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RESPECTING THE ROLE OF THE LEGAL ADVISER: CONCLUSIONS DRAWN FROM THE SUEZ CRISIS AND IRAQ WAR

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Abstract

This essay critiques the British government's mind-set towards government legal advisers in the lead up to the Iraq War and Suez Crisis. In both these uses of force situations, decision makers ignored or prolonged the process of receiving legal advice. In general, the legal adviser's role in tendering informed legal opinions is vital to the government's public and international reputation. The government neglected the legal adviser's role, relying instead on pre-formed policies. However, this directly resulted in international law violations. Therefore, it is in the government's best interests to seriously consider legal advice in order for it to garner domestic and international respect. The essay argues that a mentality change within the British government is required to avoid future violations.

Key words

International law; legal adviser; Iraq War; Suez Crisis; use of force

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I Introduction

> *"The practice of bypassing the regular channels of legal advice always leads to trouble, as it has done in the present case*" – Foreign Office Legal Adviser Sir Gerald Fitzmaurice, 5 November 1956.[1]

In 1956, Britain invaded the Suez Canal, contrary to international law and public opinion.[2] Similarly, in 2003, Britain joined the United States in invading Iraq.[3] Many nations and legal scholars have since determined that this invasion was illegal.[4] In both conflicts, Britain was condemned on the world stage. Significantly, the British government sought advice from legal advisers and then discounted their advice. The role of a legal adviser is to provide informed legal opinions, determine what legal channels are available to achieve desired policy outcomes and uphold and develop international law.[5] The government did not respect the vital role their legal advisers played in the functioning of government. This disrespect led to public dissatisfaction and political instability. Britain's breaches of international law in Suez and Iraq were not caused by a lack of domestic processes to protect the tendering and consideration of legal advice. Rather, these processes were simply bypassed. Consequently, the government disregarded the legal adviser's role in favour of pre-established policies. In a world of

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[1] Geoffrey Marston "Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government" (1988) 37 ICLC 773 at 808.

[2] Prosser Gifford and Ralf Dahrendorf "Foreword" in Roger Louis and Roger Owen (eds) *Suez 1956- The Crisis and its Consequences* (Clarendon Press, Oxford, 1989) at v.

[3] Christine Gray *International Law and the Use of Force* (2nd ed, Oxford University Press, Oxford, 2004) at 1.

[4] *See* Board of Editors "Report of the Dutch Committee of Inquiry on the War in Iraq: Chapter 8 The Basis in International Law for the Military Intervention in Iraq" (2010) 57 NILR 81; "Lessons of Iraq War Underscore Importance of UN Charter- Annan" (16 September 2004) UN News <www.news.un.org>; Owen Bowcott "Was the war legal? Leading lawyers give their verdict" (2 March 2004) The Guardian <www.theguardian.com>.

[5] Harold Koh "Foreword: America's Conscience on International Law" in Michael Scharf and Paul Williams (eds) *Shaping Foreign Policy in Times of Crisis- The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, New York, 2010) at xiii, xvii.

increasing political instability and British post-Brexit uncertainty, this problem is likely to surface again, unless there is a change in government mind-set.[6]

The essay critiques the British government's lack of respect for the legal adviser's role in the Suez Crisis and Iraq War. It argues that the general consequences of such behaviour include violations of domestic processes and international law. This, in turn, decreases public and international respect for government. Therefore, while there is no legal obligation for the British government to follow tendered legal advice, it is in their best interests to at least seriously consider it.

Part II of this essay describes the key players in use of force situations and the legal adviser's role in the decision to use force. Parts III and IV outline the legal processes involved in the Suez Crisis and Iraq War, situations where a legal adviser's advice that intervention was illegal was not respected. Part V compares these conflicts and analyses three areas where the legal adviser's role was neglected where it should not have been. Part VI considers the International Criminal Court's expanded jurisdiction to hear crimes of aggression to show that there is domestic support in Britain for holding decision makers accountable for illegal uses of force.

Ultimately, to prevent similar abuses from occurring in the future, the government's mind-set must change to understand that consulting legal advisers is not a box ticking exercise, but a vital step in the policy-making process that can lead to increased international and public respect.

II The Key Players in Use of Force Situations

This section outlines the legal framework surrounding the use of force, explains who in the British government decides whether to use force in international relations and the role of legal advisers in making that decision.

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[6] *See* James Moore "We Should Have Learned After Iraq- But Brexit Shows We Are Still Willing to Blindly Follow Politicians Into Disaster" (6 July 2017) Independent <www.independent.co.uk>; Bagehot "Lessons for Brexit from the Invasion of Iraq" (3 August 2017) The Economist <www.economist.com>.

A The Legal Framework for Use of Force

Under the Charter of the United Nations (UN), states are prohibited from using force[7] unless in situations of self-defence[8] or through UN Security Council (UNSC) authorisation.[9] As will be discussed later, the legal issue in the Suez Crisis was whether force was being used in self-defence. In the Iraq War, UNSC authorisation was at issue.

Though not clearly permitted under international law, Britain recognises the legality of limited uses of force to avert humanitarian catastrophe, for instance as applied to intervention in Kosovo during 1999.[10] Where force is used, it must be necessary and proportionate to the legal basis from which it derived.[11] The authority for the British Prime Minister (PM) to deploy armed forces is granted by royal prerogative.[12]

B The Legal Advisers

The British government's legal advisers are the primary consultants as to the legality of uses of force. The British government's international legal advisers include advisers in the Foreign and Commonwealth Office (FCO) and the government Law Officers.

