Iraq and the Law: what went wrong?
Rabinder Singh QC

Chaired by Professor Christine Chinkin
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Professor Chinkin
Good evening everybody, I'm Christine Chinkin and I'm a professor of international law here at the London School of Economics and a member of the advisory board of the Centre for the Study of Human Rights and it's my very great privilege and pleasure to be chairing this lecture tonight. So my first duty is to welcome you all here to the LSE on behalf of the Centre for the Study of Human Rights which is hosting this event as part of its public outreach activities.

Now here I'm supposed to do a number of adverts for various other activities for the Centre for the Study of Human Rights. I gather you will all have received details of the briefing and the Centre's activities as you came in and the next two major events are one at lunchtime on Thursday 29th November called Intolerance in the Ivory Tower: the threat to the free speech of scholars and then the next evening lecture is on Thursday 6th December and that will be a lecture by the executive director of Human Rights Watch, Ken Roth, and I have also been told to say that all the programmes and events are on the Centre's website which can be accessed through the general website of the London School of Economics as can details about the two leaflets that are being circulated, the one by Redress relating to the UK army in Iraq trying to come clean on civilian torture, the second, I think one might say seminal lecture that was given in 2003 by Lord Alexander of Weedon entitled Iraq: the Pax Americana and the law. So those are available through the website. I also want to thank Matrix Chambers who are sponsoring tonight's event and welcome in particular members from Matrix Chambers that I can see in the audience.

The 2003 invasion of Iraq and its aftermath have created an enormous amount of public discourse and many questions have been circulated, contested, debated including many questions of public international law such as issues as the legality of the war itself and the legal consequences of determining legality or otherwise. What are the legal obligations upon those that occupy territory through military activity and what are the rights of those who find themselves subject to such military occupation? What is the interplay of occupation law, human rights law and decisions taken by the United Nations Security Council and I think what has been especially surprising to me as a public international lawyer is that these and other questions have not just been debated within the media, within the academic circles, but also asked and addressed in various ways before our national courts and our national tribunals and I certainly find it very difficult to remember when the interface between international law and national law has become such a matter of public concern, public debate and public interest and so these questions and the legal proceedings are still continuing all of which of course makes the topic of tonight's lecture especially timely and I can't think of anybody who is better qualified to address many of these issues than tonight's

speaker, Rabinder Singh, QC, who I am also absolutely delighted to welcome here to the LSE.

Rabinder Singh is also a member of Matrix Chambers, he is a leading silk who has acted in cases across a number of areas of law, human rights, including those addressing important issues that have arisen out of the Human Rights Act, public and administrative law, commercial law, media law and increasingly, and I think especially over the past 5 years, issues of public international law. He's an expert in these various areas of law and also I think in the cross-disciplinarity of these apparently distinct areas of law, the multiple ways they intersect and inform each other. His range of subject areas shows the breadth of knowledge and diversity as does his client base. Rabinder acts for individuals and corporate clients, for governmental agencies and for the non-governmental sector, so across again the broad spectrum.

Rabinder also epitomises the way in which legal practice and academic work inform and support each other and we are delighted that he is a visiting professor here at the LSE in the Centre for the Study of Human Rights. He's published for example issues on equality and privacy. Rabinder was also awarded the Barrister of the Year award by the *Lawyer* magazine in 2001 and the Liberty Justice Human Rights Lawyer of the Year award in 2006. So it's not surprising that I regard this as a very great honour to be chairing tonight's event and to invite Rabinder to give his lecture on Iraq and the Law: what went wrong?

Rabinder Singh
Christine, thank you very much indeed for that kind introduction. It's an honour for me to be a visiting professor at the LSE and a pleasure to be asked to address you this evening.

Can I before I start on my topic pay tribute particularly to someone I'm glad to see is in the audience, Phil Shiner. Phil, as many of you will know, has been the instructing solicitor in a number of the cases that I am going to be talking about this evening arising out of the Iraq war. Most of the time my honest view about the role of lawyers is that we should be modest about what we can contribute to justice because if the truth be told I don't think I actually make much difference to the cases that I appear in and if I were not doing them somebody better no doubt would be doing them. But Phil Shiner I think is an exception to the rule because I genuinely think that if there were no Phil Shiner in this country then the sort of legal issues that Christine has referred to arising out of the Iraq war I don't think would actually have surfaced and certainly wouldn't have been given the public attention which they undoubtedly deserve.

Now what happened in late 2002 and early 2003 is well known and can be summarised briefly. On 8th November 2002 the United Nations Security Council passed Resolution 1441. In essence it found that Iraq had been in material breach of earlier resolutions throughout the 1990s following the first Gulf War relating to its programme for weapons of mass destruction. The Resolution required Iraq to allow weapons inspectors, led by Dr Hans Blix, into Iraq and to cooperate with them. And if this Resolution was not complied with it was said that the matter should come back to the Security Council for further discussion. An earlier draft of the Resolution had included the phrase "all necessary means" to be authorised should there be

breach of this Resolution and it's well understood in international law and diplomacy that the phrase "all necessary means" in a UN Security Council Resolution does authorise the use of military force. The final version of the Resolution did not contain this phrase and the US and UK ambassadors to the UN at the time confirmed in the discussions of the Security Council that there was no "automaticity", to use the British ambassador's word, and no "hidden triggers" to use the American ambassador's word.

