Guidance and Control Mechanisms for the Construction of UN-System Law—Sung and Unsung Tales from the Coalition of the Willing, or Not

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ABSTRACT

This article explores guidance and control mechanisms for the interpretation of the meaning and effects of peace-coercion law created by the United Nations Security Council, referred to as "UN-system law." Using the military action against Iraq by the Coalition of the Willing in 2003 as a case study, this article identifies institutions, processes and procedures for steering and reviewing the construction of UN-system law—legal input into a government's internal decision process and judicial proceedings in domestic and international courts of law.

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INTRODUCTION

This article explores guidance and control mechanisms for the interpretation of the meaning and effects of United Nations (UN) peace-coercion law created by the UN Security Council under the UN Charter[1]—hereinafter, UN-system law. It will use as a case study the controversy over the legality of military action against Iraq by the Coalition of the Willing[2] in March of 2003.

1. U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153 (entered into force on Oct. 24, 1945) [hereinafter U.N. Charter].

2. *See* Elizabeth Knowles, *Coalition of the Willing*, *in* THE OXFORD DICTIONARY OF PHRASE AND FABLE (2006), http://www.encyclopedia.com/doc/1O214-coalitionofthewilling.html ("[C]oalition of the willing—a group of nations agreeing to act together, especially with military involvement; the term has been particularly associated with those countries giving active support to American intervention in Iraq in 2003."). For usage of

Before and after invading Iraq, various coalition members had justified their military action under the rationale that UN-system law provided the requisite legal coverage, and that, therefore, a further authorization through the UN was not required at all.[3] At the time, this legality rationale was at the center of heated political, diplomatic, and academic exchanges. Rather than adding one more opinion piece to a debate conducted long ago,[4] this article identifies current as well as conceivable institutions and processes for guiding and reviewing the construction of UN-system law. These mechanisms include legal input into a decision process within a country's government as well as judicial proceedings in courts of law.

This article consists of four parts. After briefly recalling the relevant UN-system law relevant to the Iraq situation, this article turns to the dynamics surrounding the in-house legal advice from Attorney General Lord Peter Goldsmith to British Prime Minister Tony Blair when the case for the war against Iraq was made by Her Majesty's Government. Next, judicial review in courts of law will be covered. This portion of the article discusses cases from the United Kingdom, the Republic of Costa Rica, and the Federal Republic of Germany. It also works through conceivable judicial proceedings on the international plane. Finally, this article evaluates the different guidance and control mechanisms potentially available for the interpretation of UN-system law.

I. THE LEGAL FRAMEWORK: UN-SYSTEM LAW ON THE EVE OF THE INVASION

This section reviews the UN-system law which framed the debate over the legality of military action against Iraq by the Coalition of the Willing. Chapter VII of the UN Charter[5] assigns the UN Security Council the primary responsibility for use-of-force enforcement actions designed to coerce the maintenance or restoration of international peace and security.[6] However, without the blessing or acquiescence of the UN

the term by U.S. President George W. Bush, see, for example, *Bush: Join Coalition of the Willing*, CNN (Nov. 20, 2002), http://edition.cnn.com/2002/WORLD/europe/11/20/prague.bush.nato/.

3. *See, e.g.*, Letter from the Permanent Representative of the United States of America to JD Negroponte, President of the United Nations Security Council (Mar. 20, 2003), UN Doc S/2003/351.

4. For a concise discussion of the dossier, along with numerous references to the secondary literature, see William K. Lietzau, *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, 8 MAX PLANCK YB. U.N. 383, 420–29 (2004).

5. U.N. Charter arts. 39–51.

6. U.N. Charter arts. 24, 42. *See also* Uniting for Peace, G.A. Res. 377, U.N. Doc. A/1775 (Nov. 3, 1950) [hereinafter Uniting for Peace] (purporting the conferral on or the

Security Council's five permanent members—the French Republic, the People's Republic of China, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America—no such action can be taken.[7] Their blocking power is unfettered. In particular, the theory of presuming the UN Security Council's authorization of an enforcement action in the face of an unreasonable veto has not been accepted for lack of a basis in law and precedent under the UN Charter.[8] Decisions taken by the UN Security Council pursuant to Chapter VII are binding on all members[9] and take the form of resolutions.[10] As the UN does not have any armed forces at its disposal, the UN Security Council relies on delegated and authorized actions by members or regional organizations.[11]

Whether the use of force by the Coalition of the Willing in 2003 was covered by the UN-system law on the books or required yet another step hinges on three UN Security Council resolutions passed in the thirteen-year window between the First Gulf War[12] and the Second Gulf War.[13] When, after its invasion and occupation of Kuwait in the summer of 1990, Iraq remained unyielding about its noncompliance with a string of UN Security Council decisions urging withdrawal, the UN Security Council adopted Resolution 678.[14] This resolution—hereinafter, the liberation decision—gave Iraq a "final opportunity" to comply with the decisions condemning the invasion and occupation of Kuwait by Iraq.[15] The liberation decision further authorized the member countries cooperating with Kuwait to "use all necessary means" unless Iraq complied on or before January 15, 1991.[16] As Iraq did not leave by the deadline, the group of members supporting Kuwait acted on the

recognition in the UN General Assembly of powers to "recommend" collective measures in the event that the UN Security Council is unable to act).

7. U.N. Charter arts. 23, 27, ¶¶ 2–3.

8. LEGALITY AND LEGITIMACY IN GLOBAL AFFAIRS 342–43 (Richard Falk, Mark Juergensmeyer & Vesselin Popovski eds., Oxford Uni. Press 2012); MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL CONFLICT AND ARMED CONFLICT 1 (2007).

9. U.N. Charter art. 25.

10. For the various types of UN resolutions, see Rainer Lagoni, *Resolution, Declaration, Decision*, *in* UNITED NATIONS: LAW, POLICIES, AND PRACTICE 1081, 1081–91 (Rüdiger Wolfrum et al. eds., 1995).

11. *See* U.N. Charter arts. 42–43, 48–49, 53.

12. *See, e.g.*, MICHAEL R. GORDON & BERNARD E. TRAINOR, THE GENERALS' WAR (1995); U.S. NEWS & WORLD REPORT, TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR (1992).

13. *See, e.g.*, WILLIAMSON MURRAY & ROBERT H. SCALES, JR., THE IRAQ WAR: A MILITARY HISTORY (2003).

14. S.C. Res. 678 (Nov. 29, 1990).

15. *Id.* at ¶ 1.

16. *Id.* at ¶ 2.

authorization to use military force.[17] After Iraq was ejected and hostilities were suspended, the UN Security Council adopted Resolution 687.[18] This resolution—hereinafter, the cease-fire decision—imposed a robust regime of material conditions for Iraq to unconditionally accept before a formal cease-fire would be effective. The core of these conditions pertained to a program for the elimination of weapons of mass destruction and their delivery and support systems.[19] Other provisions addressed boundary demarcation,[20] return of seized property,[21] compensation,[22] repatriation,[23] and renunciation of terrorism.[24] The UN Security Council further decided to leave sanctions in place "until a further decision is taken"[25] and "to remain seized of the matter and to take such further steps as may be required for the implementation of the . . . resolution and to secure peace and security in the area."[26]

More than a decade later, in the wake of numerous forcible responses to cease-fire violations by Iraq and against the backdrop of the September 11th attacks in the United States, the UN Security Council adopted Resolution 1441.[27] This resolution—hereinafter, the last-chance decision—determined the continued presence of a material breach by Iraq of the cease-fire decision and other resolutions.[28] In this light, it decided to give Iraq "a final opportunity" to come into compliance with the relevant UN-system law.[29] This decision also established an "enhanced inspection regime" to see through the disarmament program imposed by the UN Security Council.[30]

At its core, the last-chance decision deemed submissions of false documentation and failures to cooperate in its implementation a further material breach subject to "assessment" by the UN Security Council,[31] set to convene immediately upon receipt of a report to that regard "in order to consider the situation and the need for compliance with all

17. *See, e.g.*, Alan Taylor, *Operation Desert Storm: 25 Years Since the First Gulf War*, ATLANTIC (Jan. 14, 2016), http://www.theatlantic.com/photo/2016/01/operation-desert-storm-25-years-since-the-first-gulf-war/424191/.
18. S.C. Res. 687 (Apr. 3, 1991).
19. *Id.* at ¶¶ 7–13.
20. *Id.* at ¶¶ 2–3.
21. *Id.* at ¶ 15.
22. *Id.* at ¶¶ 16–19.
23. *Id.* at ¶¶ 30–31.
24. *Id.* at ¶ 32.
25. *Id.* at ¶ 24.
26. *Id.* at ¶ 34.
27. S.C. Res. 1441 (Nov. 8, 2002).
28. *Id.* at ¶ 1.
29. *Id.* at ¶ 2.
30. *Id.*
31. *Id.* at ¶¶ 4, 11, 12.

relevant resolutions in order to secure international peace and security."[32] Additionally, the UN Security Council recalled its repeated warnings to Iraq "that it will face serious consequences as a result of its continued violations of its obligations."[33] Finally, the UN Security Council decided "to remain seized of the matter."[34]

In the immediate run-up to the invasion, two last-ditch efforts by the United States, the United Kingdom, and Spain to pass a "second resolution" failed.[35] On March 20, 2003, without having secured a fresh authorization from the UN Security Council, the United States and its coalition partners invaded Iraq to topple Saddam Hussein's regime.[36]

The legality of the invasion, absent a further UN Security Council authorization to use force, was the subject of a controversy as to whether the last-chance decision itself was sufficient to revive the use-of-force authorization in the liberation decision. Three opinion camps crystallized in the course of that revival debate: (1) those affirming the revival argument in principle and its operations in the Iraq situation; (2) those denying revival as such or specifically in the Iraq situation; and (3) those maintaining that the UN-system law on the books was indeterminate.[37] To rehash the various positions in this debate and their merits would be redundant.

Unfortunately, however, mechanisms to guide and control the decisions involving a country's interpretation of UN-system law have largely been underexplored in the literature. Consequently, important lessons have remained unidentified, ones that can be learnt by shifting the visor of the discussion to institutions and processes possibly accomplishing this important task. Independent professional advice on international law received from in-house counsel may offer a significant precautionary check. Yet, what if the advising component and personnel within the government appear clouded in the public's eye? Would it matter if the green light from in-house law officers did not rest on the strongest but merely an arguable legal case? Then, proceedings in

32. *Id.* at ¶ 12.
33. *Id.* at ¶ 13.
34. *Id.* at ¶ 14.
35. *U.S., U.K., Spain Introduce New Iraq Resolution*, CNN (Feb. 24, 2003), http://www.cnn.com/2003/WORLD/ meast/02 /24/sprj.irq.wrap/; Provisional S.C. Res. S/2003/215 (Mar. 7, 2003), http://www.casi.org.uk/info/undocs/ scres/2003/20030307dra ft.pdf.
36. For the full transcript of the television address by U.S. President George W. Bush, see *Bush Declares War*, CNN (Mar. 19, 2003), http://www.cnn.com/2003/US/03 /19/sprj.irq.int.bush.transcript/.
37. Alex J. Bellamy, *International Law and the War with Iraq*, 4 MELB. J. INT'L L. 497, 499–500 (2003).

international and domestic courts of law could add a powerful dimension to control the decider.

II. GOVERNMENT-INTERNAL LEGAL ADVICE GUIDING THE CONSTRUCTION OF UN-SYSTEM LAW: THE UNITED KINGDOM'S CASE FOR WAR

Political decision-makers in Her Majesty's Government have traditionally received legal advice on international law from lawyers.[38] The advising function is personified by the Attorney General, who serves as the chief legal counsel to the crown, and ensures that the government acts in accordance with the law.[39] This is particularly important because the Attorney General will generally be consulted in decisions of great import where legal positions are not clear-cut.[40]

A closer study of the legal advice given by Attorney General Lord Peter Goldsmith to British Prime Minister Tony Blair in regard to taking military action against Iraq in 2003 reveals conflict pressures encountered by in-house counsel in the interface of law and politics.[41] Pursuing the questions of how the advising process under the aegis of Lord Goldsmith unfolded and whether the Attorney General modified his legal advice in the wake of political pressuring from the Prime Minister or due to an independent professional evolution in his own legal mind[42] has been greatly facilitated by the work of the Iraq Inquiry under the chairmanship of Sir John Chilcot.[43] Launched in 2009 under the charge to consider how decisions were arrived at and to identify lessons to be learnt from the Second Gulf War,[44] the Inquiry's committee has made available online a host of declassified documents, grouped by department and arranged in a reverse chronological order.[45] Moreover, the record now includes extensive evidence to the Inquiry.[46] These primary sources

38. MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW—CASES AND COMMENTARY 783 (2014).

39. ATTORNEY GENERAL'S OFFICE, THE GOVERNANCE OF BRITAIN: A CONSULTATION ON THE ROLE OF THE ATTORNEY GENERAL 2, 5–6 (2007).

