Lawbreaker or Lawmaker? Britain and International Law on the Use of Force

1. Introduction

From the domestic constitutional framework reviewed in chapter one the analysis moves on to the international context, with this chapter considering international law, while chapters three, four, and five focus on international institutions (the UN, NATO, and the EU). This chapter gives an account of the current debate on the international rules governing the use of military force, but will differ from the normal approach that seeks to discern the rules accepted by the international community,¹ by viewing international law from the perspective of the British government. In recent years the perception is that Britain is more willing to challenge—arguably flout—international law, with its actions in Kosovo (1999) and Iraq (2003) in particular. However, this chapter will show that British practice has, on a number of occasions, since the new world order introduced by the UN Charter of 1945, been problematic from an orthodox international legal perspective. The UK’s arguments before the International Court in the Corfu Channel case of 1949, its initiatives in creating the first UN sponsored coalition of the willing in Korea in 1950, its military venture to secure the Suez Canal in 1956, are examples drawn from earlier times that, together with recent practice in Kosovo, Afghanistan (2001) and Iraq, all raise the question of whether Britain is a law-abiding state.

More fundamentally the choice in these cases appears to be between Britain being a lawbreaker or an enlightened lawmaker. To be the latter, the British arguments for variations in the established laws must be supported and accepted by the international community. International law can be developed by practice as long as that practice is accepted as law. In the two main sources of international law, custom and treaty, custom is a ‘general practice accepted as law’,² while in


² Art 38(1)(b) of the Statute of the International Court of Justice 1945.
treaty law the text of the treaty can be interpreted and developed by subsequent practice. It may be of course that an examination of British practice on war and other uses of force indicates that its record is mixed—in some instances it may have contributed to the development of the law, in other cases it has breached international law. It is to that record that the chapter turns, but in order to understand post-1945 practice, it is necessary briefly to consider the development of international law on war and the use of force in international relations.

2. The Just War

Chapter one contained a number of instances of English monarchs invoking various justifications for going to war, from defence of the realm to a just war. In the latter case, mention ought also to be made of the crusades of Richard I in the Holy Land in the twelfth century. Richard was so often fighting in the Middle East doing ‘God’s work’ that he only spent less than one year out of his nine and a half year reign in England. The ‘just war’ doctrine predated Richard the Lionheart, with an elaborate, but basically procedural doctrine being found in the Roman period. According to the Roman approach, a just war was commenced in accordance with the law by approval of the college of *fetiales*, the view of the majority of writers being that the *fetiales* were not concerned with the intrinsic justice of the war but only with the correct observance of formalities. In the fourth century St Augustine incorporated the just war doctrine into Christianity, giving a number of just causes of war including avenging injuries, but moreover declaring that war was just if it were one which ‘God himself ordains’.

Whilst Augustine in the fourth century, and much later, St Thomas Aquinas in the thirteenth century, wrote in terms of war being just only if the other party was at fault, and that the attacking sovereign intended the ‘advancement of good, or the avoidance of evil’, the principles appeared too broad to offer any precise rules as to permissible uses of force. Indeed, they seemed to advance the appalling religious wars that regularly occurred in the medieval period, culminating in the Thirty Years War that was ended by the Peace of Westphalia of 1648.

3. Westphalian Order

The period following the Peace of Westphalia marked the emergence of modern nation states in Europe, each with ‘internal’ sovereignty over their own territories,
and each being free ‘externally’ to deal with sovereign powers of other states. Thus international law moved away from being dominated by the justice discourse of the medieval period, towards a more formal or ‘positivistic’ international law created by the practice of sovereign European states either by treaty or by the formation of customary rules. As regards the freedom to wage war, Machiavelli, writing in the early part of the sixteenth century, seemed to anticipate the philosophy that was to become entrenched for the next four centuries, when he wrote that the sovereign power within a state had the absolute right to wage war whenever it was felt necessary.⁸

However, the just war doctrine did not just quietly disappear; it still competed with the emerging positivist approach. Indeed, the influence of the oft-labelled ‘father’ of international law, Hugo Grotius, writing in the period of warfare leading up to the Peace of Westphalia, was still felt for a long period. Writing in 1625, Grotius compiled a list of just and unjust causes of war, always admitting the exception for honest belief in the justice of war.⁹ Other jurists took a more state-based approach, such as Gentili who stated that war was permitted in cases of necessity and expediency as well as in self-defence.¹⁰

The natural law-motivated theories of Aquinas and Grotius eventually gave way to a significant extent to the positivist notions of state sovereignty and freedom to contract or otherwise deal with other sovereigns, which eventually took its purest form in a period of ‘political absolutism’¹¹ dominant in international relations until the League of Nations’ Covenant in 1919. Just war doctrine did not disappear completely, with limited state practice in favour of a doctrine of humanitarian intervention. In this period the task of the international lawyer changed. No longer would the jurist have so much direct influence on the development of international law. Jurists tried to capture and analyse state practice, though in so doing, by virtue of their choice and emphasis, they could still influence evolution of international law. The primary sources of international law became treaty and custom, reflecting the law’s consensual nature,¹² with the writings of jurists still playing a role, but a subsidiary one.¹³

The absolute sovereignty of states removed all but limited procedural constraints on the initiation of war. Brownlie reports that in the period between the Final Act of the Congress of Vienna in 1815 and the creation of the League of Nations in 1919 state practice reflected an almost unlimited right for states to wage war.¹⁴ Britain, being a major colonial power, was not averse to using force to pursue its national interests. For example, in the nineteenth and early twentieth

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⁸ The Prince, ch 3.
¹³ Art 38(1)(d) of the Statute of the International Court of Justice 1945.
centuries Britain intervened militarily in Afghanistan on several occasions from its colony in India, first in 1839–1842 to re-instate a deposed ruler, again in 1879 as part of the ‘great game’ being played out by the Russian and British empires, and again in 1919 when the newly installed king of Afghanistan declared full independence and sympathy for those seeking the independence of India.¹⁵ Military interventions were seen as part and parcel of international relations.

Some limited restrictions on the right to go to war did emerge in the decades before 1914. Peaceful methods of settling the underlying dispute should be tried, a rule that was incorporated into the 1907 Hague Convention for the Pacific Settlement of International Disputes, and later in the Covenant of the League in 1919.¹⁶ The machinery for the pacific settlement of disputes also developed in this period with, for example, the establishment of the Permanent Court of Arbitration in 1899.

Another, more established procedural limitation was that there had to be a declaration of war, at least for a formal ‘state of war’ to exist. However, this was not a real limitation for full-scale armed conflict could still occur without either state being at ‘war’ with the other in the absence of any formal declarations. States’ reasons for not declaring war were mainly internal, since going to war might attract constitutional constraints, and would also require the ‘preparation of public opinion’.¹⁷ In order to avoid these constraints, states develop a variety of ‘restricted forms of coercion . . . reprisals, pacific blockade, and intervention to protect nationals and their property in foreign states’.¹⁸

It will be seen that some of these forms of use of force, or variations on them have been practiced by the UK in more recent times. It is worth outlining the doctrine of reprisals as developed in the nineteenth century, and contrast it with the doctrine of self-defence. It must be remembered though at this stage of the development of the *jus ad bellum* these were only two of a number of legitimate justifications for using force.