In the first 2 months of 2003 there then followed the well known attempt to secure that elusive second resolution, the search for the second resolution as it was then known. The second resolution never came but on 20th March 2003 the invasion of Iraq began. In many people's view it was illegal under international law. Lord Alexander famously said so in the Justice Lecture to which Christine has referred. Lord Steyn, a retired law lord, also endorsed Lord Alexander's view that the government's attempt to find a legal justification for the invasion had been "scraping the bottom of the legal barrel". Kofi Annan, then Secretary General of the UN, confirmed that in his view the invasion was illegal. All regarded it as contrary to Article 2 Paragraph 4 of the UN Charter which sets out the fundamental peremptory norm of international law against the use of force against another state. Elizabeth Wilmshurst, who was the deputy legal advisor at the Foreign Office at the time, resigned on 18th March, two days before the invasion. Her resignation letter has subsequently been disclosed under a Freedom of Information Act inquiry and her resignation letter actually used the phrase "the crime of aggression".

Now what happened as far as the law was concerned at this time? Well in December 2002 the Campaign for Nuclear Disarmament took judicial review proceedings in the High Court in this country. It asked the Divisional Court to rule upon the meaning and effect of Resolution 1441 and in particular to declare that that Resolution would not authorise the use of force against Iraq. The Divisional Court rejected the claim for judicial review and essentially gave three reasons for doing so. The first was that courts do not usually give advisory opinions although they do have a discretion to do so. The second reason was that to do so in this case would damage international relations and would involve getting into terrain which the courts of this country are traditionally reluctant, very slow to intrude upon, that is the question of war or peace. The third reason given was that Resolution 1441 was an unincorporated international instrument, in other words an instrument not part of domestic law and that it was not necessary to construe it by a domestic court in order to resolve a person's rights or duties in the domestic legal system.

Contrast that with the view which the House of Lords had taken a few years earlier in the well known Kuwait Airways case. That concerned the first Gulf War. It concerned the invasion by Iraq of Kuwait in 1990, which was of course clearly illegal in international law and the Security Council of the UN indeed said so in resolutions of the time. In a property dispute heard in the courts of this country the question arose as to whom various aeroplanes belonged, these Kuwaiti aeroplanes which had been seized by Iraq at the time of the invasion of Kuwait. Normally the position in English law is that the courts of this country will respect and give effect to the legislation of another sovereign state so in this case the decree by Iraq expropriating the Kuwaiti aeroplanes would, other things being equal, be recognised as a valid law and so the property in the aeroplanes would belong to Iraq. The House of

Lords refused to do any such thing. Why? Well the House of Lords referred to the UN Security Council Resolution amongst other things. So no question of there being a problem that this was an unincorporated international instrument then. Before I leave the CND case I should mention that various of the judges also mentioned that there was no need for them to get involved because the government had access to the best legal advice available.

The next case I want to talk to you about is the case of Jones & Ayliffe. This arose out of various peaceful protests in February and March of 2003. Greenpeace and other protestors were trying through non-violent direct action to stop for example tanks and weapons being loaded on to ships to go to war in the Gulf. They wanted to argue at their trials for criminal damage and aggravated trespass that they were entitled to act as they had done because the citizen has the right to take reasonable steps to prevent a crime taking place. Now that's uncontroversial, that is undoubtedly a doctrine of our own domestic criminal law. They said that the crime in question was the crime of aggression. The Court of Appeal in the case of Jones held that aggression was not in fact a crime in international law. This came as a surprise to many people not least Lord Bingham in the course of the argument of the case in the House of Lords because as I recall he pointed out in argument that several of the Nazi high command had been tried, convicted and executed for having committed this crime at the Nuremberg tribunal.

So the House of Lords disagreed with the Court of Appeal and held that it was indeed a crime known to public international law. Those of you who are students of international law will also recall that there is a general principle of English law which says that norms of customary international law are generally rules of the English common law as well. Certainly when I was an undergraduate I was taught that that had been a rule of English common law since at least 1737. So there is a bit of a problem here because if you add those two propositions together there was a strong case for holding that the crime of aggression known to international law was also a crime in the English common law but this is where the argument fell down. So far as the House of Lords was concerned they held that there was a fundamental constitutional problem with this argument which was that at least since Knuller v DPP in 1973 the courts of this country have declared that the common law cannot create any new offences. But this does prompt the question: was this truly a new offence? As Lord Bingham recognised it was an offence known to international law as long ago as 1947. Suppose for the sake of argument that some of the Nazi high command had been tried not by an international tribunal at Nuremberg but by an English court, either exercising jurisdiction on English soil, or perhaps as the Lockerbie trial was done, an English court sitting on foreign soil. The question arises whether it would have been arguable that the common law in 1947 would have recognised the crime of aggression as being properly an offence chargeable against those people.

So the position has been that no court of this country has ever had the opportunity to pronounce on the legality of the invasion of Iraq. That in turn has made it crucial for the maintenance of the rule of law that the role of the Attorney General in providing legal advice should have been as diligently performed as it can reasonably be. Now what was that advice? Well, we now have it; we didn't at the time. He wrote a legal opinion, that is Lord Goldsmith, the predecessor to the present Attorney General. Lord Goldsmith wrote a legal

opinion on 7th March 2003 which was leaked and subsequently published by the government in 2005. He began by considering the three possible bases for the legal authority to use force.