FCO legal advisers provide advice on public international law, international human rights law, European Union law, and constitutional law and domestic law relevant to the work of the FCO.[13] The FCO Legal Director General leads the FCO Legal Directorate as the FCO Legal Adviser.[14] On a day-to-day basis, legal advisers are copied into policy documents, enabling them to volunteer advice where necessary.[15] In these situations,

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[7] Charter of the United Nations, art 2(4).

[8] Article 51.

[9] Chapter VII.

[10] *Sir Jeremy Greenstock* SC Res S/PV 3988 (1999) at 12.

[11] Gray, above n 3, at 167.

[12] Gail Bartlett and Michael Everett *The Royal Prerogative* (House of Commons Library, Briefing Paper 03861, 17 August 17) at 9.

[13] *Legal Directorate Annual Report 2013-2014* (Foreign and Commonwealth Office, 1 July 2014) at 4; *See also* Sir Michael Wood, Witness statement, former Legal Adviser, Foreign and Commonwealth Office, provided to the Iraq Inquiry, 15 January 2010, at 2.

[14] "Our Governance" Foreign and Commonwealth Office <www.gov.uk>.

[15] Sir Michael Wood Witness statement, above n 13, at 2.

legal advice is rarely provided as a formal legal opinion.[16] Legal advisers can take the initiative to bring legal disputes to the attention of policy officers, both informally through oral communication, and through emails.[17] Policy officers also bring legal issues to legal advisers' attention when they become apparent, and work with legal advisers to find solutions.[18]

There is more formality in use of force situations. The Attorney General, or in their absence the Solicitor General, "must be consulted before the Government is committed to *critical decisions* involving legal considerations".[19] The Attorney General and Solicitor General of England and Wales, known together as the Law Officers, make up the Crown's official legal advisers.[20] The Law Officers are elected government representatives and qualified lawyers.[21] The Attorney General's legal advisory role is exercised independently of government and collective ministerial responsibility.[22] The Attorney General is generally not a member of Cabinet, but by convention may be invited to attend some meetings.[23]

The Law Officers formally advise on critical decisions, but often work closely with FCO legal advisers.[24] They deal with about one per cent of total legal work.[25] By convention,

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[16] At 2.

[17] At 2.

[18] *See* Government Legal Department *Judge Over Your Shoulder- A Guide to Good Decision Making* (5th ed, 2016).

[19] Cabinet Office *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (July 2001), s 3.22; Law Officers Act 1997 (UK).

[20] The Cabinet Manual (Cabinet Office, October 2011) at 49; K A Kyriakides "The Advisory Functions of the Attorney-General" (2003) 1 Hertfordshire Law Journal 73 at 73.

[21] Kyriakides, above n 20, at 73; See also *The Governance of Britain- A Consultation on the Role of the Attorney General* (Crown Copyright, 2007) at 6*;* Alexander Horne *The Law Officers* (House of Commons Library, Standard Note SN/PC/04485, 1 August 2014).

[22] *Draft Constitutional Renewal Bill Volume 1 Report* (Joint Committee on the Draft Constitutional Renewal Bill, 31 July 2008) at 27.

[23] At 74.

[24] Interview with Sir Michael Wood, former Legal Adviser, Foreign and Commonwealth Office (Sir John Chilcot, Iraq Inquiry, 26 January 2010) transcript provided by Iraq Inquiry at 9.

[25] Sir Arthur Watts "International Law and International Relations: United Kingdom Practice" (1991) 2 EJIL 157 at 159.

the legal advice the Law Officers give to the government remains confidential, allowing the government to obtain full and frank advice.[26] In the Iraq War, this convention was set aside due to the contentiousness of the decision to allow the release of the Attorney General's written advice.[27]

Britain's legal advisory process is unique. There are normally three modes of tendering advice on international law to governments.[28] Legal advisers can be integrated into the diplomatic service, be a separate legal service, or act as an autonomous entity that sits within a foreign ministry.[29] For example, the Dutch Legal Adviser sits in the Office of the Legal Adviser within the Ministry of Foreign Affairs.[30] The United States Legal Adviser has its Office of the Legal Adviser within the Department of State.[31] The British model of having an FCO Legal Adviser within a foreign ministry and having Law Officers as representatives of Parliament is a unique hybrid model.

C Key Players Surrounding the Legal Adviser

The Lord Chancellor, Secretary of State for Foreign and Commonwealth Affairs (Foreign Secretary) and PM play a role in deciding whether to request legal advice from the FCO legal advisers or Law Officers, and how to use legal advice tendered to them.

The Lord Chancellor is a senior member of Cabinet and heads the Ministry of Justice as the Secretary of State for Justice.[32] Lord Chancellors may hold a law degree, but are not appointed to advise government on legal matters.[33] However, as will be discussed later, the Lord Chancellors in both conflicts appeared to take over the role of giving legal

[26] (14 March 2003) 401 HCPD 482.

[27] James Strong "Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative Through Syria, Libya and Iraq" (2015) 17 BJPIR 604 at 615-616.

[28] Kenneth Manusama "Between a Rock and a Hard Place: Providing Legal Advice on Military Action Against Iraq" (2011) 42 NYIL 95 at 98.

[29] At 99.

[30] At 99.

[31] "Office of the Legal Adviser" US Department of State <www.state.gov>.

[32] Roger Smith "Constitutional Reform the Lord Chancellor, and Human Rights: the Battle of Form and Substance" (2005) 32 Journal of Law and Society 187 at 190.

[33] Constitutional Reform Act 2005 (UK) s 2, s 17.

advice from the Law Officers and directly advised government themselves. The Foreign Secretary has overall responsibility for the work of the FCO and is a member of Cabinet.[34] It is not a requirement that the Foreign Secretary have a legal background.[35] The prerogative powers grants the PM of the day the ultimate decision on whether to use force.[36] While the Law Officers advise on the legality of use of force, there is no legal obligation for the government to follow advice.[37] This decision rests with the PM. However, as Part V explains, the PM may risk violating international law if they refuse to follow advice.