### 4. Armed Reprisals

In the period prior to the establishment of the League, states developed the practice of armed reprisals usually in the form of bombardments or military expeditions, as well as other forms of gun boat diplomacy, whereby states would seek to punish wrongful acts committed against them by other states. Often these expeditions served to punish states or other entities and also to protect the intervening state’s interests.

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¹⁷ Ibid., 27. ¹⁸ Ibid., 28.
An example drawn from British history was the decision by the government of William Gladstone in 1882 to punish the new nationalist government in Egypt whose anti-European sentiment was threatening the lives and property of European nationals. The arrival of a combined French and British fleet off the port of Alexandria led to the murder of a number of Europeans. The French withdrew but the British fleet bombarded the forts of Alexandria and landed marines to protect the Europeans. With Egypt falling into a state of anarchy the British army intervened to restore order by defeating the nationalist leader and occupying Cairo.¹⁹

The Naulilaa arbitration of 1928 between Germany and Portugal provided a clearer instance of a reprisal, as well as a judicial opinion on the legal content of the doctrine. It involved a German armed reprisal from its colony in South-West Africa (now Namibia) against the Portuguese colony of Angola in 1914. The initial injury to Germany arose out of a border incident which resulted in the death of three German soldiers. The German army responded by launching a military expedition into Angola which resulted in considerable damage and loss of life. These hostilities were not formally part of the First World War since Portugal was, at the time, a neutral power. The arbitral tribunal agreed to by the parties accepted that armed reprisals could be a lawful response to a prior international wrong, but Germany had not satisfied the two conditions attaching to lawful reprisals: first that it should have made a demand for reparation that had not been met; and secondly that the armed response should be proportionate to the original wrong.²⁰

5. Self-Defence

Reprisals were different to action taken in self-defence. The aim of reprisals was punitive not defensive—the aim was not to repel the border attack but to punish Portugal for its wrongful act at a time and in a manner of Germany’s choosing. In a time of an unlimited right to wage war, there was no need to define self-defence with any great precision, though it was still used as one of a number of justifications for the use of force. Classically, the Caroline incident of 1837 is cited as authority for a definition of self-defence in that period.²¹ In the incident, the British authorities authorized the burning of a ship while it was in a US port, the ship allegedly being used to further the armed insurrection taking place in the British colony of Canada at the time.

²⁰ (1928) 2 RIAA 1012.
Both the British and American governments agreed during the course of diplomatic exchanges over the incident that the British would have ‘to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation’, in order to legitimate the action. Often cited as authority for anticipatory self-defence,²² in other words as allowing a threatened state to strike first in expectation of an imminent attack, the phrase clearly allows for some degree of anticipation but not a great deal, and it may be doubted whether the British action actually met those requirements. Moreover as Ian Brownlie relates ‘self-defence was regarded as synonymous with self-preservation or as a particular instance of it’, so that it is not possible to draw out a general doctrine of self-defence from this incident, it was simply an attempt to proscribe self-preservation in relation to the particular facts.²³

6. Humanitarian Intervention

To this list of justifications for using force, there must be added the development of a nineteenth century version of the just war doctrine, namely the claimed right of humanitarian intervention. Ian Brownlie summarizes the right in the following terms:

A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable to action by any state which was prepared to intervene.²⁴

He further states the weakness that has always undermined this and older versions of the just war:

Operation of the doctrine was open to abuse since only powerful states could undertake police measures of this sort; and when military operations were justified as ‘humanitarian intervention’, this was only one of several characterizations offered and circumstances frequently indicated the presence of selfish motives.²⁵

Within a legal regime that allowed for force, humanitarian intervention was just one of many justifications that could be put forward, but the practice of states reveals very few instances of genuine interventions on humanitarian grounds.²⁶ Stowell cites the British, French, and Russian intervention in the revolt against Turkey by Greek insurgents fighting for independence.²⁷ In 1821 English and French volunteers, including Lord Byron, who lost his life in the struggle, had gone to help the

²⁴ Ibid., 338.
²⁵ Ibid., 338–9.
²⁶ Ibid., 340.
Greeks in their fight. These fighters and the Greek insurgents were on the brink of total defeat at the hands of an Egyptian fleet and army when a joint British, French and Russian fleet was sent to enforce demands for Greek autonomy. The decisive naval battle at Navarino in 1827 saw the defeat of the Egyptian fleet and the path was cleared to Greek independence in 1829 under the protection of Britain, France and Russia. Though there may have been some humanitarian considerations in this intervention, it seems more in support of the achievement of independence, an early instance of force being used in support of the self-determination of a people. Of course policies such as the weakening of Turkey were, more than likely, the real motivating factors in this British inspired military intervention.

7. The Inter-War Period

The limited constraints on ‘war’ and other uses of force identified earlier in this chapter were clearly insufficient to prevent the outbreak of the First World War. The total nature of the 1914–8 hostilities had profound effects on public and governmental thinking. The British military alone lost over 700,000 men, while over 1.6 million were wounded. The creation of a universal organization with powers to secure international peace and security was a radical development in international relations. However, the influence of state sovereignty was too strong, both on the constitution of the organization itself, especially in the unanimity requirement, and ultimately on the willingness of states to join the League and follow its strictures. The United States failed to join the League, and other powerful states were outside the League at crucial times.

The Covenant did oblige members to ‘respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League’, and it did emphasize the need for collective action by declaring that ‘any war or threat of war . . . is hereby declared a matter of concern for the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations’. However, these provisions were outweighed by a series of procedures that effectively allowed war or other uses of force. One provision, for instance, obliged member states to submit their disputes to arbitration or to the Council of the League and not to ‘resort to war until three months after the award by the arbitrators or the report by the Council’.

While the League’s Covenant and machinery was defective, the lack of a substantive and clear prohibitory norm appeared to have been remedied by the 1928 Treaty for the Renunciation of War as an Instrument of National Policy

28 Muir, British History, 528.
29 Art 5(1) of the Covenant of the League of Nations 1919.
31 Art 10 of the Covenant of the League of Nations 1919.
32 Art 11(1).
33 Art 12(1). See also arts 13, 15 and 16.
(also known as the Pact of Paris or Kellogg-Briand Pact), by which state parties condemned ‘recourse to war for the solution of international controversies’, and renounced war ‘as an instrument of national policy’. The treaty then obligated the parties to settle their disputes by peaceful means. Parallels with the norm prohibiting the use of force in the UN Charter will be seen. The Pact of Paris appeared to represent international law on the use of force by 1939 in that most states were parties, including Germany, Japan and Italy, and it was used as the basis for prosecuting crimes against peace at both the Tokyo and Nuremberg trials in which the surviving war leaders of Germany and Japan were tried in the immediate aftermath of the war. The Pact though was weak in that it only addressed ‘war’ and not ‘use of force’ more generally, and it lacked clarity on what was meant by ‘national policy’. Furthermore, it is important to note that neither Covenant nor Pact contained any definition of self-defence, though this was clearly recognized as an inherent right of a sovereign state in reservations made to the 1928 Treaty.