40. *Id*. at 6.

41. *See id*. at 11, 13.

42. *See* JANIS & NOYES, *supra* note 38, at 783–84.

43. *About the Inquiry*, IRAQ INQUIRY, http://www.iraqinquiry.org.uk/about.aspx.

44. *Id.*

45. *Declassified Documents*, IRAQ INQUIRY, http://www.iraqinquiry.org.uk/transcripts/declassified-documents.aspx.

46. *Evidence*, IRAQ INQUIRY, http://www.iraqinquiry.org.uk/transcripts.aspx (last visited June 16, 2016).

include the oral testimony and written statements by Lord Goldsmith[47] as well as original notes, minutes and letters surrounding his legal advice to Prime Minister Blair.[48]

This, of course, supposes that Lord Goldsmith did change his legal stance in the first place. The strongest suggestion for a change in Lord Goldsmith's legal posture is contained in a letter by former Foreign and Commonwealth Deputy Legal Advisor Elizabeth Susan Wilmshurst. Ms. Wilmshurst's letter, written a couple of days before the invasion, gave notice of her departure from the office based on a scathing indictment of the case for war made by Her Majesty's Government.[49] In particular, Ms. Wilmshurst made reference to two shifts in the legal advice given by Lord Goldsmith:

> My views [not agreeing with the proposition that it is lawful to use force without a second Council resolution] accord . . . with what the Attorney General gave us to understand was his view prior to his letter of 7 March. (The view in that letter has of course changed again into what is now the official line.)[50]

This passage had been removed when the letter was first released in pursuance of an open records request, but it was later obtained by a British news channel.[51] The letter diagnosed that, from Ms. Wilmshurst's perspective, Lord Goldsmith's advice took on three markedly different guises: (1) the official posture on the eve of the invasion militating for the lawfulness of the use of force; (2) an intermediate and somewhat more elastic position articulated earlier; and (3) his original position cautioning that military action would be unlawful.[52] The record as such appears to confirm Lord Goldsmith's change of heart over time. But in order to determine whether he massaged his determinations at the government's request, the original source language in the topical documentation covering the time interval

47. *Oral Evidence by Date, Week 8, Jan. 27, 2010, Rt. Hon. Lord Goldsmith Q.C., Attorney General*, IRAQ INQUIRY, http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100127.aspx [hereinafter *2010 Transcript*] (posting the videos of the morning and afternoon sessions as well as 247-page transcript); *Written Evidence by Date, Week 19, Jan. 17, 2011, Statement by Rt. Hon. Lord Goldsmith Q.C., Attorney General*, IRAQ INQUIRY, http://www.iraqinquiry.org.uk/media/50118/lord-goldsmith-statement-to-the-in quiry.pdf [hereinafter *2011 Statement*].

48. *Declassified Documents, Attorney General's Office*, IRAQ INQUIRY, http://www. iraqinquiry.org.uk/transcripts/ declassified-documents.aspx.

49. Letter from Elizabeth Wilmshurst, FCO Deputy Legal Adviser, to Michael Wood, FCO Legal Adviser, Iraq Inquiry (Mar. 18, 2003), http://www.iraqinquiry .org.uk/media/43719/document2010-01-27-100908.pdf (on early retirement/ resignation).

50. *Id.*

51. *Wilmshurst Resignation Letter*, BBC NEWS (Mar. 24, 2005), http://news.bbc.co .uk/2/hi/uk_news/politics/4377605.stm.

52. *See* Letter from Elizabeth Wilmshurst, *supra* note 49, at ¶ 1.

between the advent of the last-chance decision and the unleashing of force must be looked at more closely.

On March 17, 2003, a few days before the invasion, Lord Goldsmith articulated the official line in law within a written public statement responding to a parliamentary question by Baroness Ramsay of Cartvale who inquired about his view in regard to the presence of a sufficient legal basis for the use of force against Iraq.[53] Lord Goldsmith's words were unequivocal, albeit clothed in the terse style of a French précis:

> [T]he authority to use force under [the liberation decision] has revived and so continues today. . . . [A]ll that [the last-chance decision] requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.[54]

However, documents under Lord Goldsmith's signature, which were secret at the time, paint a picture in flux. A few days after the UN Security Council had passed the last-chance decision, the Attorney General advised the offices of the Prime Minister and the Foreign Secretary that despite "Chinese whispers" to the contrary, he was "not at all optimistic" but "in fact pessimistic" that an Iraqi breach of the resolution at some future point in time would, absent a second UN Security Council resolution, justify military action.[55] Consistent with this skeptical posture, Lord Goldsmith set out his provisional views in a draft note, which was passed to Prime Minister Blair on January 14, 2003.[56] The key passage of the note more fully expressed the reasoning behind Lord Goldsmith's view that extant UN Security Council resolutions did not suffice as a legal basis for proceeding with the invasion:

> [M]y opinion is that [the last-chance decision] does not revive the authorization to use of force contained in [the liberation decision] in the absence of a further decision of the Security Council. The

53. H.L. Hansard, *Written Answers* on *Iraq: Legality of Armed Force*, cols. WA2–3 (Mar. 17, 2003), http://www. publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317w01.htm#30317w01_spnew2.

54. *Id.*

55. David Brummel, *Iraq: Note of Telephone Conversation Between the Attorney General and Jonathan Powell*, IRAQ INQUIRY, ¶ 2 (Nov. 11, 2002), http://www.iraqinquiry.org.uk/media/46475/AGO-note-of-Goldsmith-Powell-telecon11November2002.pdf; David Brummel, *Iraq: Note Telephone Conversation Between Foreign Secretary and the Attorney General*, IRAQ INQUIRY, ¶ 2 (Nov. 12, 2002), http://www.iraqinquiry.org.uk/media/43505/doc_2010_01_ 26_11_03_33_493.pdf.

56. *See generally* Lord Goldsmith, *Iraq: Interpretation of Resolution 1441*, IRAQ INQUIRY (Jan. 14, 2003), http://www.iraqinquiry.org.uk/media/46493/Goldsmith-draft-advice-14January2003.pdf.

> difference between this view of the resolution and the approach which argues that no further decision is required is narrow, but key.[57]

In his terse note, Lord Goldsmith did not reject the revival argument as such, but insisted that revival in the Iraq situation required a fresh authorization from the UN Security Council. He thus leaned toward the view generally prevailing in the United Kingdom, namely that, in light of its exceptional character, the use of force must have a positive and express power base in international law.[58] However, Lord Goldsmith's legal position clashed with Prime Minister Blair's dual commitment of standing shoulder to shoulder with President Bush,[59] while giving the public the assurance that any action would only be taken in accordance with international law.[60]

Switching into listening mode over the next few weeks, Lord Goldsmith met with Foreign Secretary Jack Straw and Sir Jeremy Greenstock, the British Ambassador to the UN, to learn more about the negotiating and drafting history of the last-chance decision.[61] Moreover, he took the opportunity to hear out the views of his U.S. counterparts.[62] His endeavors were all about bringing to light the best arguments as to why a further UN Security Council decision was unnecessary.[63]

In the next phase, Lord Goldsmith's view started to shift. On January 30, 2003, he addressed a short minute to Prime Minister Blair.[64] In his dense one-pager, he advised:

> You should be aware that, notwithstanding the additional arguments put to me since our last discussion, I remain of the view that the correct legal interpretation of [the last-chance decision] is that it does not authorise the use of military force without a further determination

57. *Id.* at ¶ 13.

58. *See* Cathy Adams, *Iraq: Meeting with David Manning*, IRAQ INQUIRY, ¶ 4 (Oct. 14, 2002) [hereinafter Adams Meeting], http://www.iraqinquiry.org.uk/media/52459/adams-goldsmith-meeting-manning-2002-10-14.pdf.

59. *See* Richard Norton-Taylor, *Blair-Bush Deal before Iraq War Revealed in Secret Memo*, GUARDIAN (Feb. 2, 2006, 8:27 PM), http://www.theguardian.com/world/2006/feb/ 03/iraq.usa.

60. *See* Adams Meeting, *supra* note 58.

61. JANIS & NOYES, *supra* note 38, at 783.

62. *Id.*

63. Letter from Cathy Adams, Legal Secretariat to the Law Officers, Attorney General's Chambers, to Sir David Manning, UK Foreign Policy Advisor, *Iraq*, ¶¶ 1–6 (Jan. 28, 2003), http://www.iraqinquiry.org.uk/media/52 462/adams-manning-iraq-2003-01-28.pdf.

64. *See generally* Lord Goldsmith, *Note to Prime Minister on Iraq*, IRAQ INQUIRY (Jan. 30, 2003) [hereinafter Goldsmith Note to PM], http://www.iraqinquiry.org.uk/media/46496/Goldsmith-note-to-PM-30January2003.pdf.

> by the Security Council . . . . But having considered the arguments on both sides, my view remains that a further decision is required.[65]

In a somewhat admonishing tone, Lord Goldsmith still adhered to what he described as the "correct" view, that, absent a fresh UN Security Council decision, the use of force was not authorized.[66] Barely a fortnight later, Lord Goldsmith offered his pre-final draft advice, along with his legal interpretation of the last-chance decision.[67] At this stage of the advising process, he inserted a surprise of sorts.

After an in-depth discussion identifying and weighing both sides of the argument as to what action the UN Security Council would be required to take when receiving a report that Iraq was in breach of the last-chance decision,[68] Lord Goldsmith concluded that the language of the instrument was not clear and that the statements made when the resolution was adopted suggested a divergence of views among members of the UN Security Council.[69] In this light, he recommended "as the safest legal course" to secure the passage of a further UN Security Council decision authorizing the use of force.[70] Lord Goldsmith's memorandum could have continued here with the paragraph describing the kind of public defense that needed to be advanced by Her Majesty's Government were action taken without another UN Security Council decision.[71] Rather than proceeding in this fashion, Lord Goldsmith's draft advice offered the following key paragraph:

> Nevertheless, having regard to the arguments of our co-sponsors which I heard in Washington, I am prepared to accept that a reasonable case can be made that [the last-chance decision] revives the authorization to use force in [the liberation decision] . . . (Indeed, it seems to me that the case for the legality of military action now without a further resolution is rather stronger than it was [in relation to Operation Desert Fox] in December 1998 . . .).[72]

The sheer presence of this one paragraph marked a turning point in the advising process. Here, Lord Goldsmith started to signal a different

65. *Id.* at ¶ 4.

66. *See id.*

67. *See generally* Lord Goldsmith, *Draft Advice to Prime Minister on Iraq: Interpretation of Resolution 1441*, IRAQ INQUIRY (Feb. 12, 2003) [hereinafter Goldsmith Draft Advice], http://www.iraqinquiry.org.uk/media/46490/Goldsmith-draft-advice-12February2003.pdf.

68. *See id.* at ¶¶ 9–11.

69. *Id.* at ¶ 12.

70. *Id.*

71. *Id.* at ¶ 14.

72. *Id.* at ¶ 13. On the PDF file made available by Iraq Inquiry, the bracketed sentence starting with "Indeed" and ending with "1205" is crossed by three diagonal lines drawn by hand. *Id.*

posture in law, albeit still somewhat cautious in form and contours. Deploying the conjunctive adverb "nevertheless"[73] at the start of this passage, Lord Goldsmith prefaced his remarkable concession. He relinquished his previous position "I remain of the view that the correct legal interpretation"[74] in favor of "I am prepared to accept that a reasonable case can be made."[75] In the context of the Iraq situation, the reasonable case pertained to the argument that the last-chance decision itself revived the use-of-force authorization contained in the liberation decision. However, beyond the reference to Operation Desert Fox,[76] Lord Goldsmith did not expand on where the notion of a reasonable case came from and what exactly it stood for.