III The Suez Crisis

This section explains the legal and historical background to the Suez Crisis. It argues that the boundaries of international law were not well established in 1956. As such, legal advisers should be respected for their ability to advise on the most current international law developments.

The 1956 Suez crisis was a defining moment in Britain's decline as a world power.[38] Britain's relationship with the United States was in turmoil following the British, French and Israeli canal invasion.[39] Domestically, British PM Sir Anthony Eden's conservative government collapsed and there was widespread public backlash against invading Suez.[40] Decision makers distrusted legal advisers and saw them as an impediment to policy goals. Decision makers opted to pick and choose legal principles from agreeable sources, rather than seeking advice.

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[34] "Ministerial Role: Secretary of State for Foreign and Commonwealth Affairs" Gov.uk <www.gov.uk>.

[35] "Past Foreign Secretaries" Gov.uk <www.gov.uk>.

[36] The Cabinet Manual, above n 20, at 25.

[37] At [6.4].

[38] Gifford and Dahrendorf, above n 2, at v.

[39] At v; Laurie Milner "Backlash- The Suez Crisis" (3 March 2011) BBC History <www.bbc.co.uk>.

[40] Milner, above n 40.

A Background to the Decision to Use Force

1 Historical Facts[41]

The Suez Canal is an Egyptian water way completed in 1869, connecting the Mediterranean Sea with the Red Sea.[42] The Canal was controlled and maintained by the Suez Canal Company, in which Britain and France had significant shareholdings.[43] In July 1956, Egypt's President Gamal Nasser nationalized the Suez Canal Company after the United States and Britain decision not to finance Egypt's construction of the Aswan High Dam.[44] Fearing that trade and oil routes would be cut off to and from Europe, Britain and France colluded with Israel to arrange an attack on Egypt.[45] On 24 October in the secret Protocol of Sèvres, the three nations agreed that Israel would invade Egypt in the area near the Canal, and then Britain and France would issue an ultimatum to Egypt to cease fighting.[46] Britain and France would then intervene under the pretext of "separating the combatants" and "protecting the canal" when the ultimatum failed.[47] Eden's aims for invading were to rid Nasser of power and take over the management of the Canal.[48]

2 Legal Basis for Use of Force

The government's basis for intervention in the Suez Canal rested on a wide interpretation of Article 51 of the UN Charter.[49] Viscount Kilmuir addressed the House of Lords on this point on 1 November 1956.[50] He relied on Oxford Professor Arthur Goodhart's proposition that Article 51 did not restrict the customary right of self-defence, which

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[41] See Appendix A for a timeline of key dates in the Suez Crisis.

[42] Milner, above n 40.

[43] Marston, above n 1, at 774.

[44] The editors of Encyclopaedia Britannica "Suez Crisis" Encyclopaedia Britannica <www.britannica.com>

[45] Lewis Johnman "Playing the Role of Cassandra: Sir Gerald Fitzmaurice, Senior Legal Adviser to the Foreign Office" in Saul Kelly and Anthony Gorst (ed) *Whitehall and the Suez Crisis* (Frank Cass Publishers, Great Britain, 2000) at 1.

[46] Nigel White *Democracy Goes to War: British Military Deployments under International Law* (Oxford University Press, New York, 2009) at 49.

[47] Philip Skardon *A Lesson for Our Times: How America Kept the Peace in the Hungary-Suez Crisis of 1956* (AuthorHouse, Bloomington, 2010) at 334.

[48] White, above n 46, at 49.

[49] Marston, above n 1, at 777; See also Ian Brownlie *International Law and the Use of Force by States* (Oxford University Press, New York, 1963) at 265.

[50] (1 November 1956) 199 UKHL 1349.

included use of force to protect foreign property and nationals.[51] In speaking to the House of Commons on 2 August 1956, Eden based the legality of the invasion on the principle of free navigation of the waterway in the 1888 Suez Convention.[52] Human rights arguments about the treatment of the Suez Canal Company's employees were also raised.[53] In his 1956 Leader's speech, Eden called the crisis "a matter of survival" that influenced "employment, the standard of living and the pay packet of every man and woman in the land".[54]

While most twenty-first century legal theorists would question this interpretation of self-defence, the boundaries of use of force in 1956 were not so clear-cut. There was legitimate debate over whether the UN Charter restricted customary international law, or sat alongside it.[55] The idea that use of force might be legal even when no armed attack under Article 51 had occurred, invited considerable debate in the 1950s and 1960s. For example, Manchester Professor Derek Bowett argued that force could be used to protect vital national interests that had been endangered, regardless of whether an armed attack had occurred.[56] Bowett also argued that action to protect the property of a state was consistent with the UN Charter, and not excluded by Article 51.[57] In contrast, Oxford Professor Ian Brownlie took the view that Article 51 was the only exception, bar UNSC authorisation, to the prohibition on the use of force.[58] That is, the use of force was only permissible when an armed attack had occurred. Any customary right of self-defence was no longer authorised.[59] On balance, an arguable legal basis that force could be used to

[51] Marston, above n 1, at 778; Brownlie, above n 49, at 265.
[52] (2 August 1956) 557 UKHC 1603–6.
[53] White, above n 46, at 50.
[54] Anthony Eden, Prime Minister "Leader's speech" (Llandudno, 1956).
[55] Brownlie, above n 49, at 265.
[56] Marston 778; Derek Bowett *Self-defence in International Law* (Manchester, Manchester University Press, 1958) at 184-187.
[57] Bowett, above n 56, at 186.
[58] Brownlie, above n 49, at 273.
[59] At 273.