8. UN Order

In the brief overview of the development of the *jus ad bellum* given above, a number of justifications for using force have emerged: the just war (including humanitarian intervention); the right of self-defence; and the armed reprisal. These lacked great legal clarity especially as the right to wage war became increasingly recognized, at least until the formation of the League of Nations. With the advent of the UN Charter it appeared that a new world order was brought in whereby threat or use of force by states against other states was prohibited, except in the case of a defined right of individual and collective self-defence in response to an armed attack, or in the case of a Security Council sanctioned military action in response to a threat to the peace, breach of the peace or act of aggression. The scheme looked straightforward and appeared to remove the doctrines of war, just war and armed reprisal, and wider doctrines of self-preservation beyond a defined right of self-defence, from the lexicon of lawful action. In fact the only just wars were those sanctioned under the UN Charter. For example states could legitimately come to the aid of a state-victim of aggression under the right of collective self-defence, and the Security Council could authorize humanitarian

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34 Arts 1 and 2. 35 Arts 2(3) and 2(4) of the UN Charter 1945.
39 Art 2(4) of the UN Charter 1945. 40 Art 51 of the UN Charter 1945.
41 Arts 39, 42 and 53 of the UN Charter 1945.
intervention to stop genocide within a state if it deemed it to be a threat to the peace. However, there was no mention in the Charter of states or other international actors having the right of humanitarian intervention in another state to stop widespread violation of basic human rights. In fact that sort of unilateral action seemed to be prohibited by the ban on the use of force.

It is important to relate more precisely the content of the Charter rules prohibiting the use of force and the exceptions to it, since their meaning and application come into focus in the military actions examined below and in later chapters. Article 2(4) contains the prohibition and states that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁴²

One ambiguity in this provision contained in the words ‘against the territorial integrity or political independence’, was argued by Britain in the Corfu Channel case, examined below, as permitting for other limited uses of force not encapsulated in the exceptions contained in the Charter. Further, arguments that the final phrase, ‘in any other manner inconsistent with the Purposes of the United Nations’ somehow allows for force undertaken in pursuit of the UN’s purposes, including the protection of human rights, seems to be stretching the provision beyond recognition.⁴³ It does illustrate though that the ‘just war’ doctrine still has its advocates in the modern age, including Britain, despite the fact that as recently as 1984 the UK Foreign and Commonwealth Office stated that the ‘best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal’.⁴⁴ The British reliance on humanitarian motives in the 1990s in relation to interventions in both Northern Iraq 1991 and Kosovo 1999, reviewed more fully in chapter nine, represented a hardening-up of a more unequivocal doctrine of humanitarian intervention. In the light of this practice, in 2000 Britain was proposing guidelines on humanitarian intervention to the UN under which the international community should intervene ‘when faced with an overwhelming humanitarian catastrophe, which a government has shown it is unwilling or unable to prevent or is actively promoting’. That intervention should be ‘proportionate to achieving the humanitarian purpose’, should be collective, and ‘wherever possible’ should have the authority of the Security Council.⁴⁵

Article 51 of the Charter contains the right to self-defence and reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until

⁴³ Dinstein, War, Aggression and Self-Defence, 88–91.
the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁴⁶

Self-defence in this provision is limited to responding to an armed attack, which will inevitably cause problems for states wishing to try and deal with threats to them, especially given the devastating potential of (nuclear) missile attack developed during the Cold War, and the growing threat of international terrorism first emerging out of the Middle East Crisis in the mid 1960s. Should states have to wait for an attack to be able to take military force in self-defence? Bearing in mind that the Caroline incident of 1837 seemed to allow anticipatory action, the question is whether this is still good law after 1945. The British position on this will be explored in later chapters.

The right of self-defence is not dependent on the express approval of the Security Council, although if the Council takes ‘measures necessary’ to restore peace and security then article 51 suggests that the right might then cease. Arguments of what constitute such measures will be considered in later chapters. If states want to take military action that is not a response to an armed attack, the Charter does not leave them without any avenues, but they must persuade the Security Council to first of all make a determination under chapter VII, article 39 of which provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

While there is an overlap between the concept of armed attack in article 51 and ‘act of aggression’ in article 39, and between ‘threat or use of force’ in article 2(4) and ‘threat to the peace’ and ‘breach of the peace’ in article 39, practice has shown that article 39, especially the term ‘threat to the peace’, is not confined to breaches or indeed potential breaches of article 2(4), so that the Council can take action under chapter VII to deal with threats or acts of violence within countries as well as between countries.⁴⁷ While article 41 permits the Council to take non-forceful measures such as economic sanctions, article 42 covers the use of military force under Security Council auspices. Article 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have provided to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such

action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Members of the UN were meant to contribute troops to UN operations by virtue of pre-existing agreements and under the direction of the UN’s Military Staff Committee, but this proved impossible to achieve in the Cold War. Instead, as we shall see in chapter four, Britain was instrumental in developing a new method of fulfilling article 42, namely the development of coalitions of volunteer states (known as ‘coalitions of the willing’). The legal and practical weaknesses of such a system will be returned to in that chapter.

9. The Cold War

The Cold War period saw frequent and flagrant violations of the prohibition on the use of force, with very little enforcement action being taken against transgressors. The executive organ’s principal weakness—that of the veto belonging to each of the five permanent members (P5)—meant that it was largely inactive. Article 27(3) of the UN Charter contains the right of veto when it states that ‘decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . .’.

The content of article 27(2) shows that the veto does not apply to procedural matters such as the inclusion of items on the agenda, such decisions can be adopted by a majority of nine out of the fifteen members (originally seven out of eleven). However, on all other matters, in other words matters of substance, article 27(3) gives each of the P5 (France, UK, US, the Soviet Union (Russia) and China) a veto by requiring the concurrence of each of them. Practice has interpreted this provision to exclude abstention by a permanent member from being considered as a veto. Though abstention does not seem to be either ‘concurring’ or ‘affirmative’ as required by the terms of article 27(3), it has not been viewed as a veto for the simple reason that such an interpretation has been agreed by the P5 themselves and in fact does not restrict their right of veto. A permanent member simply has to cast a negative vote to block a resolution proposed under chapter VII which contains the enforcement powers (both non-forcible and forcible) of the Security Council.