He started with self defence and he discounted it. He expressly rejected the American notion that there is a right of pre-emptive self defence. So whenever anyone says to you, whenever anyone comes on the news and says that there was a right of pre-emptive self defence at the time please remind them that the British Attorney General rejected that. That was not the basis on which this country at least went to war.

The second possible basis he referred to was the emerging and still controversial doctrine of humanitarian intervention. He mentions the possibility that there may be in certain cases lawful authority to intervene in another state by force to avoid a humanitarian "catastrophe", he uses that phrase, but the important point for present purposes is to recall that again he expressly rejected that as the basis for intervention in Iraq. So please every time you hear Tony Blair come on to TV and say that Iraq is a better place because he's not sorry that he removed an evil dictator, remember and take any opportunity you can to remind him that his Attorney General did not advise him that that was the lawful basis on which he could attack Iraq.

So what was the authority which the Attorney General advised existed? Well he said that lawful force could be authorised by the United Nations Security Council itself. He didn't say directly that Resolution 1441 had that effect but rather he said that it was an earlier resolution of the UN Security Council which had been revived in the light of subsequent events and in particular in the light of Resolution 1441. You can read the opinion for yourselves and I don't have time to go through it in great detail now but the argument as I understand it, in essence it boils down to this, that in August 1990, 1990, Resolution 678 was passed which authorised members of the UN to use all necessary means to assist in expelling Iraq from Kuwait and to restore international peace and security in the region. So it was all about the first Gulf War.

Later on Resolution 686 was passed which created a temporary ceasefire and expressly kept alive the possibility of the use of force if it were breached because it kept alive 678. Then there was a permanent ceasefire in Resolution 687, at the end of the hostilities in 1991, and very significantly in my view Resolution 687 did not keep alive that reference to 678. You may think also significant that the Attorney General's advice of the 7th March 2003 nowhere makes reference to Resolution 686 and this contrast in what the Security Council had done.

In my view it's plain that Resolution 678 passed in wholly different circumstances, in the context of another armed conflict, had absolutely nothing to do with whether member states of the UN could unilaterally attack Iraq in March 2003, 12 years after the end of the first Gulf War, in wholly different circumstances. Really the killer point in this sense is this that at the time, in 1991, a number of western leaders were asked why they didn't go on to Baghdad? George Bush senior, John Major, the Prime Minister of this country at the time, said that they couldn't because they had done everything that was authorised by Resolution 678. They had

done what was proportionate to expel Iraq from Kuwait and to restore international peace and security in the region. It does defy belief that a resolution passed in 1990, in those circumstances and which did not authorise regime change in 1990, in 2003 apparently did authorise regime change. This is the argument which the Conservative peer and respected barrister, Lord Alexander, in his Justice lecture of 4 years ago, this is the argument which a man who used his words very carefully described as an argument which was “risible”, risible.

Now perhaps even more important than the actual result in the advice given was the process by which it was given and I am going to tell you a few things that are in the public domain but may not be that well known. They are largely in the public domain as a result of evidence which is before the courts of this country in a case called Gentle. Many of these issues will be explored by the House of Lords in a case called Gentle v the Prime Minister to be heard in February of next year by the House of Lords. It seems to me clear from the evidence before the court, first of all, that the only written advice ever given on the legality of the invasion was the Attorney’s advice of the 7th of March, just 13 days before the invasion started. Secondly, it’s clear that the internal advice given for example by lawyers at the foreign office was all to the effect that the invasion would be illegal without that elusive second resolution. Thirdly, it appears, although this isn’t entirely clear, that the Attorney General agreed with that view before the 7th of March. I say that because Elizabeth Wilmshurst suggests that in her resignation letter.

The next point is that Lord Boyce, the Chief of the Defence Staff at the time said that the 7th of March opinion was not good enough for him because it was full of caveats, it was equivocal. Let me remind you of one of the things that the Attorney General said in his written advice. He said that the best course would be for there to be a second resolution but having spoken to various people including Americans that he had visited recently this is the way he put it. He said I accept that a reasonable case can be made, that there is no need for a further resolution. Now I have to tell you that if I did an opinion for the purposes of legal aid saying that I think the better view is X but I accept a reasonable case can be made for Y I would not be given legal aid. Remember that that opinion is in many people’s views the highest that one can put the case. But this is when it gets really interesting. So around about the 10th of March Lord Boyce says this isn’t good enough, I’m not going to send my troops into war when they may end up facing war crimes charges.

So what happens next? Well the Freedom of Information Act again has come to our assistance here. The Information Commissioner in a little known decision last May, May of 2006, ordered the Attorney General to make a disclosure statement. What the disclosure statement says is that, as I read it, there was no further written legal analysis whatsoever. Nothing certainly is publicly available so there is no further advice. So if the Legal Services Commission had come back to me and said look, this isn’t good enough, you’ve got to do better than this, I would normally be expected to do a further written advice. There is no further written advice from the Attorney General about the legality of the invasion. What did happen was that there was a meeting with his legal secretary and at the meeting it is minuted that the Attorney General came to the view that the better view was that the revival doctrine was correct and Resolution 678 did provide the authority for the invasion.