protect national interests did exist. However, FCO legal advisers, the Law Officers, and much of the House of Lords and Commons contested the legality of this position.[60]

The government refused to seriously consider legal advice from FCO legal advisers. On 31 July 1956, Viscount Kilmiur met with Attorney General Sir Reginald Manningham-Buller, Solicitor-General Sir Harry Hylton-Foster and FCO Deputy Legal Adviser Francis Vallat.[61] A legal opinion from this meeting was prepared and presented to ministers that same day, suggesting that intervention was justified.[62] However, correspondence between Manningham-Buller and FCO Legal Adviser Sir Gerald Fitzmaurice suggests that Viscount Kilmuir wrote the legal opinion without regard to the legal advisers' viewpoints.[63] Fitzmaurice prepared a paper supporting intervention in Suez for the 16 August London Conference.[64] However, the paper was "designed to put as good a face as possible" on the legal case, and was not to be regarded as the FCO's official view.[65] On 29 August, Fitzmaurice advised FCO Permanent Under-Secretary of State Sir Ivone Kirkpatrick: "there is not a single modern authority that supports" Viscount Kilmuir's wide interpretation of self-defence.[66] Despite making the FCO legal perspective clear, the legal advisers were not consulted when the Office of the Lord Privy Seal circulated guidance on the Suez situation to the private secretaries of all ministers on 9 October suggesting that force was justified.[67] Therefore, while the FCO legal advisers tendered advice proactively, decision makers refused to engage with this advice.

Similarly, the Law Officer's advice was discounted. Viscount Kilmuir asked for a legal opinion from the Law Officers, which was received on 12 October. In it, the Law

[60] *See* Lord McNair's speech (12 September 1956) 199 UKHL 662; Letter dated 4 November 1956 from Lord McNair to Kilmuir "The Suez Canal Question" at [5]; Leader of the Opposition Hugh Gaitskell's 12 October 1956 speech in Hansard HC 558 13–14; Sir Gerald Fitzmaurice opinion in Marston, above n 1, at 788; Sir Reginald Manninghman-Buller and Sir Hylton-Foster opinion in White, above n 46, at 52-53.
[61] Marston, above n 1, at 779.
[62] At 779.
[63] At 780.
[64] At 780.
[65] At 781-782.
[66] At 785.
[67] At 790.

Officers considered that Egypt had not committed any acts justifying the use of force.[68] Viscount Kilmuir replied stating he could not agree with the conclusions.[69] In response, the Law Officers sent Viscount Kilmuir a memorandum on 31 October countering his opinion, which was also ignored.[70]

Possibly the most logical solution to determining which interpretation of Article 51 is correct would be to rely on government appointed legal advisers to highlight the most current thinking in international law. Fitzmaurice determines the importance of the legal adviser's role in addressing international law developments in his 6 September letter to Sir George Coldstream, Permanent Secretary to the Lord Chancellor's Department. Here, he commented: "very few people in this country realise the immense change that has taken place in the climate of world opinion on the question of use of force".[71] He acknowledged that "justifications that would have been accepted without question fifty or even twenty-five years ago would now be completely rejected".[72] Therefore, although the wide interpretation of Article 51 had some support in legal circles, this was seen as a decreasing minority to the legal advisers. Relying on impartial legal advisers to shed accurate light on developing legal debates not only falls within the lawyer's "duty", but also reduces the perception that government arbitrarily picks and chooses which law to apply.[73]

Indeed, Part V shows that decision makers disregarded the legal adviser's ability to accurately report on international law. Decision makers believed consultation with legal advisers was unnecessary, both in refusing to ask for legal advice, and even when legal advice was tendered, refusing to seriously consider advice in favour of their own personal legal opinions.

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[68] At 792.
[69] At 792.
[70] At 797.
[71] At 787.
[72] At 787.
[73] Brownlie, above n 49, at vii.

IV The Iraq War

This section explains the legal background to the decision to use force in the Iraq War. Significantly, conflict about the interpretation and boundaries of international law resurfaced in the lead up to the Iraq War. Decision makers were faced with the contrasting legal opinions of their own legal advisers compared with that of the United States. The legal basis for Britain's intervention in Iraq has been more widely critiqued than the basis in Suez. However, both scenarios involve similar legal issues pertaining to the process for tendering advice and the fact that once tendered, advice was ignored or prolonged by decision makers.

A Background to the Decision to Use Force[74]

The fear of weapons of mass destruction (WMDs) in Iraq, fuelled by the uncertainties of a post 9/11 world, drove British government concerns about increased threats to the stability of the Middle East.[75] Regime change was considered the best solution to stabilising the region and removing Saddam Hussein.[76]

Britain's legal justification for intervention in Iraq relied on implicit authorisation from the UNSC for use of force.[77] The government considered and then discounted relying on self-defence and humanitarian intervention. The United States recognised the doctrine of pre-emptive self-defence in justifying intervention in Iraq, in this case trigged because of Iraq's development of WMDs.[78] However, Britain refused to recognise this contentious extension of self-defence.[79] Humanitarian intervention was also discounted given there

[74] See Appendix B for a timeline of key events in the Iraq War.

[75] Marc Weller *Iraq and the Use of Force in International Relations* (Oxford University Press, New York, 2010) at 236.

[76] Sir John Chilcot *The Report of the Iraq Inquiry- Section 5 Advice on the Legal Basis for Military Action, November 2002 to March 2003* (Committee of Privy Counsellors, 6 July 2016) at 40.

[77] Alex Bellamy "International Law and the War with Iraq" (2003) 4 Melbourne Journal of International Law 1 at 15.

[78] *The National Security Strategy of the United States of America* (September 2002) at 6.