However, if the resolution is proposed under chapter VI, which contains the consensual, and therefore more traditional, powers of the Council to promote the peaceful settlement of disputes, then article 27(3) of the Charter obliges a permanent member or any other member of the Security Council to abstain from the vote if they are a party to a dispute. While this principle was respected in the

48 See arts 43–7 of the UN Charter 1945.
50 This development is supported by the International Court’s advisory opinion in the Namibia case of 1971. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) 1971 ICJ Rep. 16.
early years (witness below the UK’s abstention on the Security Council resolution which recommended that the Corfu Channel incident of 1946 be referred to the International Court), its impact was very much reduced during the Cold War period (witness below the British and French willingness to veto proposed resolutions in the Security Council during the Suez crisis of 1956).

The veto prevented significant enforcement action being taken by the Security Council during the Cold War period. There were limited exceptions such as the US-led, UN-endorsed response to the North Korean invasion of South Korea in 1950, but most military interventions went unpunished. The reaction to the North Korea invasion by the Security Council was only made possible by the Soviet Union’s absence from the chamber, which was rather controversially treated as a case of abstention. The Korean War involved significant British political and military involvement and will be reviewed more fully in chapter four.

The only other occasion that military force was authorized by the Security Council during the Cold War also involved the British military, in this case the Royal Navy in the Beira Patrol of 1966–75 on station off the coast of Mozambique. The aim of the patrol as authorized by the UN Security Council was to ‘prevent by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia’. An oil embargo had been placed on Rhodesia following its unilateral declaration of independence from Britain in 1965, yet the colonial power in Mozambique (Portugal) had permitted oil tankers to dock at Beira and oil to be piped across its colony to Rhodesia. In requesting Security Council authority to use force if necessary to stop the embargo from being breached, the British representative Lord Caradon stated in the Council chamber:

Without that authority, the United Kingdom Government has to face the defiance of the United Nations with its hands tied. The Royal Navy undoubtedly had the physical power to prevent the Joanna V, for instance, from entering Beira. But in this matter my Government has been anxious that at all times its actions should be lawful actions and that it should not risk acting in breach of the law of nations. One of the very purposes of the action we are… taking against the illegal regime in Southern Rhodesia is to assert the rule of law and the principles of the United Nations Charter. I therefore ask the Council now… To enable the United Kingdom to carry out without fear of illegality the responsibilities which in the Rhodesian situations are ours.

In 1969 the Under Secretary of State for Defence, Dr David Owen stated in the House of Commons that ‘the patrol has been fully effective in cutting off the most direct route for the supply of oil to Rhodesia’. However, alternative oil supplies were found by Rhodesia, leading to critical questioning in the House of Commons of the value of the patrol over the following years.

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In contrast to the clear illegality of its intervention in the Suez Crisis of 1956 (reviewed below), the United Kingdom acted within the bounds of the UN Charter ten years later in undertaking the Beira Patrol. In so doing it helped to develop further the idea that willing states could be authorized to use force under article 42, in the absence of any earmarked UN forces as originally foreseen in the UN Charter. Despite the high sounding words of Lord Caradon, this did not mark an enduring commitment to the rule of law in international relations, rather on this occasion the UK’s and Security Council’s interests coincided sufficiently for it to receive authority. This did not constitute a guarantee that the UK would not act unilaterally in the face of the UN Charter. Though Suez might have marked the end of Britain’s imperial ambitions, the 1990s would witness a resurgence in Britain’s propensity to use force to solve pressing problems.

Southern Rhodesia was deemed to be a threat to the peace by the Security Council by virtue of its denial of self-determination by the white racist regime.⁵⁸ During the Cold War, only the Korean War involved the enforcement of the prohibition on the use of force, North Korea having committed an armed aggression against the South. In many other cases, the Council was inherently incapable of enforcing the prohibition on the use of force. This was especially so in the case of superpower interventions in their respective spheres of influence—for instance by the United States in Guatemala (1954), Cuba (1961), the Dominican Republic (1965), Grenada (1983) and Panama (1989), and the Soviet Union in Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979).

However, the rule prohibiting the use of force seemed to survive intact because these violations were still recognized as violations not as permissible uses of force, both by the rest of the international community, and often by the violators themselves evidenced in their attempts to argue that their actions came within the exceptions to the prohibition, or that there were in fact further exceptions to the ban on the use of force other than those allowed in the Charter.⁵⁹ For instance the Soviet Union argued that its intervention in Afghanistan in 1979 was justifiable collective defence of the country at the request of the Afghan government. The falsity of this contention was not lost on the international community when it regularly condemned the Soviet Union for its invasion at each UN session up until the Soviet withdrawal in 1989.⁶⁰ The reality of the Cold War period when power often prevailed over law was shown by the comment by Dean Acheson in relation to the situating of Soviet made missiles in Cuba leading to the missile crisis of 1962:

The power, position and prestige of the United States had been challenged by another state; and law does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty.¹⁶¹

For powerful states power and prestige were more important on occasions than any notion of the rule of law. Whether middle ranking military powers like the United Kingdom also saw fit on occasions to ride roughshod over the rules on the use of force during this period needs consideration.

10. The UK and the Use of Force in the Cold War

Before reviewing the post-Cold War period, it is interesting to evaluate some of the British arguments for using force during the Cold War. Like the superpowers, the UK was not averse to using military force. Its involvement in the Korean War (1950–3), peacekeeping in Cyprus (1964 to the present day), and its defence of the Falklands (1982) will be returned to in later chapters. Furthermore, it was involved in quelling insurgencies in Malaya and Kenya in the 1950s.²⁶² In this section consideration will be given to two episodes in recent British military history, one minor involving the Royal Navy (the Corfu Channel incident 1946) and the other more significant (Suez 1956), but both representing uses of force that did not fit easily within the framework of the UN Charter.

10.1 The Corfu Channel 1946

With the United Nations barely established and the Cold War looming, Britain was involved in a minor clash with the Communist People’s Republic of Albania led by Enver Hoxha. On 22 October 1946 a squadron of four British warships was sailing through the Straits of Corfu. Their passage was ‘intended as a warning to Albania not to flex its muscles in sight of the Royal Navy’.²⁶³ When passing through the northern part of the channel, with Albania to the west, two of the ships, Saumarez and Volage, were struck by mines with resulting loss of life and injury to their crews. Three weeks later on 13 November 1946, the North Corfu Channel was swept for mines by British minesweepers and twenty-two moored mines were cut.

At this time the Cold War stalemate in the Security Council had not yet hardened into the almost automatic use of the veto in disputes between East and West, and so the Council was able to recommend that the governments of the United Kingdom

and Albania refer their dispute to the International Court of Justice in its first contentious case. Following this recommendation, both parties agreed to submit two questions to the Court. First the parties asked the Court whether Albania was liable under international law for the damage and loss of life caused by the mine explosions. Secondly, they asked the Court whether the UK had violated the sovereignty of Albania by its naval operations of 22 October and 13 November.