Finally, five weeks later, in a legal memorandum of 35 paragraphs on 13 pages addressed to Prime Minister Blair and dated March 7, 2003, Lord Goldsmith completed his pivot.[77] Explaining the operations of the revival argument, which had been touched upon in the draft, took up the bulk of the memorandum.[78] At the outset, Lord Goldsmith determined that in principle, the revival argument had a sound legal basis in international law.[79] He then addressed the legal considerations surrounding the question of the self-sufficiency of the last-chance decision itself as a trigger of revival[80] in the light of two competing propositions—whether the use-of-force authorization remained if the UN Security Council had a discussion but did not reach a conclusion,[81] or whether nothing short of a further UN Security Council decision accomplished revival.[82] After subjecting the two interpretation alternatives to an extensive discussion, which included a review of the textual choices made in the last-chance decision and the drafting history of the last-chance decision,[83] Lord Goldsmith summarized his core

73. *See* MARTHA KOLLN & ROBERT FUNK, UNDERSTANDING ENGLISH GRAMMAR 295 (2006).

74. Goldsmith Note to PM, *supra* note 64, at ¶ 4.

75. Goldsmith Draft Advice, *supra* note 67, at ¶ 13.

76. *See, e.g.*, Anthony H. Cordesman, *The Lessons of Desert Fox: A Preliminary Analysis*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Feb. 16, 1999), http://csis.org/files/media/csis/pubs/dflessons21599.pdf (discussing the four-day bombing campaign conducted by the United States and the United Kingdom to degrade Iraqi capabilities in the wake of what both countries considered Iraq's failures to comply with UN-system law and its cat-and-mouse game with UN weapons inspectors).

77. *See generally* Lord Goldsmith, *Final Advice to Prime Minister on Iraq: Interpretation of Resolution 1441*, GUARDIAN (Mar. 7, 2003) [hereinafter Goldsmith Final Advice], http://image.guardian.co.uk/sysfiles/Guardian/ documents/2005/04/28/legal.pdf.

78. *See id.* at ¶¶ 7–25.

79. *See id.* at ¶¶ 7–11.

80. *See id.* at ¶¶ 12–25.

81. *See id.* at ¶¶ 14–15.

82. *See id.* at ¶¶ 14, 16.

83. *See id.* at ¶¶ 17–25.

conclusions and professional advice in bold print.[84] In this portion of the document, he expended more language covering the notion of a "reasonable case." In addition to embracing the arguments advanced by the U.S. administration, Lord Goldsmith was further persuaded by precedents of military action on the authority of advice from his predecessors in instances where the use of force was "no more than reasonably arguable."[85] Lord Goldsmith then hastened to countenance:

> But a 'reasonable case' does not mean that if the matter ever came before a court I would be confident that the court would agree with this view. I judge that, having regard to the arguments on both sides, and considering the [last-chance decision] as a whole in the light of the statements made on adoption and subsequently, a court might well conclude that [its key operative paragraphs] do require a further Council decision in order to revive the authorisation in [the liberation decision]. But equally I consider that the counter view can be reasonably maintained. However, it must be recognized that on previous occasions when military action was taken on the basis of a reasonably arguable case, the degree of public and Parliamentary scrutiny of the legal issue was nothing like as great as it is today.[86]

In comparison to his draft advice, which he may or may not have been penned himself,[87] Lord Goldsmith's final memorandum more fully advanced his shift of opinion in favor of a reasonable case posture. Facially, however, he still stopped short of stating that the presence of a reasonable case was enough for the government to go ahead with the invasion even absent a fresh UN Security Council authorization.

Lord Goldsmith's final internal articulation of his new position did not arrive by way of an addendum or codicil to the final advice memorandum under his own signature, but was recorded by his legal secretary, David Brummel, in a discussion note, dated March 13, 2003.[88] This legal position was dubbed the "better view."[89] In substance, it affirmed that the revival argument was legally sound and that the conditions for its operations were met in the case of Iraq.[90] The note expended much effort to assure a normalcy in the evolution and formulation of Lord Goldsmith's legal advice. Lord Goldsmith

84. *See id*. at ¶¶ 26–31.
85. *See id*. at ¶ 30.
86. *Id*.
87. *2010 Transcript*, *supra* note 47, at 125 ("I'm not sure I drafted it.").
88. *See generally* David Brummel, *Note about a Discussion with the Attorney General on Iraq: the Legal Basis for Use of Force*, IRAQ INQUIRY (Mar. 13, 2003) [hereinafter Brummel Note], http://www.iraqinquiry.org.uk/media/43716/document2010-01-27-100801.pdf.
89. *Id.* at ¶¶ 2, 4, 7, Further Note.
90. *Id.* at ¶¶ 1–2.

continued to give the revival argument additional consideration and further reflection in light of his own study of additional materials and in response to input from within the Her Majesty's Government and the U.S. Administration.[91] He also found his modified view, which he had reached "earlier in the week," perfectly reconcilable with his earlier final advice memorandum to the Prime Minister as that document was meant to elucidate the competing arguments.[92] Another four days after Mr. Brummel had logged the conversation, Lord Goldsmith's legal position went public on March 17, 2003, by being deployed, as endeavored, first in Parliament and then in the cabinet.[93]

Considering the evolution of the advising process over time, there is nothing extraordinary about a lawyer changing his mind over a legal position. Yet, the allegations that Lord Goldsmith was bullied throughout his involvement as legal advisor in the decision process, gagged, excluded, and pinned to the wall have persisted.[94] When giving his oral testimony to the Iraq Inquiry, he endeavored to fill some of the holes with regard to his role and input in the decision process, especially in terms of his personal integrity and professional judgment throughout.[95] He assured that, above all, "what [he] was anxious to do . . . was to reach a correct legal view."[96] Notwithstanding his own personal preferences, Lord Goldsmith did express regrets about not having had much of a voice in the cabinet meetings on the Iraq situation, the negotiations over the last-chance decision, and the formulation of the post-adoption statements, especially since he had never received a formal instruction to advise from his client—Prime Minister Blair.[97] Lord Goldsmith insisted that once prompted into an advising mode a professional legal adviser was bound to speak truth to power.[98] Indeed, he had gone on record to protect the propriety of the legal advising process within Her Majesty's Government in relation to military action against Iraq. In a somewhat caustic note to Foreign Secretary Straw, which was drafted at the time when his own position moved from being skeptical of to endorsing the lawfulness of military action without a further UN Security Council decision, Lord Goldsmith made a strongly worded case for allowing the law officers in the government to discharge their role in a milieu of

91. *See id.* at ¶¶ 1–2, 5.
92. *Id.* at ¶ 7.
93. *See id.* at ¶ 8.
94. *See, e.g.*, Simon Walters, *Iraq Inquiry Bombshell: Secret Letter to Reveal New Blair War Lies*, DAILY MAIL (Nov. 29, 2009, 8:48 PM), http://www.dailymail.co.uk/news/article-1231746/Secret-letter-reveal-new-Blair-war-lies.html.
95. *See 2010 Transcript*, *supra* note 47, at 245.
96. *Id.* at 27.
97. *See id.* at 16, 26, 28, 36, 67, 102.
98. *Id.* at 93–94.

independence, objectivity, and impartiality.[99] He also drew the attention to avenues and mechanisms available to a minister when disagreeing with an advisor, that is, principally, to seek an opinion from the law officers.[100] Earlier, Mr. Straw had chided Foreign and Commonwealth Legal Advisor Michael Wood for not offering more nuanced advice on the Iraq situation as an alternative to the view that it would be unlawful to proceed with the military action.[101]

Years later, in his oral and written evidence to the Iraq Inquiry, Lord Goldsmith shed further light on the notion of a reasonable case in general and its significance in the Iraq situation. He explained that the test for a reasonable, or respectable, case was one "that you would be content to argue in court with a reasonable prospect of success."[102] Lord Goldsmith further advised that, in light of precedent established in previous cases, the presence of a reasonably arguable case constituted a basis for his green light to proceed with military action.[103] Recalling that he was satisfied that there was a reasonable case at the time when his draft advice was prepared,[104] Lord Goldsmith noted that, after he had given his final advice, he spoke of the "better" view as such in response to a specific request for clarity by the civil service and the armed forces.[105] Moreover, he made very clear that, from his advising perspective, indeterminacy was not an option.[106] Therefore, he actually had to come down on one side of the argument[107] and make a determination.[108] According to Lord Goldsmith, the law was in the last-chance decision and the professional advisor then had to distill what it was and what it required.[109] For this purpose, he used a test querying "[w]hich side of the argument would you prefer to be on[.]"[110] One of the central decision clinchers for him was tied to the American red line, which was all about not being locked into what the U.S. Administration

99. Lord Goldsmith, *Minute to Foreign Secretary re: Legal Advice and Law Officers*, IRAQ INQUIRY, ¶ 2 (Feb. 3, 2003), http://www.iraqinquiry.org.uk/media/43514/doc_2010_01_26_11_04_38_615.pdf.

100. *Id.* at ¶ 3.

101. Jack Straw, *Note from Foreign Secretary Jack Straw to Michael Wood (FCO Legal Advisor) re: Iraq: Legal Basis for Use of Force*, IRAQ INQUIRY (Jan. 29, 2003), http://www.iraqinquiry.org.uk/media/43511/doc_2010_01_26_11_04_18_456.pdf.

102. *2010 Transcript*, *supra* note 47, at 97–98; *2011 Statement*, *supra* note 47, at 12–14.

103. *2010 Transcript*, *supra* note 47, at 125, 174.

104. *Id.* at 125.

105. *Id.* at 184–187.

106. *Id.* at 171, 43–44.

107. *Id.* at 171.

108. *Id.* at 43–44.

109. *See 2011 Statement*, *supra* note 47, at 12–13.

110. *2010 Transcript*, *supra* note 47, at 118.

and its legal team sought to avoid in the first place—a further decision beyond a mere discussion in the UN Security Council.[111] In that context, Lord Goldsmith emphasized, the Americans succeeded in protecting their position in the text of the last-chance resolution, an outcome which the French were on record for having known at the time.[112]

In view of the criticism in the public space, Lord Goldsmith suggested that his role and input, as it evolved, was consistent with established procedure, practice, and precedent.[113] He did however counsel that the decision process within Her Majesty's Government could have benefited from "a degree of formality and structure in the way [the country] gets to a decision"[114] as well as "elements of planning from the legal side . . . at an earlier stage."[115]

Finally, while in office and after his departure, Lord Goldsmith made very clear that he advised from the vantage point of a wig-and-gown barrister[116] keen on staving off potential challenges in court. Aside from deploying a pleadings style in his oral and written communications, Lord Goldsmith's central rationale for the legality of the invasion—the presence of a reasonably arguable case for action—was predicated on how it could and would stand up in court if challenged.[117] In this light, the next section explores how the legality of military action in Iraq without a further UN Security Council authorization became or could have become the subject of judicial review proceedings.

III. THE ROLE OF JUDICIAL REVIEW IN CONTROLLING THE CONSTRUCTION OF UN-SYSTEM LAW BY ADVISERS AND DECIDERS: PROCEEDINGS IN COURTS OF LAW

Lord Goldsmith himself broached the theme of judicial review in his final advice memorandum when he described the possible consequences of action without a second resolution on the basis of a reasonably arguable case.[118] He noted that those interested "[in getting] a case of some sort off the ground," domestically or internationally, could have availed themselves of a number of very different possibilities in court, some more remote than others.[119]

111. *Id.* at 87, 111, 114, 126–128, 241.
112. *Id.* at 48.
113. *See id.* at 244–46.
114. *Id.* at 244–45
115. *Id.* at 245.
116. *Id.* at 55–56.
117. *2011 Statement*, *supra* note 47, at 12; *2010 Transcript*, *supra* note 47, at 97–98; Goldsmith Final Advice, *supra* note 77, at ¶ 32.
118. Goldsmith Final Advice, *supra* note 77, at ¶¶ 32–35.
119. *Id.* at ¶¶ 32, 35.

A. The Domestic Plane

Lawsuits arising from the Iraq situation were seen through in the United Kingdom,[120] the Republic of Costa Rica,[121] and the Federal Republic of Germany.[122] Each reflects a particular judicial review model and culture.

A closer look at these cases yields two parameters, which can have a powerful impact on whether or not the construction of UN-system law by the executive branch is reviewed in courts of law. First, legal systems vary with regard to the significance of a political question doctrine—a preliminary filter allowing the courts to sidestep highly political or heavily politicized matters. Second, legal systems differ in how they position international law in their municipal legal orders. Choices made in this regard are either monist or dualist. After introducing the three cases, both parameters will be discussed through the prisms of their doctrinal frameworks and practical operations in each case.