[79] Letter from Lord Goldsmith (Attorney General of England and Wales) to Tony Blair (British Prime Minister) regarding the legality of use of force in Iraq (30 July 2002) at 1; See also (21 April 2004) UKHL 359.

was no overwhelming and specific humanitarian catastrophe.[80] Therefore, the only legal justification for intervention in Iraq available to Britain was UNSC authorisation, which required a resolution allowing use of force.[81]

However, explicit authorisation from the UNSC was not forthcoming, despite the United States and British attempts to secure authorisation through UNSC Resolution 1441 in 2002.[82] Therefore, the United States, and eventually Britain, relied on *implicit* authorisation, arguing that Resolution 1441 "revived" authorisation of the use of force under UNSC Resolution 678 and 687.[83] As accepted by the UNSC in relation to Iraq's 1993 violation of a cease-fire, use of force can be revived where the UNSC agrees that a country seriously violates obligations in a previous resolution and resorting to force is an acceptable consequence of that violation.[84]

The contentious issue for Britain and the United States concerned whether a previous resolution was violated. In 1992, the UN Legal Counsel determined that the assessment of violation of resolution was required to come from the UNSC and was "not be left to the subjective evaluation made by individual Member States".[85] The UNSC had not clearly determined that a violation had occurred. Resolution 1441 gave Iraq a final opportunity to comply with its obligations and set up an enhanced inspection regime to bring about completion of the Resolution 687 disarmament process.[86] Resolution 1441 directed the United Nations Monitoring, Verification and Inspection Commission

[80] Interview with Sir Michael Wood, above n 24, at 13.

[81] At 14.

[82] Ralph Zacklin *The United Nations Secretariat and the Use of Force in a Unipolar World* (Cambridge University Press, Cambridge, 2010) at 139.

[83] Sir John Chilcot *The Report of the Iraq Inquiry- Section 5*, above n 76, at 23.

[84] At 24. This argument had tenuously been used to justify Britain's use of force under Operation Desert Fox in 1998, where Resolution 687 was "revived" by Iraq's violations, *see* Marko Milanovic "Legal Advisers at the Iraq Inquiry, Part 1" (26 January 2010) EJIL <www.ejiltalk.org>.

[85] Zacklin, above n 82, at 140; 24 Iraq Inquiry section 5; Sir John Chilcot *The Report of the Iraq Inquiry- Section 5*, above n 76, at 25; Lindsay Moir *Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror* (Hart Publishing, United States, 2010) at 104.

[86] Zacklin, above n 82, at 140.

(UNMOVIC) to report material breaches of Iraq's obligations to the UNSC, which would convene immediately upon establishment of a breach.[87]

The United States argument was that Resolution 1441 confirmed the right to use force if the UNSC failed to act in light of further violations by Iraq.[88] The British argument took longer to form.[89] FCO legal advisers felt that the use of force under Resolution 678 related to limited measures targeted at Iraq's weapons capability.[90] Widespread use of force fell outside this scope.[91] Indeed, Sir Michael Wood, FCO Legal Adviser, reflected that although there was a "possible" legal basis for use of force, he did not consider that the UNSC "had left to individual States the decision whether at some point in the future a material breach had occurred sufficient to revive the authorisation to use force".[92] Similarly throughout 2002, Attorney General Lord Goldsmith was clear that use of force was not revived.[93] Lord Goldsmith repeatedly voiced wishes to offer formal legal advice to Blair and Foreign Secretary Jack Straw during 2002 but was rejected because his legal opinion was only needed when the government was "close" to making a decision.[94] However, by March 2003 Lord Goldsmith was ultimately convinced that "a reasonable case can be made out that resolution 1441 is capable of reviving the authorisation in 678 without a further resolution".[95] Media have speculated that his decision was influenced by his February 2003 trip to the United States where he met United States Security Council Legal Chief John Bellinger.[96]

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[87] At 140.

[88] Bellamy, above n 77, at 15.

[89] Zacklin, above n 82, at 141.

[90] Sir Michael Wood Witness statement, above n 13, at 6.

[91] At 6; *See also* Weller, above n 75, at 238 and 240.

[92] Sir Michael Wood Witness statement, above n 13, at 6.

[93] Sir John Chilcot *The Report of the Iraq Inquiry- Section 5,* above n 76, at 41.

[94] Interview with Rt Hon Tony Blair, former Prime Minister (Sir John Chilcot, Iraq Inquiry, 29 January 2010) transcript provided by Iraq Inquiry at 144.

[95] Sir John Chilcot *The Report of the Iraq Inquiry- Section 5,* above n 76, at 81-83; Shirley Scott, Anthony Billingsley, Chistopher Michaelsen *International Law and the Use of Force A Documentary and a Reference Guide* (ABC, California, 2010) at 271.

[96] Philippe Sands "Why did Attorney General Support Such a Weak and Dismal Argument?" (23 February 2005) The Guardian <www.theguardian.com>; Richard Norton-Taylor "Revealed: The Rush to War" (23 February 2005) The Guardian <www.theguardian.com>; Charlotte Peevers *The Politics of Justifying*

After the invasion, the Iraq Inquiry did not rule on the legality of intervention.[97] However, the Netherlands' Inquiry suggested that there was no mandate for intervention.[98] UN Secretary General Kofi Annan declared the invasion illegal in 2003.[99] Similarly, legal scholars published articles declaring the invasion illegal.[100]

Given the controversy around the legality of intervention at the time, it would again seem plausible that the government legal advisers were respected for their opinions on whether the use of force was legal in this situation. However, as Part V shows, obtaining legal advice was merely a box-ticking exercise for decision makers.