Then what happened, and this appears to be the first time, external counsel was instructed. Now contrary to popular belief it appears from the evidence before the court that external independent counsel from the bar were never instructed previously to advise on the legality question and indeed didn't advise now because the disclosure statement is very interesting. It says counsel was instructed to assist in drafting the statement which the Attorney General would make to parliament. So not to advise but to act as a sort of secretary, helping to draft a document.

Now the statement is well known. It was given to parliament on 17th March, which was a Monday. Many of you will have seen it, it's a nine paragraph statement which says in unequivocal terms that the invasion will be lawful. It has no ifs, not buts, no mention of reasonable cases this way or the other, no reference to the vast majority of academic lawyers who took the contrary view, no reference to Elizabeth Wilmshurst or anything of that sort. Parliament was told simply that the Attorney General's view is the invasion is legal. Earlier that morning the Cabinet had met. Robin Cook's seat was vacant, so Clare Short tells us in her memoirs, his seat was vacant because he had just resigned from the government over the proposed invasion. His seat was taken by Lord Goldsmith. Lord Goldsmith's statement was shown to the full Cabinet, but this is the last thing I want to emphasise: the full Cabinet, we know this from the evidence, the full Cabinet was never shown the 7th of March opinion. So not only the parliament of this country, but also the government of this country in the sense of the full Cabinet, went to war without ever being told about the caveats and qualifications and equivocations in the Attorney General's view of 7th of March.

I am going to pause there for a few minutes. Before I do can I just ask a question? It's a straw poll of this audience, forgive me for swinging this on you, but who in this room has heard of Abu Ghraib? Can I ask a different question? Who in this room has heard of Darul Dhyafa? Okay. Well Darul Dhyafa was a British run prison just outside Basra and in September 2003 certain events took place there and rather than tell you what happened in my words I want to show you now, just for 5 minutes, an extract from a recent *Panorama* programme. *Panorama* is, as many of you will know, the flagship current affairs programme of the BBC in this country and at the end of a court martial in March of this year *Panorama* broadcast this programme about what appears to have happened at Darul Dhyafa.

[Film]
Hello, I'm Jeremy Vine and this is Panorama. He had 93 separate injuries on his body when he was left for dead on a toilet floor.

What I saw in that cell wasn't interrogation, it wasn't detention, it was torture.

Jeremy Vine: But what's the biggest scandal? A rare example of horrific abuse by the British Army or a failure to nail those really responsible.

Cover-up is almost a fact of life within the military. The military are very secretive, naturally.

Jeremy Vine: The facts are shocking, yet to read some of the coverage of the court-martial into the death of a prisoner you'd think the charges were somehow trumped up in an excess

of political correctness. There is nothing fabricated about the injuries to Baha Mousa or the fact that dozens of soldiers either joined in or witnessed the abuse. So why is only one man facing punishment?

A scene of crime, there's a dead body. There are men with internal bleeding, ruptured organs, broken bones. They have sandbags over their heads, their hands are bound. They're lying in their own excrement, semi-naked, semi-conscious, shaking, terrified. They've been tortured for 36 hours. If they were British we'd want the people who did this to go to jail, but this is a war crime committed by British soldiers and the Iraqi victims have been let down by British justice.

It disturbs me that it is probable that this trial will conclude and we will not know how Baha Mousa died. For the vast majority of soldiers they feel uncomfortable, even ashamed perhaps that such deeds are alleged to have been made by members of their army.

This is the detention centre in Basra where it happened. We know war crimes were committed in these rooms. We know which units were there, we know who was in charge. We even know who inflicted some of the abuse. Enough, you'd think, for a properly functioning investigation to move towards finding the culprits but it failed to do that and not for the first time.

You've got soldiers investigating other soldiers, and then the papers are sent up to soldiers who decide who should or shouldn't be prosecuted.

Rabinder Singh
Now that was a reconstruction as you could see from *Panorama* but a reconstruction based upon evidence that was given at the court martial to which reference was made there. As you will have heard there the case was primarily, but not exclusively by any means, about a young man called Baha Mousa. Baha Mousa was a hotel receptionist who along with several of his colleagues at the hotel in Basra was arrested in September 2003 and taken to the detention centre where a few days later he died. Now did you notice in the film, based on the evidence at the trial, one of the things that is very visible is that the detainees there have sandbags over their heads. Hooding has apparently returned as a conditioning technique, at least at that time, in Iraq and it’s something I want to come back to but before I do that I want to tell you a little bit about the law arising from this case.

Many of you will know about the case of Al Skeini. Al Skeini was a set of 6 test cases one of which was on behalf of the family of Baha Mousa and it was decided by the House of Lords in June of this year. In my view it represents a real break through in that the House of Lords held that the UK’s Human Rights Act does in principle apply to British forces outside the territory of the UK. It did apply to that incident that you’ve seen in Iraq. But note that the House of Lords also held that very few cases, in fact fall within the jurisdiction of the United Kingdom in Iraq, under the European Convention on Human Rights, because it held that jurisdiction was exercised over Baha Mousa on a very narrow basis namely that he was detained in a British detention centre. So not even arrest by itself apparently would suffice.