1. Case Studies: United Kingdom, Costa Rica, and Germany

UN-system law in the Iraq situation came before municipal courts in three countries. The following passages offer a brief synopsis of each case.

a. The British Case: Interpretation of Meaning and Effects of the Last-Chance Decision Foreclosed by Justiciability Doctrines

In the late autumn of 2002, soon after the last-chance decision had been adopted, the question of how to construe the meaning and effects of the topical UN-system law was tested in a court of law. The Campaign for Nuclear Disarmament (CND), a British not-for-profit anti-war protest organization,[123] initiated proceedings against Prime Minister Tony Blair, Foreign Secretary Jack Straw and Defense Secretary Geoff Hoon in the

120. *See* Campaign for Nuclear Disarmament v. The Prime Minister of the United Kingdom, the Secretary of State for Foreign and Commonwealth Affairs and The Secretary of State for Defence Advisory declaration [2002] EWHC 2777 (Admin) (QBD) (UK).

121. Sala Constitucional de la Corte Suprema de Justicia, Res. No. 2004-09992, Dkt. No. 03-004485-0007-CO (Costa Rica Sept. 8, 2004, 2:31 PM), http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20Politica/Sentencias/2004/04-09992.htm.

122. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 21, 2005, 2 WD 12.04 (21), http://www.bverwg.de/entscheidungen/pdf/210605U2WD12.04.0.pdf.

123. For its strategic objectives and policies, see *About CND*, CAMPAIGN FOR NUCLEAR DISARMAMENT (June 15, 2016, 9:10 PM), http://www.cnduk.org/about/aims-a-policies. *See also* PAUL BYRNE, THE CAMPAIGN FOR NUCLEAR DISARMAMENT (1988).

Administrative Court[124]—a specialist court within the Queen's Bench Division of the High Court of Justice of England and Wales, which, through the procedure of judicial review, exercises supervisory jurisdiction over persons discharging a public law function.[125]

CND asked the Administrative Court for a declaration determining the meaning of the last-chance decision and more specifically, whether, absent a fresh UN Security Council decision, the last-chance decision authorized UN members to take military action if Iraq found itself in breach of its terms.[126] Because no actual decision amenable to a challenge existed at the time, CND only sought advisory relief.[127] CND asserted that the peremptory norm of customary international law prohibiting the unlawful use of force was part of English common law; hence the court's conventional common law supervisory jurisdiction was triggered.[128] CND argued that their case on the true construction of UN-system law, which they insisted was one in law and not about policy considerations, factual disputes, or international developments, was not merely arguable but strong.[129] This, according to CND, was especially due to the great public interest in ensuring that the government would know what the law actually was so that it did not use military action in the mistaken belief that it was lawful to do so when it was not.[130]

Her Majesty's Government countered that the relief sought by CND was detrimental to the national interest of the United Kingdom. A decision in favor of CND would prematurely forecast, disclose, and freeze in place a chiseled legal position of the executive, whilst its conduct of international affairs in general and diplomatic negotiations at the UN required unencumbered adaptability and agility.[131]

Ultimately, CND's application did not survive the preliminary stage, which had been limited to issues of justiciability, prematurity, and standing.[132] The three judges ruled that they had no power to declare the true interpretation of the last-chance decision. Describing CND's request as a "novel and ambitious claim"[133] the Administrative Court dismissed the application as non-justiciable based on two reasons.[134] First, the

124. *Campaign for Nuclear Disarmament*, [2002] EWHC 2777.

125. *Royal Courts of Justice and Rolls Building Courts, Administrative Court*, MINISTRY OF JUSTICE, (June 15, 2016, 9:10 PM), http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court.

126. *The Campaign for Nuclear Disarmament*, [2002] EWHC 2777, at ¶ [2].

127. *Id.*

128. *Id*. at ¶ [17]

129. *Id*. at ¶ [10].

130. *Id*. at ¶ ¶ [11]–[13].

131. *Id*. at ¶ ¶ [5], [7].

132. *Id*. at ¶ [7].

133. *Id*. at ¶ [2].

134. *Id*. at ¶ [47].

court had no jurisdiction to interpret UN-system law, which, unlike customary international law, did not form part of English common law and operated solely on the international plane, without any foothold in domestic law in terms of construing a person's right and duties under English law.[135] Second, the court needed to abstain, as a matter of discretion or as a matter of jurisdiction, from determining the question because a ruling would tie the government's hands in its negotiations with other countries and thereby damage the public interest in the fields of national security, defense, and international affairs and relations.[136]

b. The Costa Rican Case: Foreign Policy Communiqué in Support of the Coalition Annulled by Constitutional Guardian for Infringing UN-System Law

In Costa Rica, the construction of UN-system law with regard to the Iraq situation took center stage in the spring of 2003. Luis Roberto Zamora Bolaños and others, in their personal capacities and as representatives of various professional and advocacy organizations, instituted actions of unconstitutionality (*acciónes de inconstitucionalidad*) in the Constitutional Chamber of the Supreme Court of the Republic of Costa Rica (*Sala Constitucional de la Corte Suprema de Justicia de la República de Costa Rica*).[137] They challenged the Foreign Policy Communiqué of March 19, 2003, signed by President Abel Pacheco de la Espriella and Minister of Foreign Relations and Worship Roberto Tovar Faja, which, along with other pronouncements, not only gave expression of Costa Rica's support of the U.S.-led international alliance in the fight against terror but also explained Costa Rica's appearance on the White House's web-based list of countries ostensibly committed to the anti-terror cause.[138] The complaints asserted that the support by Costa Rica's executive for the military operations in Iraq amounted to a complete disrespect for the engagement of the UN Security Council in the process of finding a solution to the conflict, and hence negated the very objectives pursued by the international community through the creation of the UN.[139] According to the

135. *Id*. at ¶ ¶ [47], [23], [36]–[40].

136. *Campaign for Nuclear Disarmament*, [2002] EWHC 2777, at ¶ ¶ [41]–[43], [47].

137. *See* Lisbeth Zamora Bolaños, *Roberto Zamora Bolaños: Presidente Debería Llevarsea la Corte de la Haya*, SEMINARIO UNIVERSIDAD (Sept. 16, 2004), http://semanariouniversidad.ucr.cr/universitarias/roberto-zamora-bolaos-presidente-debera-llevarse-a-la-corte-de-la-haya/.

138. *See id.*

139. Sala Constitucional de la Corte Suprema de Justicia, Res. No. 2004-09992, Dkt. No. 03-004485-0007-CO, Resultando ¶ 2 (Costa Rica Sept. 8, 2004, 2:31 PM),

petitioners, not only did the UN Charter provide for a mechanism, through the UN Security Council, to authorize the use of force in general; more specifically, the Iraq situation was the subject of a UN Security Council resolution, the last-chance decision, which had been endorsed but subsequently and inexplicably left aside by Costa Rica's executive.[140] The Government of Costa Rica countered that there was no infringement of the last-chance decision, because the resolution covered actions similar to the one taken by the State of Costa Rica; it simply demanded compliance with UN-system law.[141]

By a unanimous vote of its seven magistrates, the Constitutional Chamber sided with the petitioners and annulled the Communiqué for infringing Costa Rica's Political Constitution and UN-system law.[142] After deducing the capacity of the value of peace to serve as a constitutional parameter validly equipped to confront and adjudge the acts of public authorities in general and the executive branch in particular,[143] the court emphasized that Costa Rica's pacifist tradition required adherence to the international system under the auspices of the UN, which had been designed to replace the use of force as a national instrument of policy and international relations.[144] Therefore, UN-system law had to be considered incorporated into the domestic fabric as a controlling limit applicable to the actions of Costa Rican authorities.[145] More specifically, UN-system law restricted their radius in the field of international relations, which made it impossible for the government to associate its foreign policy, even by way of mere moral support, with military activities outside or even in parallel with the system of the UN as a means of conflict resolution.[146] Consequently, the court rejected the argument of the Government of Costa Rica that review of support for military action was not within the purview of the courts without a declaration as to the lawfulness or unlawfulness of armed operations in Iraq.[147] The court found the question to be much narrower.

Costa Rica's adhesion to the international system of the UN prohibits any manifestation suggestive of force outside or even on the fringes of the procedures and processes established by that system.[148]

http://sitios.poderjudicial.go.cr/salaconstitucional/Constitucion%20Politica/Sentencias/2004/04-09992.htm.

140. *Id.* at ¶ 3.
141. *Id.* at ¶ 5.
142. *Id.* at Portanto.
143. *Id.* at Considerando ¶ VI.
144. *Id.* at ¶ X.
145. *Id.*
146. *Id.*
147. *Id.*at ¶ XI.
148. *Id.*

Therefore, declaring the armed conflict lawful or unlawful was of no material relevance whatsoever, when from the Costa Rican perspective it was incorrect, constitutionally speaking, to support the use of force outside the action framework of the UN.[149] After finding that the actions in Iraq undertaken by the Coalition of the Willing were clearly not covered by UN-system law, the Constitutional Chamber determined that the challenged acts and pronouncements of the executive power clearly manifested its support inasmuch for the objectives of the coalition as for the means in pursuance thereof, without any hint that the solidarity extended only to fighting terror and spreading peace, liberty, and democracy in Iraq.[150] Hence, the Communiqué and other pronouncements of the executive in moral support of the Coalition of the Willing had to fall.[151]

c. The German Case: Incidental Review of UN-System Law in the Context of a Soldier's Refusal to Obey Orders

In the German case, the question of whether the military action against Iraq was covered by extant UN-system law arose in the course of disciplinary proceedings against Major Florian Pfaff. When instructed to participate in the development of a military software program, Major Pfaff had informed his superiors of his decision not to obey any army orders that, carried out, would make him complicit in what he considered Germany's unlawful contributions to an illegal war of aggression against Iraq.[152] After Major Pfaff was found guilty of service malfeasance (*Dienstvergehen*) and demoted in rank to captain with a court martial, the decision was appealed to the Second Senate for Military Service (*Zweiter Wehrdienstsenat*) of the Federal Supreme Administrative Court (*Bundesverwaltungsgericht*).[153]

The Second Senate for Military Service overturned the decision of the court martial and gave the soldier a full acquittal.[154] According to the court, the solder did not commit a service malfeasance because he was not disobedient in regards to his official duty of service and because he did not otherwise breach his duties under the Law on Soldiers (*Soldatengesetz*).[155] The court offered its legal opinion relative to the

149. Sala Constitucional, Res. No. 2004-09992, at Considerando ¶ XI.
150. *Id.* at ¶ IX.
151. *Id.* at ¶ XI.
152. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 21, 2005, 2 WD 12.04 (5, 15–23), http://www.bverwg.de/entscheidungen/pdf/210605U2WD 12.04.0.pdf.
153. *Id.* (5–9).
154. *Id.* (1, 11, 125–26).
155. *Id.* (25).

military combat operations in Iraq under UN-system law when analyzing whether the order subject to the proceedings was to be deemed non-binding because it violated the soldier's freedom of conscience.[156] According to the court, Major Pfaff took his decision of conscience in the context of the war against Iraq by the Coalition of the Willing, which was ongoing when the opinion was issued.[157] The court then determined that this war exhibited "grave concerns under international law" (*schwere völkerrechtliche Bedenken*), which stemmed from the absence of a justification under UN-system law.[158]

After finding a prima facie violation of the prohibition on the use of force by the Coalition of the Willing, the Second Senate for Military Service ticked through the liberation, cease-fire, and last-chance decisions.[159] It held that the liberation decision had expired because its objectives had been accomplished in 1990/91, after Iraq was ejected from Kuwait, and therefore it could not authorize the use of force more than a decade later.[160] Next, the cease-fire decision could not authorize the use of force for the following three reasons: (1) the pre-conditions for the cease-fire had been met when Iraq consented in writing to fully comply with its contents; (2) the cease-fire was never formally rescinded; and (3) the UN Security Council had reserved the right to decide upon further steps.[161] Zeroing-in on the last-chance decision, the court distilled several reasons why it did not furnish a valid authorization either.[162] In that instrument, according to the court, the UN Security Council had left open how it would decide if Iraq had been reported in breach of the demands and inspection regime imposed on it.[163] Furthermore, it had not elaborated upon the meaning of its warning to Iraq of facing "serious consequences."[164] Also, the UN Security Council had explicitly decided to remain seized of the matter, which the court interpreted as meaning that the UN Security Council did not want to leave the decision-making to others or to approve or otherwise legitimize the use of force sought by the Coalition of the Willing.[165] If the UN Security Council had intended to authorize the use of force, the court added, it would have needed to say so textually.[166] Hence, the absence of