V The Legal Adviser's Neglected Role in the Conflicts

These conflicts presented situations where the law on use of force was developed or tested, and its boundaries were not well defined. Accordingly, this section argues that the legal adviser's role in providing clarity on international law should have been vital in these conflicts. However, the British government ignored legal advice and consequently harmed its public and international reputation. First, decision makers were seen to defy domestic processes and block the legal adviser from tendering advice. Second, decision makers abused the ambiguities of international law to contravene the law. Third, decision makers misunderstood the meaning and implications of the legal adviser's opinion.

These failings suggest that a change in government mind-set is required. Legal advisers should not be seen as an impediment to government, but as benefitting the decision-making process.

Force: The Suez Crisis, the Iraq War, and International Law (Oxford University Press, New York, 2013) at 150.

[97] However, the Iraq Inquiry did conclude that the "circumstances in which it was ultimately decided that there was a legal basis for UK participation were far from satisfactory" - Sir John Chilcot *The Report of the Iraq Inquiry- Executive Summary* (Committee of Privy Counsellors, 6 July 2016) at 62.

[98] Board of Editors "Report of the Dutch Committee of Inquiry", above n 4, at 83.

[99] "Lessons of Iraq War Underscore Importance of UN Charter- Annan", above n 4.

[100] Matthew Craven, Gerry Simpson, Susan Marks and Ralph Wilde "We are Teachers of International Law" (2004) 17 Leiden Journal of International Law 363 at 364.

A Compliance with Domestic Processes

The government's lack of respect for the legal adviser in these conflicts was apparent even before legal advice was tendered. Decision makers refused to engage in the required domestic processes for receiving legal advice. The required domestic process for obtaining advice in use of force situations is that the Law Officers are consulted for an opinion on whether intervention is justified *before* intervention is carried out.[101] In both Suez and Iraq the British government did not obtain proper legal advice prior to the interventions.

1 Suez Crisis

A) Process for Obtaining Legal Advice

Throughout the Suez Crisis, the British government refused to engage legal advisers in the decision making process, fearing that the legal adviser would try to block policy goals. Eden made statements that indicate he regarded legal advisers as an impediment to policy-making. Consequently, he blocked the legal advisers from accessing relevant information required to forming a legal opinion.[102] When Anthony Nutting, then Undersecretary for Foreign Affairs, asked whether lawyers should be consulted about the proposed intervention, Eden famously stated: "lawyers are always against our doing anything. For God's sake keep them out of it. This is a political affair".[103] The correspondence between the legal advisers suggests that if the legal advisers had their legal advice recognised they would have proved Eden correct and advised against intervention. Regardless, Eden's mind-set of seeing the legal advisers as an obstruction meant that he refused point blank to engage with them. This meant he risked breaching international law.

While decision makers have to take into account "political affairs" as well as legal considerations, this does not mean they are entitled to bypass obtaining legal advice

[101] The Cabinet Manual, above n 20, at 49.

[102] Stephen Bouwhuis "The Role of an International Legal Adviser to Government" (2012) 61 ICLC 939 at 940.

[103] Anthony Nutting *No End of a Lesson; The Inside Story of the Suez Crisis* (Potter, New York, 1967) at 95.

altogether. As Manningham-Buller noted to Foreign Secretary John Selwyn-Lloyd on November 1 1956, "it will be generally assumed that we have been approached for advice as to the legality of what has been done."[104] In keeping the lawyers "out of it," Eden denied the Law Officers the chance to carry out their responsibilities in delivering an informed legal opinion to the government.[105] This is clearly stated in Manningham-Buller's 14 September 1956 letter to Selwyn-Lloyd where he concludes: "I am sure you will appreciate how difficult it is to give a legal opinion without adequate information".[106] Therefore, while the ultimate power to make the decision to use force rested with Eden, the domestic processes for obtaining legal advice were bypassed.

The consequences of bypassing domestic processes were that the FCO legal advisers and the Law Officers could not present as a united government. Manningham-Buller wrote to Lord Butler, the Lord Privy Seal, on 1 November 1956 expressing that if the Attorney General was asked in a House of Commons debate to express a view on the legal position, "I shall be in a position of acute difficulty for I cannot really advance any legal justification".[107] This emphasises the tensions involved in taking up an impartial position as a Law Officer while having a seat in government. More broadly, it shows that lack of respect for legal advisers closes off the opportunity for a united and strong government legal position in use of force situations. This is further illustrated in Fitzmaurice's circulation of a note around the FCO that same day expressing that the FCO legal advisers and Law Officers were not consulted about the legality of using force and that both remain of the opinion that force cannot be justified.[108] Ultimately, the government must have an obligation to receive and consider legal advice. Otherwise, the legal adviser's role in tendering a reasoned legal opinion to government is useless.

B) Usurping Domestic Processes for Obtaining Legal Advice

[104] Marston, above n 1, at 804.
[105] At 791.
[106] At 791.
[107] At 805.
[108] At 806.

In bypassing the legal adviser, decision makers relied on their own legal opinions. In response to the Law Officer's 12 October letter explaining that use of force cannot be justified, Viscount Kilmuir stated that he *could not agree* with all the conclusions put forward, and proceeded to outline his own opinion.[109] However, as Fitzmaurice's 5 November minute pointed out, the Law Officers are the only people who had "any official function to give advice to the government of the day".[110] The repercussions of usurping this established role are clear, as Eden latched on to Viscount Kilmuir's opinion that use of force was justified and used it to assert the government line.[111] While Viscount Kilmuir was previously the Attorney General, in his capacity as Lord Chancellor he was not authorised to give the government legal advice on critical legal matters.[112] Consequently, the legal advisers questioned whether they would have to resign because they could not support the government.[113] Furthermore, the FCO legal advisers were concerned about their international reputation and that of the FCO, given that "in legal circles abroad it would be they who would be thought to have been responsible for the advice given."[114] Hence, when domestic processes are bypassed, this both gives an opportunity for elected representatives to input their own legal opinion and risks the reputation of the organs of government.