Contrast that with other cases in Strasbourg. For example the Ocalan case. Ocalan was arrested in Kenya by Turkish authorities and yet the Strasbourg court had no difficulty in holding that from the moment of his arrest in Kenya he fell within the jurisdiction of the Turkish authorities for the purposes of the European Convention. The House of Lords also held that occupation, in other words belligerent occupation of another state or part of its territory, is not enough to trigger jurisdiction within the meaning of the European Convention. Contrast the International Court of Justices opinion in the Palestinian wall case and its judgement in the Congo case where it was held that the ICCPR jurisdiction did arise because of occupation of other territories. Those cases, I'll be corrected if I'm wrong, those cases are nowhere dealt with and analysed in the opinions of the House of Lords and this raises some very troubling questions. Suppose for example that Baha Mousa had not died at the detention centre but rather that he had been tortured and killed in the toilets of the hotel. We know from the evidence that the beatings started in the toilets of the hotel. According to the reasoning of the House of Lords he would never have fallen within the jurisdiction of the UK if he had died at the hotel.

How did these men come to be hooded? Well it wasn't for reasons of security because again the evidence suggests that they were not in fact taken wearing hoods to the detention centre so the sandbags were put over their heads at the detention centre. Other techniques were used on Baha Mousa and the other detainees which the public had been told had been banned since 1972 when they had been used in Northern Ireland, techniques of conditioning, as it's euphemistically called, of requiring detainees to adopt stress positions, that's things like having to sit down without a chair and do that for hours on end. Food deprivation – Baha Mousa's stomach had no food in it after 36 hours so the autopsy showed. Sleep deprivation. The European Court of Human Rights was told in Ireland against the UK in 1978 that these techniques had been banned by the British government.

In a chilling letter from the Treasury's solicitor put in evidence before the court earlier this year, the Treasury's solicitor wrote to the House of Lords that although it was government policy that these techniques should not have been used the policy had not "cascaded down" to the relevant officers and soldiers. One of the men tried and acquitted at the court martial was Colonel Mendonca, the Commander of the relevant unit, and quite understandably you may think he said that he had asked for legal advice and he was advised that the techniques used for conditioning were lawful.

I have to say that it is utterly unclear to me at least, and I have been involved in this litigation for 5 years now, it's unclear to me what was the government's position in 2003 and 2004 in relation to the applicability of any international human rights treaty? I asked twice in the House of Lords whether the counsel for the government could enlighten us on whether the government accepts even that the Convention Against Torture applies to British forces in Iraq? We received no answer. The Committee Against Torture has asked the same question of the British government and again as I understand it there has no been clear answer given.

Now these questions may be looked at in the near future by the Joint Committee on Human Rights by both Houses of Parliament. If you go to their website you will find that on the 8th of August of this year they issued a call for evidence and they raise amongst other questions

these: why were some troops in Iraq apparently ignorant of the long standing ban on the five conditioning techniques? Was this a problem in relation to one brigade or more widespread. Why was legal advice given that the illegal conditioning techniques could be used? Who was ultimately responsible for that advice? Did the Attorney General advise that the European Convention and the Human Rights Act did not apply in Iraq? If so, was there any connection between that advice and the legal advice that the illegal techniques could be used?

Well giving evidence to the JCHR at the end of July, I think on the last day that he was in office in fact, Lord Goldsmith said that his position had always been that the ECHR did apply in cases like Baha Mousa's in Iraq. If that was his position again it appears not to have cascaded down to others because I've seen the evidence as counsel in the case of Baha Mousa, which was filed on behalf of the government. A witness statement was filed which apparently set out the legal obligations which the British government thought it was under in the occupation of Iraq and if you read that witness statement you will see numerous references to international humanitarian law, in particular the Geneva Conventions, but you will not see any reference to the European Convention on Human Rights. Indeed that would be consistent with the position which the government took in the litigation because in the Divisional Court they fought tooth and nail the suggestion that even Baha Mousa fell within the jurisdiction of the UK under the ECHR. Now I should record that subsequently in the Court of Appeal and the House of Lords they made that concession after the Divisional Court had decided that point against the government. But Baha Mousa's case was not an isolated incident and it seems to me it's vital to know what was the policy which had been adopted by the UK and perhaps by other NATO states in Iraq at that time. That's why there are many calls today for a full and public inquiry into what was going on.

I want to say a few words by way of conclusion now. What are we to make of all of this, these intense pressures put on the rule of law in the last 5 years? One view is that we should simply give up on law. The legal philosopher and constitutional lawyer, David Dyzenhaus, reminds us that in ancient times there was a custom that when a war was about to begin the statues of the gods would be covered in shrouds so that they should not see what we were about to do. There was a touching echo of that in 2003 when before the Iraq war started Colin Powell was at the UN in New York to make the case for war and somebody noticed that behind him the TV cameras would be able to see Picasso's famous painting of Guernica and so somebody put a shroud over the painting of Guernica.

Are we to conclude then that force and réalpolitik will always prevail or is there room to be a little more hopeful? Those of you who know me know that I am an eternal optimist and I would like to say three things about why I think we should be hopeful.

First of all law matters not only to the public but to the state itself. You may say this was only a fig leaf but even a fig leaf has some purpose. In this case the fig leaf was not enough to cover the naked use of power and most people can see that. The state has found itself unable to escape the nagging doubts ever since because the law question marks have refused to go away.