156. *Id.* (28–46).
157. *Id.*
158. *Id.* (71, 72–80).
159. *Id.* (73–77).
160. *Id.* (73–74).
161. *Id.* (74–75).
162. 2 WD 12.04 (76–77).
163. *Id.* (76).
164. *Id.*
165. *Id.* (76–77).
166. *Id.* (77).

a definition of serious consequences precluded a finding of a sufficient basis for authorization.[167] The court further rejected the assertion that the United States and the United Kingdom would not have voted for the final version of the last-chance decision that did not contain the desired use-of-force authorization.[168] According to the court, any actual or purported mental reservations on the part of the representatives from the United States and the United Kingdom had to be immaterial since the text did not even mention the word "authorization."[169] The court explained that this was the reason why the United States, the United Kingdom, and Spain attempted to codify a positive and explicit authorization in a subsequent resolution, albeit unsuccessfully.[170]

The Second Senate for Military Service found that the soldier embraced these grave concerns under international law with regard to both the Iraq war[171] as well as Germany's contributions as a launch pad and logistics hub in support of the military operations in Iraq, which triggered in him a severe moral conflict.[172] In this regard, the court did not deem it necessary that his participation in the software project supported and sustained the war effort.[173] Rather, a serious possibility of such an outcome and his fear of making himself complicit were enough to justify a severe strain on his conscience.[174] Therefore, when commissioned as a recruit and professional soldier he did not have to take into account that Germany might engage in contributions causing grave concerns under international law and that his service might be a part thereof.[175] The court was fully persuaded in light of the record that the decision of conscience by the soldier was taken in view of his ethical compass and that the condition of his state of mind was so serious, deep, and compelling as to impede him from carrying out his orders without a severe moral conflict.[176]

2. First Parameter: Political Question Doctrines

According to the classical test developed by the U.S. Supreme Court, the political question doctrine is triggered when a court, in the process of querying whether it is seized of a matter, deems the political

167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* (77).
171. *Id.* (71, 72–80).
172. 2 WD 12.04 (71, 80–100).
173. *Id.* (71–72, 94–99).
174. *Id.* (71, 98–99).
175. *Id.* (99).
176. *Id.* (99–105).

system of accountability to be the best mechanism for resolving an issue when one of the following six factors is met:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[177]

When called to adjudge certain strategic decisions taken by the executive power, British courts regularly test the analogue to the American political question doctrine in the preliminary threshold stage of justiciability.[178] In the Iraq opinion from the United Kingdom, the Administrative Court gives full expression of the doctrine. Beyond affirming the existence of sensitive, no-go, or forbidden areas of executive action, it firmly declines "to embark upon the determination of an issue if to do so would be damaging to the public interest [and embarrassing to the government] in the field of international relations, national security or defence."[179]

In Costa Rica, the political question doctrine (*doctrina de la cuestión política*) exhibits a mixed record in the recent history of constitutional jurisprudence.[180] It may even be on the retreat.[181] In contrast to the British court's deferential posture of staying out of government decisions in the political and diplomatic space such as that

177. Baker v. Carr, 369 U.S. 186, 217 (1962).

178. David Jenkins, *Judicial Review Under a British War Powers Act*, 43 VAND. J. TRANSNAT'L L. 611 (2010) (undertaking a comparative analysis of how U.S. courts apply the political question doctrine in war powers cases and how British courts might exercise review under a hypothetical British "war powers act").

179. Campaign for Nuclear Disarmament v. The Prime Minister of the United Kingdom, the Secretary of State for Foreign and Commonwealth Affairs and The Secretary of State for Defence Advisory declaration [2002] EWHC 2777 ¶ [47] (Admin) (QBD) (UK).

180. Dante Figueroa, *La Doctrina Estadounidense de la Cuestión Política: Etiología, Axiología, y Perspectivas para Latinoamérica*, IX IUSDOCTRINA, Law Review of the University of Costa Rica's Law School 8 (2013), http://revistas.ucr.ac.cr/index.php /iusdoctrina/article/view/13564/12852 (observing that, in its recent history, Costa Rica exhibits mixed approximations to the Political Question Doctrine).

181. Pedro Nestor Sagüés, *Constitución y Sociedad: La Revisión de las Cuestiónes Políticas No Justiciables (A Propósito de la "Coalición" contra Saddam Hussein)*, Año XIII N° 13 PENSAMIENTO CONSTITUCIONAL 73, 93 (2008) (diagnosing that the doctrine, which has political and pragmatic origins, has evolved over time and tends to dissipate in Costa Rica).

of going to war, the Iraq decision by the Constitutional Chamber[182] showcases active judicial intervention by a special court[183] entrusted with exercising completely concentrated judicial review.[184] Generous conceptions of standing facilitate access to the Constitutional Chamber for almost anyone—without the need for an actual case or a factual basis—as long as the petition invokes a collective interest in judicial intervention.[185] The Iraq decision of the court does not mention justiciability or separation of powers. Rather, by embracing the process of constitutional "judicialization" (*judicialización*) fully from the perspective of its institutional raison d'être and design,[186] the court's control of the executive branch is not hindered by these doctrines because the sheer force of the parameter of peace, which springs from a living organism of constitutional values (*constitución viva*),[187] permeates all facets of political life. This allows the court, when scrutinizing the Costa Rican Government's support activities against the constitutional measuring stick of peace, to squarely decide that they cross the line into the constitutionally impermissible, even if the goals as such might be laudable. Still, it remains uncertain how and when the Government of Costa Rica could have better conveyed that its solidarity operated exclusively vis-à-vis the goals pursued by the coalition.

182. Robert S. Barker, *Constitutional Justice and the Separation of Powers: The Case of Costa Rica—A Translation into English of an Article by Justice Luis Fernando Solano Carrera*, 47 DUQ. L. REV. 871, 895–99 (2009); Fernando Cruz Castro, *Costa Rica's Constitutional Jurisprudence, Its Political Importance and International Human Rights Law: Examination of Some Decisions*, 45 DUQ. L. REV. 557, 570–73; Robert S. Barker, *Stability, Activism and Tradition: The Jurisprudence of Costa Rica's Constitutional Chamber*, 45 DUQ. L. REV. 523, 543–46 (2007).

183. Massimo Iovane, *Domestic Courts Should Embrace Sound Interpretive Strategies in the Development of Human Rights-Oriented International Law*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 622 (Antonio Cassese ed., 2012).

184. *See, e.g.*, Violaine Autheman, *Global Lessons Learned: Constitutional Courts, Judicial Independence and the Rule of Law* 3–4 (IFES Rule of Law White Paper Series, Keith Henderson ed., 2004), http://pdf.usaid.gov/pdf_ docs/PBAAB592.pdf.

185. Rep. of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox 9, U.N. Doc. A/HRC/25/53/Add.1, at 9, ¶ 27 (Apr. 8, 2014).

186. For descriptions of the history, design, and jurisprudence of the Constitutional Chamber, see, for example, Bruce M. Wilson, *Constitutional Rights in the Age of Assertive Superior Courts: An Evaluation of Costa Rica's Constitutional Chamber of the Supreme Court*, 48 WILLAMETTE L. REV. 451 (2012); Bruce M. Wilson, *Enforcing Rights and Exercising an Accountability Function: Costa Rica's Constitutional Chamber of the Supreme Court*, *in* COURTS IN LATIN AMERICA 55 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

187. Sala Constitucional de la Corte Suprema de Justicia, Res. No. 2004-09992, Dkt. No. 03-004485-0007-CO, Considerando ¶ IV (Costa Rica Sept. 8, 2004, 2:31 PM), http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20 Politica/Sentencias/2004/04-09992.htm.

In Germany, it is said that "[n]othing done by government is beyond judicial review."[188] Pursuant to Germany's overarching constitutional principle of a state under law (*Rechtsstaatsprinzip*), all public authority must be lawfully exercised,[189] and anyone whose rights are violated by public authority has recourse to the courts.[190] In this sense, Germany's Federal Constitutional Court (*Bundesverfaßungsgericht*) has steadily reserved the right to control the constitutionality of the government's conduct in the realm of foreign affairs.[191] However, in practice, the Federal Constitutional Court accords the executive power some latitude when making certain factual assessments and prognoses (*Beurteilungs- und Prognosespielraum*).[192]

The Iraq decision by the Second Senate for Military Service highlights the absence of a formal first filter corresponding to the practice of Anglo-American courts immunizing the government's conduct in foreign affairs from judicial scrutiny. At first blush, the judgment appears to offer an elaborate scholarly opinion regarding the legality of the military action against Iraq by the Coalition of the Willing and, in consequence, Germany's contributions in support of the campaign and the occupation.[193] However, the court stops short of sharing the prevailing view in the German literature that the military action was illegal. It does not make a hard determination in this regard but rather couches the result of its analysis in the locution of grave concerns under international law[194]—a label that appears 15 times in the

188. THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 110 (1992).

189. Grundgesetz [GG] [Basic Law for the Federal Republic of Germany] Dec. 23, 2014, art.19, para. 4 (Ger.).

190. *Id.*

191. Nikolaus Schultz, *Was the War on Iraq Illegal?—The German Federal Administrative Court's Judgement of 21st June 2005*, 7 GERMAN L. J. 25, 38 (2005).

192. *See, e.g.*, Cormac Mac Amhlaigh, Does Germany need a political questions doctrine? EUTOPIA LAW (Feb. 21, 2014), http://eutopialaw.com/2014/02/21/does-germany-need-a-political-questions-doctrine/ (emphasizing that "what [the Federal Constitutional Court] does not do is determine, as a preliminary issue, whether the subject-matter is such that it is not appropriate, for practical or democratic reasons, that a court be seized of a particular dispute"); Thomas Giegerich, *Verfassungsgerichtliche Kontrolle der auswärtigen Gewalt im europäisch-atlantischen Verfassungsstaat: Vergleichende Bestandsaufnahme mit Ausblick auf die neuen Demokratien in Mittel-und Osteuropa*, 57 HEIDELBERG J. INT'L L. 409, 430, 433 (1997), http://www.zaoerv.de/57_1997/57_1997_2_3_a_409_564.pdf (diagnosing that, contrary to the prevailing literature, a rightly understood political question doctrine has its place in German constitutional law and has indeed occupied it in the jurisprudence of the Federal Constitutional Court in substance, albeit not by name).

193. Schultz, *supra* note 191, at 25.

194. *Id.* at 25–27, 37.

judgment.[195] This is not due to the shackles of the political question doctrine as such[196] but to the court's diagnosis being wrapped into its analysis of whether the soldier's exercise of his basic right to freedom of conscience disabled the service order.[197] In this context, a dual apprehension of potentialities in the soldier's mind was sufficient to activate basic right protections—that Germany possibly supported a war effort that was possibly illegal. The stance of the court with regard to the operation of political question rationales would in all likelihood have had to become much clearer, if it had reviewed the Iraq situation under a different stand-alone ground for disabling insubordination, namely, the infringement of general rules of international law.[198] It would then have needed to make a hard illegality determination.

3. Second Parameter: Monism or Dualism

Doctrines explaining the relationship between international law and domestic law have traditionally been grouped into one of two schools: dualism and monism.[199] According to the theory of dualism, international law and domestic law are independent of one another.[200] They differ in terms of their respective sources of law, subject matter, legal addressees, and coercive scope.[201] Since both legal orders exist in parallel, a national legal act is necessary to bring about the municipal validity of international law within the domestic space.[202] Dualism exists in two variants: radical dualism and moderate dualism. Radical dualism allows both legal orders to co-exist but in strict separation and without any overlap.[203] Therefore, should a conflict arise between a municipal legal act (a statute law, a judgment, or an administrative act) and international law, each law remains unaffected and continues to stand. Moderate dualism on the other hand recognizes some degree of overlap between international law and domestic law. Both legal orders intersect

195. Manuel Ladiges, *Irakkonflikt und Gewissenskonflikte*, WISSENSCHAFT UND SICHERHEIT ONLINE, 6 n.58 (Mar. 22, 2007), http://www.sicherheitspolitik.de/uploads/media/wus_02_2007_irakkonflikt-gewissenskonflikt.pdf.

196. *Id.* at 37–38.

197. *Id.* at 26.

198. *Id.* at 4.

199. For a detailed review of monism and dualism in international law doctrines, see CHRISTINE AMRHEIN-HOFMANN, MONISMUS UND DUALISMUS IN DEN VÖLKERRECHTSLEHREN (2003).

200. GEORG DAHM, JOST DELBRÜCK & RÜDIGER WOLFRUM, I/1 VÖLKERRECHT 99 (1988).

201. *Id.* at 99–100.