2 Iraq War

A) Process for Obtaining the Law Officer's Advice

Similarly, the delay in obtaining the Law Officers' advice in the Iraq War risked the government's domestic and international reputation. Formal legal advice was not requested of Lord Goldsmith until 4 February 2003.[115] By this time, the British military had been ordered to prepare for intervention and Blair had given Bush his full support for

[109] At 792.
[110] At 808.
[111] At 800.
[112] The Cabinet Manual, above n 20, at 49.
[113] Marston, above n 1, at 807.
[114] At 807.
[115] Sir John Chilcot *The Report of the Iraq Inquiry- Section 5,* above n 76, at 75.

intervention.[116] As Wilmhurst noted, official advice "seemed to have been left until the end" as if it were "simply an impediment that had to be got over before the policy could be implemented".[117] This box-ticking mentality is dangerous because it questions the utility of legal advice. Moreover, by the time formal advice was requested "it would have been very, very difficult for [Lord Goldsmith] to give a different view without giving a major public relations advantage to Iraq".[118] That is to say, while Lord Goldsmith was free to come to a legal conclusion, the preparations underway meant he would have been under pressure to come to a conclusion favoured by the government. Significantly, the lack of perceived transparency in this delayed process increased suspicions that Lord Goldsmith had been "got at" by Blair.[119] Indeed, following the Iraq invasion, public and members of parliament called for the separation of the Attorney General's political and legal functions to ensure impartiality in the role.[120]

This begs the question of when the right time is to receive formal advice on use of force. Blair was asked this question in his Iraq Inquiry testimony, responding that formal advice was not required until the government was close "to the point of taking a decision".[121] But as the interviewer suggested, "wouldn't it have been helpful to have known our options" and "know if there was an alternative?"[122] It seems that Blair was either, entirely confident that Lord Goldsmith would provide the legal justification warranted, or was not prepared to consider alternatives unless absolutely necessary. If confidence was the cause, this merely solidifies the claims that Lord Goldsmith was partly pressured into declaring the invasion legal, perhaps on his trip to the United States. If it was obstinacy,

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[116] At 150; Letter from Tony Blair (British Prime Minister) to George Bush (United States President) regarding support for the Iraq War (28 July 2002).

[117] Interview with Ms Elisabeth Wilmshurst, former Deputy Legal Adviser, Foreign and Commonwealth Office (Sir John Chilcot, Iraq Inquiry, 26 January 2010) transcript provided by Iraq Inquiry at 24.

[118] At 27.

[119] Henry Porter "Trust is Still the Crucial Issue" (27 March 2005) The Guardian <www.theguardian.com>.

[120] *See* Select Committee on the Constitution *Reform of the Office of Attorney General* (House of Lords, Report of Session 2007-2008).

[121] Interview with Rt Hon Tony Blair, above n 95, at 144.

[122] At 152.

this demonstrates "a worrying trend … to delay and obfuscate legal advice".[123] The lack of transparency around how and when legal advice is tendered can have significant effects on the quality, or at least perceptions, of the legal advice. Legal advice should have been obtained far earlier in the decision-making process. This would have allowed Lord Goldsmith to fulfil his legal obligations by providing a more substantive legal opinion that included a range of legal options.

B) Bypassing Domestic Processes for Obtaining Legal Advice

Much like Viscount Kilmuir's refusal to acknowledge the Law Officers' opinion that the Suez invasion was illegal, various decision makers also took over the legal adviser's role in Iraq. Straw discounted advice given to him by Wood that the invasion would be unlawful without further UNSC action. Straw's reply; "I note your advice, but I do not accept it".[124] Akin to Viscount Kilmuir's dismissal of the Law Officers advice, here a political appointee rejects advice given by a government legal adviser.[125] While constitutionally there is no requirement that ministers must accept legal advice "any more than you have to accept policy advice," the way Straw declined the legal advice was problematic.[126] Straw noted that he was routinely advised of illegalities in cases he took on when he was Home Secretary, and used the fact that he had nevertheless won these cases in court to assert the fluidity of law.[127] Straw drew on his personal legal experience to counter legal advice given by a professionally employed legal adviser. However, Straw was not tasked with providing government legal opinions. So, while he may not have to accept legal advice, he was not qualified in his capacity as Foreign Secretary to suggest alternative advice. This disregard for following domestic processes exposes a lack of care and respect on the part of decision makers to leave questions of law to the legal advisers.

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[123] James Green and Stephen Samuel "The Chilcot Report: Some Thoughts on International Law and Legal Advice" (2017) 22 Journal of Conflict and Security Law 2 at 352.

[124] Milanovic, above n 84.

[125] Milanovic, above n 84.

[126] Interview with Rt Hon Jack Straw, former Foreign Secretary (Sir John Chilcot, Iraq Inquiry, 21 January 2010) transcript provided by Iraq Inquiry at 25.

[127] Interview with Sir Michael Wood, above n 24, at 31.

B Compliance with International Law

As well as the processes for tendering legal advice being bypassed, the decision makers refused to seriously consider the legal advice once it was obtained. As legal advisers advise on international law, disrespect for the legal adviser's advice can directly lead to disregard for international law. Legal advisers have a "duty to the law in the international system".[128] As Wood describes, it is precisely because international law cannot normally be tested in domestic courts that the legal adviser must acknowledge that they set precedents by "the very fact of saying things and doing things".[129] As Thomas Franck suggests, it would be a "low estate" if the legal adviser could not enforce respect for international law.[130] Given the unique position legal advisers are in to influence the development of international law, they must "be all the more scrupulous in adhering to the law".[131]

In these conflicts, the British government was perceived as having violated the rules-based international order when it intervened in Iraq and Suez and failed to seriously consider legal advice. Consequently, this reduced domestic and international support for the government of the day. A government change in mind-set to seeing the legal adviser as a support mechanism for obeying international law could benefit the government's internal and external relations, as well as allowing the legal adviser to more easily perform their role of advising on international law.