Secondly, I would say some important victories have been won along the way. It is important that Baha Mousa's family has secured the victory it did in the House of Lords especially that detainees are protected in principle by human rights treaties wherever they may be in the world and that the Human Rights Act applies in principle outside the territory of the UK. Just think for a moment of why Guantanamo Bay is where it is. Why is it in Cuba and not in Wyoming? The reason is that the law affects the real world. Legal doctrine shapes the world around us: there is a doctrine of American constitutional law which has said in the past at least that the American constitution does not confer rights on a foreign national so as long as they remain on foreign soil. The Human Rights Act, as Shami Chakrabarti said on the day the Baha Mousa judgement came out, means that there can be no British Guantanamo Bay so wherever British forces detain a foreign national anywhere in the world they will be protected by the human rights law of this country.

Thirdly, I'd like to say this that perhaps most important is the method of the law. The law asks hard questions even of the most powerful which they may find difficult to answer. With all its faults the law has integrity. The people can see, that it consists of general norms announced in advance and which are not simply designed to suit the expediency of our political rulers. As Dworkin has said law operates in the realm of principle, politics in the realm of expediency. Law offers hope at a time when people are increasingly embittered about their lack of trust in politicians. It seems to me law is the antithesis of violence but there is no room for complacency. At most what I can say to you has been achieved can be regarded merely as work in progress and I would like to finish by reading from a poem, some of you will have heard me read this before and forgive me if you've heard it but I think it's important. Last December on the anniversary of John Lennon's murder Yoko Ono composed this poem in his memory and I extract from it. She said:

To the people who have lost loved ones without cause: forgive us for having been unable to stop the tragedy.
We pray for the wounds to heal.

To the soldiers of all countries who were maimed for life or who lost their lives: forgive us for our misjudgements and for what happened as a result.

To the civilians who were maimed or killed or lost their family members: forgive us for having been unable to prevent it.

To the people who have been abused and tortured: forgive us for having allowed it to happen.

Thank you very much.

Professor Chinkin
Thank you very much indeed, Rabinder, for that extraordinary lecture. It was informative, analytical, moving and I think was also extremely important to remind us that law is not just an abstract set of questions. We are dealing with real people, real victims, and reminds us of the very painful situations that lawyers address and seek to find answers in some ways to.

Now Rabinder has agreed to answer questions.

Question
[Name] from the University of Westminster. Just a quick question – are politics and law a real distinct? I mean I am thinking about the US constitution, is it law or is it politics?

Question
Philip Harris, was a practicing barrister for 30 years, haven't been for the last 10. Thank you for a delightful speech. It seems to me that this is important, it may or may not be the case that in international law aggression is a crime but it certainly isn't justiciable, is it, in the international criminal courts. It seems to me that big people should suffer for their injustices as much as small people and I think Tony Blair should be prosecuted for his crimes relating to Iraq and I think he would have no defence to charges in the domestic courts. I think he would have no defences to charges of murder in relation to the ordering of soldiers to attack Iraq. If I am wrong he would certainly be guilty of multiple charges of manslaughter. I also think he would be guilty of conspiracy to kidnap, of false imprisonment and conspiracy to commit GBH with intent to commit GBH. Clare Short agrees with me, what do you think?

Question
[Name], I'm a member of the bar. I would like to ask Mr Rabinder Singh as well as the Chair whether your optimism is somewhat dented with the appointment of Rosalind Higgins, a former professor of this university, as the President of the ICJ? Someone who believes in process oriented law, in other words what the big guys do is what matters and what becomes law.

Question
I like to ask Rabinder Singh about…does he agree with me there is an identical scenario of attacking Iran on the basis of false, twisting the arm of India in the nuclear club in Geneva, and now raising all the false reasons in attacking Iran or trying to attack Iran, the subversions, the soldiers attacking Kurdistan and all, so I wonder there is an identical scenario to that?

Rabinder Singh
The first question related to whether there is really a distance between law and politics and is the US constitution actually politics? Well I'm not an expert on American constitutional law although I was a student for a year there. My understanding from that brief period is that certainly there is a distinction between law and politics as understood in the USA and the constitution is a very important source of law and not merely political action by another word.

Secondly, I think the gentleman in the front asked a question about whether the crime of aggression is justiciable in international courts? My understanding is that pursuant of the Rome statute establishing the International Criminal Court it's not currently justiciable in that court but nevertheless as the House of Lords confirmed, and as was held at Nuremberg, the fact that the crime does exist, although its outer edges may be unclear, has been clear since 1947. I don't think I want to comment about any individual potential defendant in the future.

The third question was about Rosalind Higgins. I don't feel qualified, Christine, really to answer that question. Safe to say that from my – I've never met Rosalind Higgins – from my understanding she is a highly regarded international lawyer and I wasn't surprised to learn that she had been appointed President of the ICJ but Christine may have her own thoughts on that.

Fourthly, a question was asked about Iran. I agree that there is grave cause for concern about Iran. In a sense that's why these questions still matter. It's not only about fighting the last war it's also about learning lessons for maybe the next war. All I could say to you, again maybe you'll think I'm unduly optimistic, but I genuinely believe that the legal questions which have been raised over Iraq for the last 5 years should mean that it must be much more difficult, at least for this country, to take part in an invasion of Iran if they are going to rely on the sort of dubious legal bases that they did for Iraq.