202. *Id.* at 100.

203. MICHAEL SCHWEITZER, STAATSRECHT III: STAATSRECHT, VÖLKERRECHT, EUROPARECHT 12, para. 32 (2010).

when norms refer to the other legal order or when norms are transformed from one order to the other.[204] Should municipal law be in conflict with international law each remains intact but the State becomes internationally responsible for the breach of its international obligations; in the long run, international law eventually prevails.[205]

In contrast to dualism, monism posits that only one overall legal order exists comprising both international law and domestic law.[206] In consequence, international law is integrated into domestic law from its moment of inception.[207] Though the question of rank arises, the answer is determined according to two doctrinal variants: monism with the primacy of domestic law and monism with the primacy of international law.[208] Under the former, international law always gives way to municipal law.[209] This theory, however, reduces international law to the whim of every single legal order in the world and thereby destroys the goal of legal uniformity. The alternative variant is radical monism with the primacy of international law, under which municipal law is trumped and obliterated by international law.[210] A moderated version of monism with the primacy of international law posits that while municipal law stays provisionally around when in conflict with international law, the State is bound to come into compliance with international law.[211] Not surprisingly, in their Iraq decisions, the three courts reflect very different approaches to positioning international law, more specifically UN-system law, which is secondary international law made in pursuance of international treaty law, within their respective legal orders.

The United Kingdom adheres to the doctrine of strict dualism.[212] Thus, international law treaties have no special status and no automatic effect in municipal law.[213] Inasmuch as the provisions of a treaty have been transposed into domestic law, the implementing legislation is dispositive with regard to the rise of private rights and remedies for alleged treaty breaches.[214] Typically, in the absence of such legislation,

204. *Id.* at 12, para. 33.
205. *Id.* at 12–13, para. 33.
206. DAHM ET AL., *supra* note 200, at 100.
207. *Id.*
208. *Id.*
209. *Id.*
210. SCHWEITZER, *supra* note 203, at 11, para. 28.
211. *Id.* at 11, para. 29.
212. Anthony Aust, *United Kingdom*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT 476, 476 (David Sloss ed., Cambridge Univ. Press 2014) ("When it comes to treaties, the United Kingdom is very much a dualist state."); Nallaratnam Singarasa v. Attorney-General, S.C. Spl. (LA) No. 182/99 (2006) ("The constitutional premise of the United Kingdom . . . adheres to the dualist theory.").
213. Aust, *supra* note 212, at 477.
214. *See id.* at 487.

the courts will not accord a remedy for treaty breaches.[215] Since "neither the [UN] Charter nor [UN Security Council] resolutions [have] been incorporated into English law,"[216] it is not surprising that the Iraq opinion from the United Kingdom is so calm and unwavering about its adherence to the strictly dualist posture in declining "jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights or duties under domestic law."[217]

Costa Rica subscribes to the school of radical monism with the primacy of international law (*monismo con primacía del Derecho Internacional*).[218] Thus, its Political Constitution confers onto international agreements authority superior to domestic laws (*autoridad superior a las leyes*).[219] The Iraq decision from Costa Rica adds yet another dimension by enlisting international elements to elucidate the contents and reach of the constitutional value of peace, thereby melding the international and municipal planes into a monist amalgamate of at least a quasi-constitutional rank amenable to be readily vindicated by anyone under widely open conceptions of *locus standi*. In its reasoning with regard to the relevant UN-system law, however, the Constitutional Chamber shrinks from carefully developing its very own construction and deconstruction of the meaning and effects of the last-chance decision, which it simply reproduces without much commentary. Is its insufficiency to cover the invasion so clear to the judges? It certainly appears that the court would disagree with the proposition that an arguable case, as Lord Goldsmith put it in the course of advising Her Majesty's Government, would suffice to cover the invasion under extant UN-system law absent a fresh authorization by the UN Security Council. The court signals this understanding when observing that any use of force would need to be fully and squarely, and not merely arguably, within the envelope of the requisite procedures established by the international system of the UN.[220] Finally, in pursuance of its radically

215. *See id.* at 487, 503.

216. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 53 (2013).

217. Campaign for Nuclear Disarmament v. The Prime Minister of the United Kingdom, the Secretary of State for Foreign and Commonwealth Affairs and The Secretary of State for Defence Advisory declaration [2002] EWHC 2777 ¶ [47] (Admin) (QBD) (UK).

218. Jorge Enrique Romero Pérez, *El Derecho Internacional Público y El Derecho Nacional*, REVISTA DE CIENCIAS JURIDICAS 91 (2012).

219. CR POL. CONST. art. 7.

220. Sala Constitucional de la Corte Suprema de Justicia, Res. No. 2004-09992, Dkt. No. 03-004485-0007-CO, Considerando ¶ IV (Costa Rica Sept. 8, 2004, 2:31 PM), http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20Politica/Sentencias/2004/04-09992.htm.

monist posture, the Constitutional Chamber deems an act not covered by international law when it is either "outside" (*fuera*) or merely "on the fringes" (*al marjen*) of UN-system law.[221]

Germany leans towards the doctrine of moderate dualism (*gemäßigter Dualismus*).[222] Treaties with legislative approval rank on par with domestic legislation.[223] However, there has been a debate about how this effect arises. Under the rejected theory of wholesale adoption (*Adoptionstheorie*), the domestic approval law of incorporation preserves the international law character of the treaty.[224] The traditional theory of transformation (*Transformationstheorie*) construes the domestic approval law as discharging a dual role. In addition to consenting to the international act of ratification, it transposes the treaty from the international to the municipal realm.[225] Pursuant to the more progressive theory of execution (*Vollzugstheorie*), the domestic approval law is construed as an order to follow the treaty as international law within the domestic space.[226] Independent of whether one follows the transformation or the execution theory,[227] Germany acceded to the UN in the wake of the passage of its domestic approval law.[228] In the literature, the question has arisen as to whether the German legislator also intended to transfer real sovereign powers to the UN and make UN-system law internally binding and enforceable by the courts.[229] Most commentators remain skeptical because the UN Charter, as the international law treaty to which the approval law consents, binds UN members as such; however, it does not imply that the UN Council, through UN-system law, has the prerogative to exercise such powers within the States.[230] The Iraq decision from the German Second Senate for Military Service is not on point in this regard. First, the court touches on peace coercion against a member country, as opposed to legislative measures by the UN Council implicating individuals or organizations. Second, the court is not even indirectly "in the service of enforcing international law,"[231] because the

221. *Id.* at ¶ VII.

222. SCHWEITZER, *supra* note 203, at 11, para. 38.

223. Andreas L. Paulus, *Germany*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT 209, 217 (David Sloss ed., Cambridge Univ. Press 2014).

224. *Id.*

225. *Id.*

226. *Id.* at 217–18

227. *Id.*

228. Gesetz vom 6.6.1973 (law dated June 6, 1973), BGBl II, 430.

229. MEINHARD SCHRÖDER, GESETZESBINDUNG DES RICHTERS UND RECHTSWEGGARANTIE IM MEHREBENENSYSTEM 209–10 (2010).

230. *Id.* at 210.

231. Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 111 BVerfGE 307, 328 (2004). For commentary, see Paulus, *supra* note 223, at 223.

case discusses the effects of UN-system law on the basic right to freedom of conscience in the context of a soldier's conscientious objection and situational refusal to obey orders in the armed forces.[232]

4. Summation: Combinations of Parameters Shaping the Availability and Intensity of Judicial Review of the Executive Power's Construction of UN-System Law

In their ensemble, the three decisions highlight a larger spectrum. On one end, the combination of justiciability doctrines with strict dualism will, in all likelihood, foreclose the construction of UN-system law by courts of law. This is the case in the United Kingdom. At the other end of the spectrum, when the absence of a political question doctrine and adherence to radical monism with the primacy to international law combine, judicial review of acts and activities by the executive will become available. Such is the case in Costa Rica. Finally, the combination of judicial restraint short of a political question doctrine and moderate dualism leads to a more fluid, case-specific diagnosis regarding the degree of judicial control by a court of law. This is the case in Germany.

B. The International Plane

In the international domain judicial proceedings never materialized. But conceivably, recourse could have been sought in two standing international tribunals—the International Court of Justice (ICJ) and the International Criminal Court (ICC).

1. Route to the ICJ: Request by the UN General Assembly for an Advisory Opinion

The ICJ enjoys a dual jurisdiction. In addition to deciding contentious cases between States, the ICJ gives advisory opinions on legal questions in response to requests from within the UN System.

It was highly improbable that the Iraq situation could be made the subject of a contentious case before the ICJ. First, its jurisdiction is

232. *See* Jürgen Rose, *Conscience in Lieu of Obedience: Cases of Selective Conscientious Objection in the German Bundeswehr*, *in* WHEN SOLDIERS SAY NO: SELECTIVE CONSCIENTIOUS OBJECTION IN THE MODERN MILITARY 177, 185–88 (Andrea Ellner, Paul Robinson & David Whetham eds., 2014); Hans Georg Bachmann, *Militärischer Gehorsam und Gewissensfreiheit*, *in* RECHT UND MILITÄR: 50 JAHRE RECHTSPFLEGE DER BUNDESWEHR 156, 156–68 (Holger Zetsche & Stephan Weber eds., 2006).

limited to disputes between States.[233] Thus, individuals and governmental and non-governmental organizations cannot be parties in contentious cases. In addition, States must have consented to the ICJ's exercise of its jurisdiction. This consent can be enshrined in a special agreement, a treaty clause, or an optional declaration recognizing the ICJ's jurisdiction as compulsory.[234] Therefore, the United States could not have been made a defendant in a contentious case based on the ICJ's compulsory jurisdiction in legal disputes over questions of international law, because it had long withdrawn its optional declaration already heavily reserved and modified at the time.[235] While the United Kingdom has an optional declaration in place,[236] States without a matching declaration, such as Iraq, would have failed the reciprocity requirement for opening up the ICJ's compulsory jurisdiction in a case against the United Kingdom.[237] Finally, a third State with a reciprocal optional declaration would still have needed to surmount the hurdle of having to assert a real and actual controversy with the United Kingdom over its legal rights at the time when the case was presented.[238]

233. Statute of the International Court of Justice, June 26, 1945, art. 34 [hereinafter ICJ Statute].

234. *Id*. at art. 36.

235. United States: Department of State Letter and Statement concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, 24 I.L.M. 1742 (1985). *See also* 84 Dep't of State Bull. 89 (June 1984) (attempting to exclude "disputes with any Central American state" so as to avoid ICJ jurisdiction in the *Nicaragua* case); Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, *in* THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 46, 67 n.69 (Cesare P. R. Romano ed., 2009) (noting that the United States: (1) "declined to participate in the ensuing merits phase of the *Nicaragua* case, which led to a judgment against the United States on several counts" (Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 ICJ Rep. 14 (June 27)); and (2) "ignored the Court's judgment and vetoed measures of implementation sought by Nicaragua at the Security Council"). For the optional declaration by the United States prior to the Nicaragua controversy, see 1982-1983 YB. I.C.J. 88, 88–89 (1983).

236. For the full declaration by the United Kingdom (as of Dec. 31, 2014), see Declarations Recognizing the Jurisdiction of the Court as Compulsory, International Court of Justice [hereinafter UK Optional Declaration], http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB ("The Government of the United Kingdom of Great Britain and Northern Ireland accept as compulsory ipso facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after 1 January 1984, with regard to situations or facts subsequent to the same date . . . .").

237. ICJ Statute, *supra* note 233, art. 36 ¶¶ 2–3; UK Optional Declaration, *supra* note 236 ("on condition of reciprocity").

238. ICJ Statute, *supra* note 233, arts. 34, 38, 41. *See* Goldsmith Final Advice, *supra* note 77, para. 32 (not totally discarding the eventuality that a State strongly opposed to the use of force against Iraq could initiate a contentious case and ask for interim relief).

Nevertheless, the most promising means for throwing an obstacle in the way of the march to war by the Coalition of the Willing could have been for the UN General Assembly to request an advisory opinion from the ICJ on the question as to whether military action in Iraq, absent a fresh UN Security resolution, would be in accordance with UN-system law. If the UN General Assembly had adopted a resolution transmitting the request for an advisory opinion, the ICJ would, if past were prologue,[239] have reached the substance of the question.