In answering the first question, the Court acknowledged that, given the evidence, it was not possible to establish that Albania had laid the mines that the British ships had struck. There were suggestions that Albania’s then close ally, Yugoslavia, led by President Tito, had laid them, though the Court could not entertain these contentions. Despite that, the International Court thought that Albanian liability would be established if knowledge of the minelaying could be imputed to it. The principle established by the Court referring to ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’, is still seen as good law and the Corfu Channel case was cited widely in the International Law Commission’s Commentary on its Articles on State Responsibility of 2001. The Court was satisfied that Albanian knowledge had been established by the fact that it constantly kept a close watch over the waters of the North Corfu Channel, and by the fact that the geography of the Albanian coast made it easy to maintain such a close watch. The Court concluded that ‘the laying of a minefield in these waters could hardly fail to have been observed by the Albanian coastal defences’.

Having found Albania liable in international law for the explosions of 22 October, which gave rise to a duty on Albania to pay compensation to the UK, the Court then considered the second question in two parts by looking at each of the naval operations of 22 October and 13 November. The Court related the background to both naval actions by recounting the fact that Albania had fired upon British naval vessels in the North Corfu Channel in May 1946, which led to the UK protesting to the Albanian government that its right of innocent passage had been violated. The British government warned that if firing continued then that fire would be returned by British warships. It was in such circumstances that the squadron of four warships sailed through the North Corfu Strait on 22 October.

64 SC Res. 22, 9 April 1947. The Soviet Union and Poland abstained on the vote and the UK did not vote as it was a party to the dispute, so complying with the requirements of art 27(3) of the UN Charter which provides in part that ‘a party to a dispute shall abstain from voting’. Chapter VI of the Charter empowers the Council to recommend procedures or methods for the settlement of disputes, including referring the case to the International Court of Justice: see art 36(3). Such resolutions are recommendatory only see obiter statement in Corfu Channel Case (Preliminary Objections) 1947–8 ICJ Rep. 15 at 31–2 (joint separate opinion).

65 Corfu Channel Case (Merits) 1949 ICJ Rep. 4 at 6.


68 See Corfu Channel Case (Assessment of the Amount of Compensation) 1949 ICJ Rep. 244.
The Court considered that the Corfu Channel was an international strait through which passage could not be denied in times of peace, and therefore the UK had not violated Albanian sovereignty by sending the warships through. It also found that the manner in which the British warships sailed through the straits did not violate the principle that the passage should be innocent, even though the warships were at action stations ready to respond if they had been fired upon, and that the British action was not simply for navigation purposes but was really to test Albania’s attitude and ‘demonstrate such force’ that Albania ‘would abstain from firing on passing ships’. Though the Court did not expressly say so, by acknowledging that the British warships exercising their right of passage had the right to fire-back if fired upon, it seemed to be accepting that the manner in which the passage was undertaken was not a threat of force contrary to article 2(4) of the UN Charter, but legitimate preparation to act in self-defence if attacked by Albania.

Thus it would appear that the British, while engaging in a limited form of gunboat diplomacy on 22 October 1946, had kept within the bounds of international law. However, by characterizing the passage of British warships as innocent, the Court did seem to be allowing this concept to cover the forceful exercise of the right. The British were, after all, intent on using force if necessary to keep the Straits open. However, somewhat paradoxically, the Court was far more critical of the second naval operation of 12–13 November 1946, known as ‘Operation Retail’.

In response to the explosions of 22 October, the British government informed its Albanian counterpart of its intention to sweep the Corfu Channel for mines. The Albanian government refused to give its consent to minesweeping in its waters. The Court found that the minesweeping operation could not be justified as the exercise of the right of innocent passage, and that ‘international law does not allow a State to assemble a large number of warships in the territorial waters of another State and to carry out minesweeping in those waters’. Furthermore, the Court took the opportunity to balance its rather lenient approach to the passage of 22 October by dismissing two British arguments for allowing a limited use of force in the form of Operation Retail on 13 November. First of all the British argued that limited intervention was allowed to secure evidence of wrongdoing (in this case the mines) in the territory or territorial waters of another state. The Court rejected this argument in language that was rather sweeping when compared to its analysis of the incident on 22 October:

The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it

would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.\footnote{Ibid., at 35.}

The Court does not mention article 2(4) but the subliminal message is clear. Forceful interventions, no matter how limited, are not permitted, and it is no excuse to argue that the Security Council has been unable to take effective action to deal with the dispute. A strict approach to the rules prohibiting forceful action was reinforced by the Court’s response to the second line of argument put forward by Sir Ian Beckett on behalf of the UK, namely that the action of 13 November ‘threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence’\footnote{ICJ Pleadings, \textit{Corfu Channel Case}, iii, 295–6 cited in Brownlie, \textit{International Law and the Use of Force by States}, 266.}. The Court again responded in broad condemnatory terms:

> The United Kingdom Agent, in his reply, has further classified ‘Operation Retail’ among methods of self-protection or self-help. The Court cannot accept this line of defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations . . . . [T]o ensure respect for international law . . . the Court must declare that the action of the British navy constituted a violation of Albanian sovereignty.\footnote{1949 ICJ Rep. 35.}

What the \textit{Corfu Channel} case of 1949 shows is an early attempt by the British government to test the limits of the rules governing the use of force, in particular by trying to establish that article 2(4) does not contain an absolute ban on the threat or use of force, so that certain limited uses of force, not taken in self-defence, may be allowed. Although the Court almost seemed to allow this argument to succeed in relation to the events of 22 October by virtue of a very lenient definition of innocent passage through the territorial waters of another state, its conclusions on the minesweeping ‘Operation Retail’ of 13 November make clear that article 2(4) is to be read as protecting the sovereignty of all states from forceful interventions no matter how limited. For a country used to asserting its rights and interests by forcible means, this represented a blow, though there was very little discussion of the incident or the case in parliament.\footnote{A brief written answer was given on the mining of the two destroyers on 22 October 1946: \textit{Hansard} HC vol 430, col 133w, 20 Nov. 1946. A fuller explanation of the incident in the form of a written note was introduced into the House on 11 December 1946: \textit{Hansard} HC vol 431, cols 1168–75, 11 Dec. 1946. Even in February 1947 the government dismissed the idea of taking the case before the International Court of Justice: \textit{Hansard} HC vol 433, col 1151, 19 Feb. 1947. The House of Commons was kept informed of the proceedings before the Court from November 1947 until the Court decided in December 1949 that Albania should pay nearly £850,000 in damages for the sinking of October 1946: see \textit{Hansard} HC vol 472, col 750, 13 March 1950. Negotiations with Albania regarding payment of the compensation dragged on throughout 1950 and the government reported that they had led to no result in January 1951: \textit{Hansard} HC vol 483, col 570, 29 Jan. 1951 (Ernest Davies). Suggestions were made in a fuller discussion in the House of Commons in March 1951 that Albanian assets be seized but the government minister said that such assets were.
stop it from using military means to secure its interests when in 1956 it played a leading role in the Suez Crisis.