Professor Chinkin
Perhaps if I may I'll just say one comment. Professor Higgins is an adherent to the so called Newhaven School of international law. It's certainly a theoretical approach that sees law as a processial notion rather than as a straight rule oriented system but I think it is also very important to remember that one aspect of the Newhaven School is a very firm commitment to human dignity and when she was a member of the Human Rights Committee for example many of the statements and general recommendations that came out from that Committee show a very clear commitment to human rights and to legal analysis as well.

Question
[Name] formerly an IR student here at the LSE. I hope you can help me, regarding the Desert Fox campaign, the aerial bombardment of Iraq conducted by the US and UK in 1998, I'd just like to know if you know what the legal authority was for that because I honestly don't and whether that was also the revival doctrine, whether they referred to resolutions from the early 90s for that, and just a general enquiry because I am wondering if that then would be a continuation of that in 2003?

Question
[Name] You may remember I was an avid follower of the Al Skeini case through the High Court and the Court of Appeals process and I was wondering are you happy with the House of Lords decision or will you take it a step further? I mean will you take the case to the European Court of Human Rights?

Question
Conor Gearty, LSE and also Matrix Chambers. If we follow the reasoning that we've heard it seems to be the case that we need UN resolutions in order to authorise the use of force, at Security Council level, and if we accept that many despicable regimes have friends in the Security Council it must therefore often be the case that no action can be taken and is one of the consequences of the Iraqi adventure that we have to say that no action of a military nature can ever be taken in such situations and look in the face the horrors of certain

regimes and say that a further price that is paid by the Iraqi adventure is the relative impunity with which they can continue now to act?

Question
John Robins, journalist. Can you clarify the allegations surrounding the Al Alamara incident in May 2004 in the *Guardian* a few weeks ago please?

Rabinder Singh
First there was a question at the back about Operation Desert Fox in 1998. Now I must confess I haven't studied the legal reasoning in so far as it's available in relation to that as closely as I have in relation to 2003 but my understanding is that there was certainly reference to the earlier UN resolutions and so a similar argument about revival was made at that time. My understanding is that there was also reference made to the humanitarian intervention doctrine but as I said that was expressly ruled out, that latter argument, in 2003.

Second question rose again at the back about the House of Lords decision in Al Skeini. I don't think I can in a public forum disclose confidential advice. I think all I can say is watch this space.

The third was from Professor Gearty about UN resolutions and whether we may have to face the prospect that many despicable regimes one cannot act against. I think this raises one of the most pertinent and difficult questions of the evening, if I may say so, and let me try and deal with it as best I can but know that others will have their views about this. I don't claim a monopoly of wisdom, far from it, but it seems to me that first of all, whether or not one accepts that there is an emerging doctrine of humanitarian intervention, that on any view it would have to be very carefully controlled if it's not to become a licence for unilateral use of force by members of the UN. Now it was said to be the legal basis for the NATO intervention in Kosovo in 1999, which was, as I recall at the time, certainly compared to Iraq, a relatively popular military action. I remember some commentators at the time talking about NATO having become the military wing of Amnesty International. So we do have to confront this important question. Let's assume that there is such a doctrine, nevertheless I think everyone recognises that it has to be kept within very careful confines. Even Lord Goldsmith said that about Iraq.

So what that then leaves is certainly the possibility that there will be situations when international law is not able through at least military action to intervene in the internal affairs of a sovereign state and I think that is a considered position. I don't think it's accidental but that's where we have arrived. I think it's a considered position because our forebears who had come through the atrocities of the 1930s and the Second World War understood well what they call in the UN Charters preamble the scourge of war and there are just two things that I would say, Conor, to share with you if I may.

One is that even the Second World War, which in most people's view unless you are an absolute pacifist, and I'm not and people know that, even the Second World War was horrific in what happened to soldiers, to civilians. I don't know if people have seen the film *Atonement* recently, they had to tone down the World War II scenes in the film version. In

Ian McEwan's novel, *Atonement*, he describes how one of our noblest moments in the Second World War, which was the retreat to Dunkirk, how people are dealt with on both sides and those are the horrors of what happens in war. So I think that our forebears when they drafted the UN Charter understood well that war should never be an easy option.

The second thing I would say, Conor, is this that certainly in the school where my children go to school, what we try to teach them is that however much there may be reason to act violently against others there is no justification to act violently against the bully for example. We try to inculcate in our children the value that is important to have peaceful resolution of disputes and that's why I come back to my concluding remarks about how the law is the antithesis of violence. If we didn't have the law it seems to me that we would back to fighting literally. I remember a barrister in the 12th century was a knight because you had trial by combat then. It was only in that century that we moved from trial by combat to trial by jury and I would have been useless at that time! [Laughter]

The last question was about Al Alamara. I don't think I can add to what the *Guardian* about that. It maybe that others in this room can shed light on that.

Question
How many prisoners in UK army in Iraq have died and am I right in understanding that the vast majority of them were not actually so called combatants but actually were civilians picked up for things like looting?