Independent of the ICJ's answer,[240] no State, whether with or against the Coalition of the Willing, could have prevented it from being rendered[241] because the advisory opinion embodies the ICJ's assistance in law lent to the UN General Assembly, as opposed to a decision handed down in a real and actual dispute between proponents and opponents of the use of force against Iraq. Yet, the substance of the ICJ's guidance would have reached States with an interest in the Iraq situation through the UN General Assembly as a conduit.[242] If the ICJ had determined that military action in Iraq absent a fresh UN Security Council resolution would not be in accordance with UN-system law, the UN General Assembly would likely have passed a resolution[243] urging members not to take any action in contravention of the advisory opinion. Such a resolution might have either remanded the Iraq situation to the negotiating table at the UN Security Council or even avoided a military conflict. In the alternative, it might have forced members of the Coalition of the Willing to go ahead with the use of force against Iraq in blatant disregard of the authoritative, albeit legally non-binding, pronouncements by the UN General Assembly and the ICJ. On the other hand, if the ICJ had determined that military action in Iraq, absent a fresh UN Security resolution, would be in accordance with UN-system law, this would have given the use of force by the Coalition of the Willing international judicial cachet.

Ultimately, the idea of going through the UN General Assembly to seek an advisory opinion from the ICJ never gathered enough steam.

239. For the most recent advisory opinion by the ICJ, see Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ Rep. 403 (July 22) [hereinafter Kosovo Advisory Opinion].

240. For a collection of voices in the "yes" and "no" columns as to whether extant UN-system law provided the requisite coverage for the use of force, see *Did the UN Security Council Resolution 1441 Provide Sufficient Legal Basis for Military Action Against Iraq?*, PROCON.ORG (Sept. 24, 2009, 1:12 PM), http://usiraq.procon.org/view.answers.php?questionID= 000875 (last visited July 16, 2016).

241. *See* ANDREAS ZIMMERMANN, KARIN OELLERS-FRAHM & CHRISTIAN TOMUSCHAT, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 1621 (2012).

242. *See id.*

243. For the practice of the UN General Assembly with regard to advisory opinions rendered by and received from the ICJ, see *id.*

Perhaps too many delegations realized that the invasion would arrive sooner rather than later and that there simply was not enough time to secure the guidance in law from the ICJ before the fact. Indeed, even assuming that the UN General Assembly had passed a resolution with the request in the immediate aftermath of the UN Security Council's last-chance decision in the fall of 2002, it was somewhat uncertain that the UN General Assembly would have received the advisory opinion from the ICJ before the spring of 2003. In addition, it was unlikely that the Coalition of the Willing would have put its military planning activities on hold during the pendency of the proceedings. Of course, if the UN General Assembly had made the request with urgency or the ICJ itself had found that an early answer was desirable, the ICJ would have been required to do everything in its power to accelerate the procedure.[244] This could have included dispensing with the second written phase normally conducted in its proceedings.[245] Yet, while advisory procedures do not tend to take long,[246] the shortest time on record between the request from the UN General Assembly and the rendering of the opinion by the ICJ has been seven months.[247] Other than the potentially too-short window in time before the invasion, the thinking amongst certain delegations might have been that the military action would end quickly and in its wake, the UN system as a whole would need much inner- and inter-institutional cohesion for purposes of managing the post-conflict rehabilitation phase in Iraq.

Contrariwise and despite the massive U.S.-British troop buildup, it also appears that an insufficient number of delegations were convinced at the time that military action against Iraq was imminent, since negotiations in the UN Security Council over a second decision continued until not even a fortnight before the invasion. Or, more generally, the reluctance by many delegations to rally behind the adoption of a resolution transmitting a request for an advisory opinion to the ICJ may have stemmed from their unwillingness to remove the Iraq situation from the political and diplomatic dynamics under their direct control to the courtroom where the outcome in a politically charged situation, albeit only advisory in nature, was not subject to their immediate influence.[248]

244. International Court of Justice, Basic Documents, Rules of Court, art. 103, http://www.icj-cij.org/documents/ index.php?p1=4&p2=3&p3=0.

245. Raj Bavishi & Subhi Barakat, *Procedural Issues Related to the ICJ's Advisory Jurisdiction*, LEGAL RESPONSE INITIATIVE, at 5 (2012), http://legalresponseinitiative.org/wp-content/uploads/2013/09/BP41E-Briefing-Paper-The-ICJ-Advisory-Opinion-Procedure-11-June-2012.pdf (giving the example of the *Wall* case).

246. ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 1105 (2013).

247. Bavishi & Barakat, *supra* note 245, at 5.

248. MARK W. JANIS, INTERNATIONAL LAW 152–53 (2012).

2. Route to the ICC: Crime of Aggression

The international crime of aggression under the auspices of the ICC could offer another gateway for the construction of UN-system law by an international court. At the time of the Iraq conflict, however, the ICC only had a mandate to examine conduct during an armed conflict (*in bello*), but none to scrutinize the legality of a decision to engage in an armed conflict (*ad bellum*).[249]

As part of a compromise reached during the negotiations in 1998,[250] the Rome Statute had listed the crime of aggression as one of the four core crimes within the jurisdiction of the ICC, but deferred offering substantive definitions or jurisdictional trigger mechanisms.[251] This gap was closed when the amendments defining the crime of aggression and setting out the conditions for the ICC's exercise of jurisdiction were adopted by consensus at the Review Conference of the Rome Statute, which was held in Kampala in 2010.[252] Under the new framework, the individual crime of aggression means "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[253] When unpacked, this dense definition of individual criminal responsibility yields three major building blocks—the leadership clause, the actus reus clause, and the threshold clause.[254] First, the perpetrator must be a

249. *See generally* Thomas S. Harris, *Can the ICC Consider Questions on Jus ad Bellum in a War Crimes Trial*, 48 CASE W. RES. J. INT'L L. 273 (2016).

250. Phillipe Kirsch & John T. Holmes, *The Rome Conference on International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L. L. 3, 10 (1999).

251. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 5.2 [hereinafter Rome Statute]. *See also* "Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court," Annex I, Resolution F, para. 7, U.N. Doc. A/CONF. 183/10 (1998), at 8–9 (directing the ICC's Preparatory Commission to "prepare proposals for a provision on aggression, including the definition and Elements of Crimes of Aggression and conditions under which the ICC shall exercise its jurisdiction with regard to this crime").

252. Assembly of States Parties Res. RC/Res.6, annex III (June 11, 2010) [hereinafter Kampala Amendments], https://treaties.un.org/doc/Treaties/2010/06/20100611%2005-56%20PM/CN.651.2010.pdf. *See also* Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 1 (2012), http://ssrn.com/abs tract=2209687. For a polite, but highly critical assessment by two leaders of the U.S. delegation, see Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L. L. 257 (2015).

253. Kampala Amendments, *supra* note 252, art. 8 *bis*, para. 1.

254. *See* Handbook: Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC, Crime of Aggression, War Crimes 8 (Liechtenstein Institute on Self-Determination, 2012) [hereinafter Handbook].

political or military leader[255] but not necessarily the only leader. Second, he or she must have planned, prepared, initiated, or executed a State act of aggression. This element presupposes that the State act of aggression was committed.[256] A State act of aggression in turn is defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the [UN Charter]."[257] Examples of such "kinetic force directed against the [target] through military weaponry"[258] include, but are not limited to, invasion, military occupation, bombardment, and blockade.[259] Third, criminal responsibility for State acts of aggression is limited to those uses of force, which, in light of their nature, severity, and magnitude, amount to a violation of the UN Charter that is manifest and not merely unlawful in a technical sense.[260]

The new provisions governing the conditions under which the ICC may exercise its jurisdiction over the crime of aggression distinguish between two trajectories based on the absence or presence of a referral by the UN Security Council. Both routes require the activation of the ICC's jurisdiction, which is predicated on the arrival of two cumulative events. First, at least 30 State Parties must have ratified or accepted the amendments.[261] Second, the State Parties have to take a decision to activate, at any time after January 1, 2017, by consensus or at least an absolute two-thirds majority.[262] The Kampala amendments contain no legal obligation for their domestic implementation before or after ratification.[263] Several States, however, have in place domestic provisions criminalizing aggression.[264] They differ as to whether domestic criminalization is extended only to their own leaders or likewise to leaders of other States.[265]

The first trigger mechanism, which is based on State referral to the ICC Prosecutor or the ICC Prosecutor proceeding *proprio motu*, offers a consent-based jurisdictional regime for State Parties. Any State Party may opt out of the ICC's jurisdiction by lodging a declaration to this effect with the Registrar.[266] Simply not opting out suffices for consent.

255. Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L L. 477 (2007).
256. Gillett, *supra* note 252, at 8.
257. Kampala Amendments, *supra* note 252, art. 8 *bis*, para. 2, cl. 1.
258. Gillett, *supra* note 252, at 8.
259. Kampala Amendments, *supra* note 252, art. 8 *bis*, para. 2, cl. 2(a)–(g).
260. Gillett, *supra* note 252, at 23–26.
261. Kampala Amendments, *supra* note 252, arts. 15 *bis*, para. 2, 15 *ter*, para. 2.
262. *Id.* arts.15 *bis*, para. 3, 15 *ter*, para. 3.
263. Handbook, *supra* note 254, at 14.
264. *Id.*
265. *Id.*
266. Kampala Amendments, *supra* note 252, art. 15 *bis*, para. 4.

In contrast, the ICC does not exercise jurisdiction over non-State Parties.[267] For purposes of this trigger, the UN Security Council does not have to actively determine the presence of an act of aggression nor does it have to authorize investigations. If it does, after being notified by the ICC Prosecutor of his or her intention to open an investigation,[268] such a determination suffices.[269] In the absence of word from the UN Security Council, the ICC Prosecutor may still proceed after waiting six months from the initial notification and upon receiving the authorization by the judges of the ICC Pre-Trial Division.[270] The second trigger mechanism, which is based on UN Security Council referral, does not require the satisfaction of any of the tailored conditions imposed on State referral or *proprio motu*.[271] Notably, the exercise of the ICC's jurisdiction is not predicated upon any type of consent furnished by the involved States.

Since it was agreed early on in the amendment process that the envisaged provision on aggression would be prospective in nature only, there could be no prosecution at the ICC of the Iraq situation under the aggression amendments in their current form.[272] Yet, the Iraq situation must have colored the United Kingdom's posture in the amendment process. For example, in the deliberations about the trigger mechanisms for the ICC's exercise of jurisdiction over the crime of aggression, the United Kingdom vigorously favored giving exclusivity to the UN Security Council in line with its responsibility under UN Chapter VII.[273] This stance, of course, is not surprising since it would have enabled the United Kingdom to wield its veto power and avoid the onset of ICC jurisdiction at its pleasure. Although the Review Conference ultimately did not adopt the position of the United Kingdom, the comments by the United Kingdom welcoming the final text still invoke the "primacy" of the UN Security Council with respect to the maintenance of international peace and security, while at the same time speaking of a "mutually reinforcing relationship" between the UN Security Council and the ICC.[274] At present, the United Kingdom does not rank among those who have consented to the amendments adopted at Kampala.[275]

267. *Id.* art. 15 *bis*, para. 5.
268. *Id.* art. 15 *bis*, para. 6.
269. *Id.* art. 15 *bis*, para. 7.
270. *Id.* art. 15 *bis*, para. 8.
271. *Id.* art. 15 *ter*, paras. 1–5.
272. Gillett, *supra* note 252, at 17 n.76.
273. *See id.* at 5 n.23.
274. Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June, Official Records, Annex VIII 124 (International Criminal Court, 2010).
275. *Status of Ratification and Implementation*, GLOBAL CAMPAIGN FOR RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION, http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-im

Even if purely theoretical, playing through the Iraq situation highlights an open flank in the new regime governing the crime of aggression. Logically, the availability of exceptions to prohibited uses of force will deny the presence of a State act of aggression, which itself is a prerequisite for individual criminal responsibility. UN Security Council approval of the use of force in a certain situation would supply such an exception.[276] This would return us full circle to the question of how explicit the authorization must be and how implicit, or arguable, it can be.[277] Certainly, as much as the paradox of a UN Security Council determining an act of aggression in the wake of having previously passed a resolution under UN Chapter VII, construed by some as an authorization to use of force, will rarely arise, it may be incumbent upon the ICC Prosecutor, once his or her mandate will have vested, to construe the meaning and effects of UN-system law when seeking to initiate an investigation in the wake of allegations concerning the legality of a conflict.[278] This is quite a significant horizon for the judicial construction of UN-system law.