10.2 The Suez Crisis 1956

The Anglo-Egyptian Agreement of 1954 had guaranteed the international status of the Suez Canal. In July 1956 President Nasser of Egypt, who had recently come to power, nationalized the Suez Canal Company, a company in which Britain and France had significant holdings. As part of a co-ordinated plan by France, Britain and Israel, on 29 October 1956 Israel invaded Egypt in the area of the Suez Canal. A cease-fire resolution proposed by the United States was vetoed by Britain and France in the Security Council. Instead, France and Britain issued an ultimatum to Egypt and Israel demanding that they agree a cease-fire and withdraw their troops from the Suez Canal and allow French and British troops to police the area around the Canal. The ultimatum was not heeded and on 31 October French and British troops landed in the Suez Canal area.

The period between the Egyptian nationalization of July 1956 and the use of force by Britain and France at the end of October, reveals both political and legal tensions. Politically, the Suez intervention (‘Operation Musketeer’) proved extremely difficult for the Conservative government, particularly its Prime Minister, Sir Anthony Eden. ‘Eden was aware that he was coming perilously close to the limits of what a statesman in a democracy can do’. Public support for a military operation quickly fell away in the weeks following the nationalization of July 1956. Furthermore Eden’s cabinet reflected that opinion and ceased to be united after the initial decision to use force. The planning and running of the operation was handled on a day to day basis by an ad hoc Egypt Committee, under Eden’s chairmanship. ‘At its first meeting the committee identified the overthrow of Nasser as the prime objective, to be followed by the international takeover of the management of the canal’.

In parliament the government put forward legal arguments to justify its actions. Shortly after the nationalization in July 1956 Sir Anthony Eden spoke briefly in the House of Commons of Egypt’s ‘unilateral decision . . . to expropriate the Suez Canal Company, without notice and in breach of the Concession Agreements’, negligible and that the Albanian government had offered only £40,000 in settlement. The Minister stated that the ‘Albanian government happen to be a Communist Government who do not respect the rule of law or the principles of international law as do Western democracies: Hansard HC vol 484, col 2513, 1 March 1951 (Davies). Questions were still asked on the matter until May 1955: Hansard HC vol 540, col 1344, 2 May 1955.

77 See generally K. Scott, ‘Commentary on Suez: Forty Years on’ (1996) 1 JACL 205.
78 UN Doc. S/3710, 1956.
81 Ibid.
and that the government was considering a number of options after evaluating its international rights. In a full debate on 2 August he spoke of the Egyptian action breaching the 1888 Suez Canal Convention, particularly the principle of free navigation of the waterway, and how the treatment of the Suez Canal Company’s employees by the Egyptian authorities in forcing them to remain at their posts under threat of imprisonment, was a violation of their human rights. After stating that the government could not accept a position whereby the Canal was in the ‘unfettered control of a single power’, he announced that ‘certain precautionary measures of a military nature’, in the shape of movement of armed forces, were being taken.

Such initial steps were supported by the opposition. Hugh Gaitskell, however, warned that ‘while force cannot be excluded, we must be sure that the circumstances justify it and that it is, if used, consistent with our belief in, and our pledges to, the Charter of the United Nations and not in conflict with them’. Full-scale intervention was being planned by the government but this was not made clear to parliament. Legal advice, which was not made public, was against military intervention made clear by the Foreign Secretary’s memorandum to the Egypt Committee of the Cabinet on 20 August, which read in part ‘however illegal the Egyptian action in purporting to nationalize the Suez Canal Company may be, it is not, in itself as things stand at present, of such a character as would, under international law, afford a justification for armed intervention’. This may explain why when the intervention was imminent Eden was reputed to have declared that the ‘lawyers are always against our doing anything. For God’s sake keep them out of it. ’

The parliamentary consensus of early August seems to have disappeared in the next full debate on the matter on 12 September, when the Prime Minister was constantly interrupted and again only hinted at the use of force. He denied the charge of ‘sabre rattling’ and stated that it was Egypt that had first used force by seizing the assets of the Suez Canal Company by armed agents. Hugh Gaitskell spoke of the debate in the country where there was a wide difference of opinion, and stated that, in the absence of any act of aggression by Colonel Nasser, if the government contemplated ‘the use of force to impose a solution’ then it would not have the support of the opposition, and he accused the government of having a joint plan with the French even before the earlier debate in August. Such ‘sabre-rattling’ he stated had undermined any attempt to settle the dispute peacefully.

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84 Ibid., col 1617.
87 *Hansard* HC vol 558, cols 13–14, 12 Sept. 1956.
He urged the government to go to the Security Council to seek a solution.\textsuperscript{88} Another Labour MP stated that if the Security Council was blocked by the veto then the authority of the General Assembly should be sought, as recognized by the Assembly’s own Uniting for Peace Resolution of 1950.\textsuperscript{89} The opposition’s mood was that Britain should not go it alone, but should act through the United Nations and thus comply with its international legal obligations. The division in the House of Commons was made clear by the fact that a vote endorsing the government’s policy was only won by 319 votes to 248.\textsuperscript{90}

The excuse to intervene that the British and French governments had been looking for was conveniently provided by the Israeli invasion of Egypt on 30 October 1956. In the House of Commons Eden issued the ultimatum to withdraw and allow British and French troops into the Canal Zone, and concluded that if either Israel or Egypt did not comply then ‘British and French forces will intervene in whatever strength may be necessary to secure compliance’. Gaitskell immediately asked ‘under what authority and with what right, he believes the British and French forces are justified in armed intervention in this matter? The Prime Minister stated that there was nothing in the Charter ‘which abrogates the right of a Government to take such steps as are essential to protect the lives of their citizens’ and vital international ‘rights such as here at stake’\textsuperscript{91} In response to calls from the opposition benches that action should be delayed, the Foreign Secretary, Selwyn Lloyd, dismissed the idea that the government needed the agreement of the opposition before taking action.\textsuperscript{92} The government accordingly won the vote on adjournment but the House was deeply divided.\textsuperscript{93}

On 31 October the Prime Minister announced the British and French military intervention to the House of Commons,\textsuperscript{94} and it won a further vote endorsing its action,\textsuperscript{95} but it was in the House of Lords that a full legal justification was given by the Lord Chancellor, Viscount Kilmuir, during a lengthy debate on the British and French military action. He stated that force may only be used lawfully either with the express authority of the Security Council, or in self-defence, ‘but self-defence includes a situation in which the lives of a State’s national’s abroad are threatened and it is necessary to intervene on that territory for their protection’. He further stretched this principle to include the protection of ‘valuable and internationally important foreign property’ which was in danger of ‘irreparable injury’.\textsuperscript{96}