Question
[Name] Human rights student. Referring to Conor's question that if those states are governments which are very much concerned about the rights of other people in other nations and they want to make them accountable to them then why are they not applying the universal jurisdiction principles to them like say i.e. the party to the ICC and when it comes to them they say that okay, there is the reason that we are not becoming party to the ICC because the providence of the defence are not there but when it comes to the Guantanamo Bay, as you rightly mentioned, that they are denying to them. So for me it is the political will rather than we can say it's the matter of the national interest which matters to what happens to Rwanda.

Second, as far as I am an international member I defer with your point of view that Amnesty International doesn't advocate or doesn't oppose but we say that whatever action you are conducting should conform to the norms of the human rights so the Amnesty International position at the Kosovo intervention was that we opposed it, not for it.

Question
[Name] LSE. Just a quick question – are you disheartened at all or perhaps if you see the glass is half full you're not that whenever there are issues that deal with international law, in order to bring some attention to it or redress concerns that are raised, often one is forced to try and come up with an issue or deal with an issue at municipal level. So in your case significant issues with respect to international law were dealt with in the Al Skeini case, do

you think real politicians or real practitioners in real politiques see that as a real threat to their ability at the international level to do what they think is fit in terms of might equals right.

Question
Ben Grant, law student from BPP College. What is the maximum penalty, if there is one, for deliberately misleading the Cabinet and parliament and people from the information you've given us?

Question
My name is Joe Rober. I was an oil consultant and I have a question of a rather different sort from the ones we've been asking, which are mainly to do with the ambiguities of the law and the law as concerning people's rights and killing people, I have a question about the possible passage of the oil law in Iraq. If it passes it will be a law passed by the Iraq parliament and it will change the rules under which Iraq oil reserves are made available for exploitation allowing companies, American companies mainly, to exploit them. Now this could be seen as an unjust law. It could be seen as a law opening the way to expropriation of the sovereign reserves of the Iraqi people and it could be seen as having been passed under considerable pressure from the occupying power. What would be the status of such a law?

Rabinder Singh
I think there were five people who asked questions, I'll try and deal with them each in turn. The first related to how many prisoners have died in British detention facilities in Iraq and were they not combatants? The genuine honest answer to those questions is that we don't know, that's the problem. One of the principle objectives, both in law and in practice of the litigation to which I have made reference this evening, is to obtain a full independent public inquiry into civilian deaths in particular but also into allegations of abuse of those that have not died. Suffice it to say that on the evidence I have seen certainly one can say that these were not isolated incidents and one can say that they did include non-combatants who were arrested for presumably not military matters.

The second question was about the applicability of the universal jurisdiction principle and if I've understood the point correctly I do have sympathy with that point of view. It seems to me that one of the reasons why there is public cynicism in this area is there appears to be asymmetry in the standards which are applied to different powerful people around the world and if I understood there was I think a second limb to that question which is that, more of a comment and I respect the comment, I do accept that in relation to Kosovo, it was not Amnesty itself which had advocated the armed action, I was simply making a reference to how some media commentators had referred to the action.

Third question was I think from the gentleman over here asking if I was disheartened that this tends to happen at a municipal level? Well not necessarily. I think there is room obviously for international judicial action when appropriate. We've seen that in a number of criminal tribunals, ad hoc ones in the past and now a permanent international criminal court. Obviously I would not in any way want to diminish the importance of a court like the ICJ. As I said some of the leading judgements that we were able to site in the Al Skeini litigation were given by the ICJ, especially the Congo case, which I think repays careful consideration but I

think what I would say is that general experience of legal practitioners like me suggests that politicians do tend to have their minds concentrated a little more when they think that it is going to be the courts of their own country which are going to be coming after them.

In relation to Strasbourg this has been very noticeable because of course this country has been party to the ECHR since 1953 and had allowed individuals to petition the Strasbourg organ since 1966 but the ECHR, it seems to me, never had the impact on the public consciousness that the Human Rights Act has had in just 7 years since it came into force and there is a certain immediacy. You see Baha Mousa's case would probably be stuck in some office in Strasbourg because they've got a huge backload. It's not their fault. It would take on average 5-6 years for a case to be decided in Strasbourg. So I think that sort of immediacy and the possibility of getting municipal remedies against public authorities here does tend to concentrate the minds of the governing class.

The fourth question was from up there about what is the maximum penalty for deliberately misleading parliament and the people? That's an interesting question. I advised a few years ago on the possibility of impeachment by parliament of being a possibility, certainly constitutionally it appears to me that impeachment would have been possible but of course in relation to something like misleading parliament the normal sanction is for parliament itself to decide and I suppose if a Prime Minister has already left office and is no longer a Member of Parliament it would be difficult to see what practical sanction could now be applied.

The fifth was a very interesting question about the oil law proposed in Iraq. I have to say that I don't know enough about it to be able to give a full answer or even a proper answer to that question. From what you said about the terms of the law it seems to me, I think this is the most I can say, it seems to raise some very interesting questions about in what circumstances you would refuse to recognise the validity of foreign law. Not usually done, at least in this country, but as I mentioned in the Kuwait Airways case it was done and that wasn't the first time, that was building upon jurisprudence going back to the 1970s which had had to deal with the aftermath of the Second World War and refusing to recognise decrees as being valid laws. So I think there could be interesting arguments about that.

Professor Chinkin
I think that all that really remains for me to do is to thank Rabinder again very, very much.