IV. PERSPECTIVES

Steering and control mechanisms for the construction of UN-system law in a case face a unique challenge. UN Security Council decisions are the products of political and diplomatic negotiation and voting processes;[279] and therefore, they frequently contain formulaic compromises and open terms which, by design, are not drafted with the chiseled precision of court judgments.[280] This interpretation challenge as to what the law is and what it requires is vividly illustrated in the Iraq situation, which ultimately was all about language memorialized in the relevant UN-system law.[281] Accordingly, those called to interpret UN-system law must resolve important questions. How clearly must a use-of-force authorization be stated?[282] Does it have to be quite explicit in

plementation/ (last visited June 26, 2016) (identifying the United Kingdom as a State Party having "made positive references to the amendments" at the 9th and 10th sessions of the Assembly of States).

276. Gillett, *supra* note 252, at 16–17.

277. *See id.*

278. *See* Letter from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court 4 (Feb. 9, 2006), http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_ senders_re_Venezuela_9_February_2006.pdf.

279. Kosovo Advisory Opinion, *supra* note 239, at para. 94.

280. *See* Christian Tomuschat, *Der 11. September 2001 und seine rechtlichen Konsequenzen*, [2001] EUROPÄISCHEGRUNDRECHTEZEITSCHRIFT (EUGRZ) 535, 545.

281. *2010 Transcript*, *supra* note 47, at 244.

282. Philip Kunig, *Das VölkerrechtalsRecht der Weltbevölkerung*, 41 ARCHIV DES VÖLKERRECHTS (AVR) 327, 329 (2003); Christian Tomuschat,

light of its exceptional character? Or does, as Lord Goldsmith suggests, the presence of an arguable case suffice?

This article has studied two guidance and control mechanisms—legal advice as input into a government's decision process and judicial review in courts of law. At first blush, when a government system ensures that its internal decision process is guided by independent and robust legal input, the need for control through unfettered access to judicial review in courts of law appears not as pronounced. However, if such precautionary checks are not in place, dysfunctional, or simply not trusted by the public, the courts play a significant role. When court review with regard to the proper construction of UN-system law is sought, the design of the sluices for entry into the courtroom becomes crucial.

The United Kingdom, Costa Rica, and Germany embody different approaches to guidance and control mechanisms for the interpretation of UN-system law. In the United Kingdom, in-house legal advice from professional government lawyers has a long tradition. If exercised in a milieu of independence and integrity, legal input into the decision process offers a powerful ex ante safeguard. Ideally, advice from within the government will carry much weight and authority as the client who has requested it seeks frank legal input into a decision process aimed at the lawful achievement of policies.[283] However, attendant conflict pressures accrue from the advisor's own political party affiliation, his or her status as a salaried minister of the crown, and his or her service at the pleasure of the prime minister.[284] In other words, the presence of these factors may make the advice appear biased or lacking in candor despite being the fruit of the exercise of best professional judgment.[285] Or worse yet, the advisor could come under political pressure to bend or slant the advice in a particular way so as to accommodate and support an outcome desired or already preordained by the government.[286] These themes are still playing out in the United Kingdom, as the Iraq Inquiry has not yet released its final report. Interestingly, the narrative in the public space with regard to the performance of guidance and control mechanisms for the interpretation of UN-system law in the Iraq situation is focused on the deciders themselves rather than the role of the courts where judicial review is regularly curtailed by the operations of justiciability doctrine—

VölkerrechtistkeinZweiklassenrecht, Der Irak-Krieg und seine Folgen, 51 VEREINTENATIONEN (VN): ZEITSCHRIFT FÜR DIE VEREINTENNATIONEN UND IHRE SONDERORGANISATIONEN 41, 44 (2003).

283. ATTORNEY GENERAL'S OFFICE, *supra* note 39, at 12.

284. *Id*. at 2, 4.

285. *Id*. at 12.

286. *Id.*

political question non-justiciability of acts of the executive in the arena of foreign affairs and international relations[287] and dualistic non-justiciability of unincorporated treaties.[288]

Conversely, self-monitoring within the government's decision process seems much less of a concern if judicial review is readily available to correct potential overreach by the executive branch in cases turning on the interpretation of UN-system law. This is the case in Costa Rica where a constitutional guardian is on hand. It is readily accessible, undeterred by political question doctrines and vigorously committed to the doctrine of radical monism. In Germany, the executive power is, at least in theory, fully controlled by the courts. This commitment to judicial review allows courts to speak to the construction of UN-system law—at a minimum incidentally, but conceivably also more directly, depending on the particular posture of the case.

In view of the disparateness of municipal system paradigms and designs, the international plane could offer a lynchpin for resolving questions of how to construe the meaning and effects of UN-system law. The ICC, through the prism of its jurisdiction over crimes of aggression, may at some point be called to construe the meaning and effects of UN-system law. This horizon will become even more powerful once more State actors embrace the ICC. In turn, the ICJ, while fully operational, faces its own challenges. At present, the ICJ takes up contentious cases between States and entertains requests for advisory opinions from within the UN system.[289] Due to the consent-based design of its contentious jurisdiction over cases between States, it is highly improbable that the ICJ will be called to decide an actual controversy over the interpretation of UN-system law. Given that four of five veto powers on the UN Security Council have not, or no longer have, in place an optional declaration opening up the ICJ's compulsory jurisdiction, even if a case were decided, enforcement by the UN Security Council is even less

287. Council of Civil Service Unions v. Minister for the Civil Service (the GCHQ case), [1985] AC 374, 398 (1985) ("[M]any of the most important prerogative powers concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the Law Courts.") (per Lord Fraser); R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt 116 ILR 607 (1999); Campaign for Nuclear Disarmament v. The Prime Minister of the United Kingdom, the Secretary of State for Foreign and Commonwealth Affairs and The Secretary of State for Defence Advisory declaration [2002] EWHC 2777, ¶ [47] (Admin) (QBD) (UK).

288. For the general proposition that a treaty only creates rights and duties in domestic English law until an Act of Parliament gives effect to it, see, for example, J.H. Rayner (Mincing Lane) Ltd v. Department of Trade and Industry, [1990] 2 A.C. 418 (HL); MICHAEL BARTON AKEHURST, MODERN INTRODUCTION TO INTERNATIONAL LAW 45 (1970).

289. ICJ Statute, *supra* note 233, art. 34, 65.

likely.[290] While embodying the more promising route to those interested in the ICJ's review of UN-system law, the advisory jurisdiction of the ICJ exhibits several open flanks. A request for an advisory opinion can only originate from within the UN system, which is populated by State representatives who would need to gel in sufficient majorities before a request could filter through the United Nation's political organs and specialized agencies. The framers deliberately excluded States from the circle of originators in their own name.[291] A further question harks back to the effect in law spawned by advisory opinions. In doctrine and practice, advisory opinions have been described as declarative of the law without binding force and without the effect of res judicata.[292] The practical reality is that within the invoking arena and beyond there must be a political will to heed the ICJ's advice, whatever its contents may be.[293] Indeed, the record of advisory opinions, in terms of their frequencies and effects, reflects rather low expectations in this regard.

In the light of the experiences discussed earlier with regard to judicial review of the Iraq situation under UN-system law, two reform proposals come to mind. One more modest reform would open the advisory route by enabling any State to make a request of the ICJ. This would make it easier and faster for any State to reach the ICJ because it no longer would have to work through the UN General Assembly or the UN Security Council. Yet, the same compliance concerns afflicting the current system prevail, unless advisory opinions were given *erga omnes* effects. An even bolder idea would be to confer upon the ICJ the jurisdiction to render preliminary rulings or interlocutory judgments in response to questions from municipal judges.[294] Specific references from the municipal to the international judges could of course be limited to construing the meaning and effects of UN-system law. This reform would open the ICJ to lawsuits by individual parties as vigilant international law subjects[295] and ensure that international law is observed in the interpretation of UN-system law. Restricting this function to interpretation questions would make it very different from legality

290. S. Gozie Ogbodo, *An Overview of Challenges Facing the International Court of Justice in the 21st Century*, 18 ANN. SURV. INT'L & COMP. L. 93, 110–11 (2012).

291. JANIS, *supra* note 248, at 152–53.

292. KOLB, *supra* note 246, at 1094; Kenneth L. Penegar, *Relationship of Advisory Opinions of the International Court of Justice to the Maintenance of World Minimum Orde*r, 113 U. PA. L. REV. 529, 555–57 (1965).

293. Penegar, *supra* note 292, at 557.

294. For a concise discussion identifying the relevant positions in the debate, along with references to the topical literature and scholarship, see, for example, JANIS, *supra* note 248, at 157–59.

295. *Id.* at 157–58.

control and full-scale judicial review of UN-system law.[296] However, despite the allure of such a mechanism,[297] the spectre of making the ICJ, throughout the space of its subscribers, some kind of "constitutional" guardian of international law would trigger staunch sovereigntists, especially among the permanent members of the UN Security Council, into stalling institutional reform.[298] Thus, the prospects of any amendments to the UN Charter[299] that would widen prerogatives of the ICJ appear rather dim.

Still, despite the fact that the military action against Iraq went ahead, it did not do so in an un-checked legal vacuum. Notwithstanding the lessons that may be identified by the Iraq Inquiry, the United Kingdom has in place a practice of legal input into government decision-making, including the construction of the meaning and effects of UN-system law. One may disagree with Lord Goldsmith's proposition of an arguable case in the context of the Iraq situation, but he documented his advice at the time and defended it in subsequent years. Especially when compared to what has trickled out from the vaults of other members of the Coalition of the Willing,[300] the record made available to post hoc public scrutiny in the United Kingdom is quite immense and relatively deep. Moreover, the Costa Rican and German examples illustrate that the review of UN-system law is not necessarily confined to the lofty spheres of politics and diplomacy, but may actually play out in domestic

296. *See, e.g.*, Mark Angehr, *The International Court of Justice's Advisory Jurisdiction and the Review of Security Council and General Assembly Resolutions*, 103 NW. U. L. REV. 1007, 1026 (2009); Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996).

297. JANIS, *supra* note 248, at 159.

298. *See* Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, 79 FOR. AFF. 9 (2000), http://www.foreignaffairs.com/articles/56621/peter-j-spiro/the-new-sovereigntists-american-exceptionalism-and-its-false-pro (Jan. 21, 2015).

299. U.N. Charter, *supra* note 1, arts. 108–109.

300. For Australia, see, for example, *Special Feature—Advice on the Use of Force against Iraq*, 4 MELB. J. INT'L L. 177 (2003) (providing the Memorandum of Advice provided to the Commonwealth Government by Bill Campbell QC of the Attorney-General's Department and Chris Moraitis of the Department of Foreign Affairs and Trade, two letters of advice provided to the Leader of the Federal Opposition, the Hon. Simon Crean MP, one by George Williams and Devika Hovell of the University of New South Wales, and the other by Grant Niemann of the Flinders University of South Australia). For the United States, see, for example, Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (Mar. 21, 2003) (providing Ambassador Negroponte's notification of the invasion by the coalition, along with rationales for its justification); William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq and International Law*, 97 AM. J. INT'L L. 557 (2003) (offering with more detail the positions of the Legal Adviser of the United States Department of State and the Assistant Legal Adviser for Political-Military Affairs of the United States Department of State).

courts of law. In addition, judicial review of UN-system law may be sought under existing and new international avenues. It would therefore be premature indeed to label the guidance and control mechanisms at work with regard to the construction of UN-system law in the Iraq situation and beyond with the Ciceronian adage *silent enim leges inter arma* ("for the laws fall silent in times of war").[301]

V. POSTLUDE AND PRELUDE

On July 6, 2016, the final Report of the Iraq Inquiry—a 2.6 million-worded document comprising an Executive Summary and 12 volumes of evidence, findings and conclusions—was released to the public.[302] Notably, the report does not reach a view on the legality of the war, offering instead that this question "could . . . only be resolved by a properly constituted and internationally recognized Court."[303] This, of course, returns us full circle to this article's discussion of guidance and control mechanisms for the construction of UN-system law.

301. Marcus Tulius Cicero, *Pro Milione Oratio*, *in* MARCUS TULIUS CICERO, TEN ORATIONS, WITH THE LETTERS TO HIS WIFE 164, 167 (Richard Alexander von Minckwitz ed., 1908). For usage of this phrase with a different sequence in words, see Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting) ("Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.").

302. *Report*, IRAQ INQUIRY, http://www.iraqinquiry.org.uk/the-report/.

303. *Sir John Chilcot's Public Statement, 6 July 2016*, IRAQ INQUIRY, http://www.iraq inquiry.org.uk/the-inquiry/sir-john-chilcots-public-statement/.