Though there has been a significant amount of state practice before and after 1945 to support limited interventions to evacuate or rescue nationals whose

\textsuperscript{88} Ibid., cols 15–31. \textsuperscript{89} Ibid., cols 44–5 (Henderson). See GA Res. 377, 3 Nov. 1950.
\textsuperscript{90} \textit{Hansard} HC vol 558, cols 311–12, 13 Sept. 1956.
\textsuperscript{91} \textit{Hansard} HC vol 558, cols 1275–7, 30 Oct. 1956. \textsuperscript{92} Ibid., cols 1372–3.
\textsuperscript{93} Ibid., col 1378. \textsuperscript{94} \textit{Hansard} HC vol 558, cols 1446–9, 31 Oct. 1956.
\textsuperscript{95} \textit{Hansard} HC vol 558, col 1743, 1 Nov. 1956, by 320 votes to 253.
lives are in serious danger in a foreign state,⁹⁷ the Suez action was designed to secure wider aims—the Canal itself and to undermine the Egyptian government. Contrary to the Lord Chancellor’s opinion, the Law Officers—the Attorney General (Sir Reginald Manningham-Buller), the Solicitor General (Sir Harry Hylton-Foster)—had stated in a letter to Lord Kilmuir on 12 October that it was ‘difficult if not impossible to establish that such use of force by us came within the doctrine of self-defence’. The failure of the Security Council to act did not somehow free the UK from legal obligation since the ‘doctrine of self-help was condemned by the International Court in the Corfu case’.⁹⁸ Neither the Law Officers nor the Foreign Office Legal Advisers (Sir Gerald Fitzmaurice and Francis Vallat) knew about the British, French and Israeli plan, and were not consulted about the legality of the British element of that plan (‘Operation Musketeer’). The exchange of views between these advisors and the government clearly showed that the decision was taken on grounds of policy not of law, and that none of the advisors would have supported the Lord Chancellor’s view that the intervention was legal. They also criticized the Cabinet and Prime Minister for taking the action solely on the advice of the Lord Chancellor.⁹⁹

The lack of convincing legal argument reflecting the wider lack of legitimacy underlying the Suez campaign seems to have undermined support in parliament and in the country. Kyle also considers the level of international protests to be significant, especially by the United States which viewed Suez as an unnecessary distraction from the concerns of the Cold War.

The volume of world protest at British and French action continued to be turned up, all the more in that it was being orchestrated by the United States and that the Suez War coincided with the savage repression of the Hungarian rising against Soviet imperialism. The yearning, as the United States prepared to go to the polls on 6 November, was for the world scene to be transformed into a morality play in which communism, caught in the beam of a searchlight resting unblinkingly on what was occurring in Budapest, would be forever damned. Thanks to the Suez campaign the moral absolutes seemed confused.¹⁰⁰

For the United States, the confrontations of the Cold War were far more important than the dwindling imperial ambitions of Britain and France. ‘So ended Britain’s last serious effort to play the Great Power in the Middle East and its last effort to carry out on the ground a foreign policy in the face of US dissent’.¹⁰¹ Its inability to carry public opinion and world opinion led to the ignominious withdrawal of British and French troops and their replacement by the first UN peacekeeping force (UNEF I) authorized not by the Security

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¹⁰⁰ Kyle, ‘Britain’s Slow March to Suez’, 111.
¹⁰¹ Ibid., 115.
Council, but by the General Assembly, due to the fact that the matter had been passed from the Security Council to the Assembly under the Uniting for Peace Resolution following the British and French vetoes of early cease-fire proposals.

A further interesting feature of the Suez intervention was the criticism it received at the hands of the military, who were concerned about the unclear aims of the operation. "The armed services felt that they had achieved what had been asked of them and been exposed to ridicule by indecisive political leadership." The criticism from the military was about the 'lack of a clear political aim', not any perceived lack of legality and legitimacy of the operation. Of course it would be extremely difficult for the military establishment to question the overall legality of an operation since that might undermine the soldier’s obligation to obey ‘lawful’ commands. As Tony Rogers clearly states 'soldiers have a duty to obey lawful orders and a duty not to comply with unlawful orders'. Although this is written in the context of superior orders not being a defence to a specific war crime committed by a soldier, it can be seen how a war that was recognized as unlawful under the *jus ad bellum* could undermine the whole command structure of the armed services.

11. Post-Cold War and Post-9/11

The rule prohibiting the use of force certainly seemed to receive very robust support in 1990–1, literally at the beginning of the post-Cold War period, when the aggression committed by Iraq against Kuwait was repulsed by a coalition of states, including the UK, acting under a UN mandate. The 'relative indelibility' of the rules on the use of force in the Charter reflects their peremptory status in international law—they are widely viewed as fundamental rules or ' *jus cogens*'—from which no derogation is allowed and which are very difficult to modify. Although the rules governing the use of force survived the intense power pressures of the Cold War, it might be questioned whether the post-Cold War period, in combination with the post-9/11 era, have led to the re-emergence of

102 GA Res. 1001, 5 Nov. 1956. Adopted by 57 votes to 0, with 19 abstentions (including France and Britain).
104 Kyle, ‘Britain’s Slow March to Suez’, 115.
107 SC Res. 678, 29 Nov. 1990.
older doctrines of just war, reprisals—uses of force not contemplated by the UN Charter—as well as a wider right of self-defence than recognized by article 51.

With the defeat of Iraq in 1991, the Iraqi army was turned upon the Kurds and the Shias within Iraq who had revolted against Saddam Hussein. Unable to secure any clear authority to intervene from the Security Council,¹⁰⁹ Western states intervened by briefly sending troops to northern Iraq to protect the Kurds, and then by imposing no-fly zones in the north again to protect the Kurds and in the south to protect the Marsh Arabs. In defending the second of these no-fly zones in the absence of an express Security Council mandate, the British Foreign Secretary Douglas Hurd stated that ‘not every action that a British Government…takes has to be underwritten by a specific provision in a UN resolution provided that we comply with international law’, and ‘international law recognises extreme humanitarian need’.¹¹⁰ As shall be detailed in chapter nine, this argument was developed in 1999 by the UK when it contributed to the NATO air campaign directed at stopping the crimes being committed by Serb forces against the Albanian majority in the Serbian province of Kosovo in defiance of Security Council resolutions.¹¹¹

Such post-Cold War, post-modern interventions which disregard the strong concept of state sovereignty found, for example, in the International Court’s judgment in the Corfu Channel case, cause problems for the rules on the use of force since they appear to be a violation of them yet in their pure ‘just’ form they seem necessary to prevent gross violations of human rights. In essence a fundamental norm of international law (that prohibiting the use of force) is being breached in order to uphold other fundamental norms (such as those prohibiting genocide and other crimes against humanity). Such a challenge to the orthodox rules on the use of force has been supported in recent years by the United Kingdom, a full analysis of which is given in chapter nine.

