wish the writers did a bit more, such as attempting to infuse discussions of international rules with unavoidably intertwined issues in international politics or international sociology. If the bulk of this collection is representative of the claimed “middle road” between “American Voluntary” and “European Absolutist” approaches to International Law that is supposedly offered by the English, the alternative can benefit from more seasoning.

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