Somewhat differently, the post 9/11 interventions in Afghanistan in 2001 and Iraq in 2003 were attempts to expand the two recognized Charter exceptions to the ban on the use of force—the exercise of the right of self-defence (in the case of Afghanistan) and military action taken under the authority of the Security Council (in the case of Iraq). While the underlying concerns that are driving these types of intervention are the need to combat global terrorism and the spread of weapons of mass destruction (WMD), made clear in President Bush’s National Security Strategy of 2002,¹¹² the ‘just war’ rhetoric found in the Kosovo campaign was also found in relation to the response of the US and its allies to

9/11 as regards their campaign in Afghanistan. For instance, on 8 October 2001, the day after force was used by the United States and the United Kingdom in Afghanistan, Prime Minister Tony Blair declared that ‘we will see this struggle through to the end and to the victory that would mark the victory not of revenge but of justice over the evil of terrorism’.¹¹³ The British involvement in Afghanistan will be considered in more detail in chapter eight below.

In the case of Iraq in 2003, Iraq’s failure to fulfil the disarmament agenda set by the Security Council in 1991,¹¹⁴ frustrated the US and the UK to the extent that they intervened ostensibly on the basis of this failure. Ultimately as shall be seen in chapter ten the British justifications for the invasion of Iraq were based on an interpretation of Security Council resolutions.¹¹⁵ Furthermore, just war rhetoric was less evident and even less convincing in the invasion of Iraq, though before the invasion President Bush did try to link the proposed action to the war on terrorism and the idea of defending the nation:

The danger is clear. Using chemical, biological or, one day, nuclear weapons obtained with the help of Iraq, the terrorists could fulfil their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country or any other.¹¹⁶

Again the rhetoric is wider than the formal rules on the use of force, where defence is only allowed in response to an armed attack, and it is wider than the customary law of self-defence said to be contained in the Caroline incident of 1837, which permits defensive force in response to an imminent attack. While the current consensus seems to be that the Caroline incident still represents (or has come to represent) good law, the doctrine of pre-emption found in American claims has not been accepted.¹¹⁷ The issue of whether the British and American action in Iraq has contributed to the stretching of the two exceptions to the ban on the use of force—namely the right of self-defence, and the right to use force under the authority of the Security Council—will be considered in greater detail in chapter ten.

Interestingly, as with the unpopular Suez campaign of 1956, the current military operations in Afghanistan and Iraq have come under criticism from senior military commanders as well as politicians, not only in terms of the clarity of the aims of the operations, but also in terms of the pressure placed on the armed forces caused by overstretch. As well as significant military presences in Iraq and Afghanistan in 2008, British troops are deployed to a number of countries including Cyprus, the Falklands, and Kosovo. Charges that the troops are under-equipped for the job have been combined with even more serious allegations that the unwritten covenant that binds soldiers to the country is in danger of being

breached. The covenant has been ‘codified’ (in the sense of being written down) in an army publication in 2000, which explains that ‘the Military Covenant is the mutual obligation between the Nation, the Army and each individual soldier; an unbreakable common bond of identity, loyalty and responsibility which has sustained the Army throughout its history’. More specifically it states that in return for the personal sacrifices made by soldiers, including the ultimate sacrifice, ‘British soldiers must always be able to expect fair treatment, to be valued and respected as individuals, and that they (and their families) will be sustained and rewarded by commensurate terms and conditions of service’.

While not legally binding, the fact that senior politicians and military commanders view that covenant under threat seriously undermines the legitimacy of existing and any further controversial deployments of troops to conflict and post-conflict zones. For example, in March 2008 the leader of the Conservative Party, David Cameron, declared that the military covenant had been broken in particular by the poor treatment of the wounded;¹¹⁹ in July 2008, General Sir Richard Dannatt, the head of the British Army, described the covenant as out of balance caused by lack of resources;¹²⁰ and in September 2008 Sir Menzies Campbell of the Liberal Democrats stated that the operational strain placed on the forces in recent years had breached the covenant.¹²¹

12. Conclusion

The purpose of this chapter is to show that in the most recent period of history around the turn of the twenty-first century we are seeing liberal democratic countries willing to use force in circumstances that are not reconcilable with the rules contained in the UN Charter. This does not simply represent a continuation of the Cold War approach of the superpowers who tended to disingenuously state that they were operating within the bounds of international law, while at the same time putting power above the law. Rather it represents a concerted attempt by these countries to develop the recognized exceptions as well as additional exceptions to the ban on the use of force. The British government, though, has something of a track record of attempting to develop the law in this area. Sometimes its approach is viewed as a breach of international law as in the Corfu Channel incident in 1946 and ten years later in the disastrous Suez campaign, and sometimes it is seen as a development of the law as with the idea that the Security Council can simply authorize volunteer states to undertake military

action under its authority, as shown by the Korean War (reviewed more fully in chapter four) and the Beira Patrol. It remains to be seen whether the just war rhetoric behind the Kosovo and Afghan campaigns, and the technical arguments about breach of Security Council resolutions relayed by Britain in the Iraq war of 2003, have become, or will become, part of a growing lexicon of legitimate uses of force in international relations.

However, the lessons of history drawn from earlier British practice show that there are a number of significant hurdles that have to be overcome to develop a legal doctrine that is not simply a clear application of the rules contained in the UN Charter. The first is legal and found in the nature of the rules themselves. As peremptory rules or *jus cogens* these rules reflect the basic values of the international system as created in 1945. The rule prohibiting the use of force has been fought for by leaders, politicians, states and many other interest groups and individuals over the centuries. Its embodiment in the UN Charter represented the climax of that struggle and it is something that will not be given up easily. For a start, world opinion must come behind any attempted change to the rules.

Political, military and general public opinion also form political obstacles to the legitimacy of military operations that have a controversial pedigree. A British government will struggle, as happened in the Suez Crisis of 1956, to maintain a military campaign unless it has the support of the opposition and the general public as well as its own party. While the government of the day might be able to win narrow votes in parliament in the short-term, the longer-term consequences for its credibility and its electability will be serious if it continues to prosecute an unpopular war. Admittedly, there is no direct correlation between the illegality of a war and its unpopularity, but it is apparent that while politicians and the public will generally support a war that is in defence of the nation, or in furtherance of clearly stated universal values, wars that fall short of these requirements will usually be unpopular.

Thus it is argued the axioms of international law try to reflect in their admittedly imperfect way the values of the international community. There may be hard cases, where the laws seemed to prevent the achievement of justice, when opinion might either lead to a change in the law or a recognition that such cases do not necessarily make good law in the sense of establishing clear general rules for the future. These are issues that we will come back to in chapters four to ten when considering the main post-1945 instances of the use of force by the UK. Before that, though, it is necessary to consider the British attitude towards the international organizations which it helped establish in order to provide for international peace and security in the aftermath of the Second World War.