1 Suez Crisis

Eden's disregard for international law's "legal quibbles" directly led to deep divides in Parliament, public resentment, and ultimately contributed to Eden's resignation.[132] Gaitskell's comments in the 2 August House of Commons debate made it clear that the Labour Party would not support the use of force where it would breach international law. He stated that the government was "reverting to international anarchy" and noted that the

[128] At 34.

[129] At 34.

[130] Thomas Franck "An Outsider Looks at the Foreign Office Culture" (2005) 23 Wis Int'1 LJ 1 at 5.

[131] Interview with Sir Michael Wood, above n 24, at 34.

[132] Marston, above n 1, at 777.

government must not "get into a position where [it] might be denounced in the Security Council as aggressors".[133] Divides in Parliament were compounded by the aims of the Labour Party's Suez Emergency Committee, established in August to "mobilize public opinion against a war with Egypt".[134] The Labour Party's nation-wide campaign called for "law not war", resulting in public protests throughout Britain, and nearly 30,000 demonstrators breaking the police cordons of Number 10 Downing Street.[135] The media latched on to the illegality of intervention, highlighting the legal weaknesses of "Eden's War", with some calling for Eden's removal.[136] Therefore, Eden's failure to adequately address the legality of use of force mobilised the Labour Party to discredit the government, fuelled public resentment about violating international law, and led to direct attacks on Eden. These events show that without respecting current thinking on international law, as advocated by the legal advisers, the government was unable to perform the basic function of garnering the respect of the Opposition, public, and media.

Eden's disregard for international law can perhaps be explained through the circumstances surrounding the decision to intervene. The Sèveres Protocol[137] revealed that Britain colluded with France and Israel to arrange an intervention in the Canal.[138] Secret treaty-making is illegal under international law.[139] Hence, the political moves were so illegal in the first place, that "keeping [the lawyers] out of it" was the only way to hide the political goal. Indeed, private policy-making was endemic of Eden's government, where not only were the legal advisers kept at arm's length, but also wider Cabinet involvement was significantly narrowed to prevent the spread of confidential information.[140] This closed style of government would later be replicated in PM Tony

[133] Khalid Mahmood "British Public Opinion and Suez" (1962) 15 Pakistan Institute of International Affairs 204 at 205, 206.
[134] At 206.
[135] At 217.
[136] At 219.
[137] The text of which was only formally released in 1996.
[138] Avi Shlaim "The Protocol of Sévres 1956: Anatomy of a War Plot" (1997) 73 International Affairs 509 at 509.
[139] League of Nations, art 18.
[140] Peevers, above n 96, at 201.

Blair's *sofa-style* government during his term in power.[141] If these closed governments had respected the role of the legal adviser in tendering legal advice, perhaps the level of government transparency would have increased. This is because the legal adviser required access to private government information to form robust legal opinions.

2 Iraq War

It is not only decision makers who must adapt to viewing the legal adviser as an asset for obeying international law. In the Iraq War, the legal adviser did not view their own role with respect. Lord Goldsmith himself arguably disregarded international law interpretative tools when he based his legal justification for the use of force on the views of several negotiators of Resolution 1441, namely the United States drafters who openly supported the revival argument.[142] Here, Lord Goldsmith relied on private conversations he had with drafters on his visit to the United States to form his opinion on the interpretation of Resolution 1441.[143] It would have been more open on the facts for Lord Goldsmith to rely on the wording of Resolution, which did not explicitly authorise force. Thus, it was suspicious that Lord Goldsmith favoured private legal views. Other international law interpretative tools support this conclusion. While the Vienna Convention does not apply to resolutions, its interpretative provisions can aid our understanding of interpreting resolutions.[144] Preparatory work and drafters' notes may be considered as supplementary means of interpretation when a treaty's meaning is ambiguous.[145] Private conversations likely exceed the remit of this provision because they are not universally available, written down, or convey the opinion of the majority of drafters. Wilmshurst agrees, noting that a resolution's interpretation must be gained from, among other elements, the wording itself and *published records* of preparatory work.[146]

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[141] Brian Wheeler "Curtains for Blair's 'sofa cabinet'?" (15 July 2004) BBC <www.news.bbc.>

[142] Interview with Rt Hon Lord Goldsmith, former Attorney General (Sir John Chilcot, Iraq Inquiry, 27 January 2010) transcript provided by Iraq Inquiry at 119.

[143] At 122.

[144] Vienna Convention on the Law of Treaties.

[145] Article 32.

[146] Wilmshurst, above n 117, at 17.

There are serious consequences to expanding the methods for interpreting international law. Legal theorist Stephen Tully points to the United State's weak justification for the legality of interrogation techniques later on in the Iraq War to show how easy it is for states to "interpre[t] away an international rule" and create a dangerous precedent.[147] Unorthodox interpretations of resolutions risk the legal adviser being perceived as picking and choosing which tools to apply. Hence, for the role of the legal adviser in upholding international law to be respected, the legal adviser must first and foremost interpret international law with the most logical and reasonable methods available on the facts.

C Understanding Legal Advice

Interrelated to how decision makers, and even legal advisers, disregarded international law, are the ways in which decision makers failed to understand tendered legal advice. In Suez, decision makers contested the tendered legal advice by asserting that international law must also take into account social factors and political considerations. Advice tendered prior to the Iraq War showed that there was no uniformity in how certain legal advisers must be in their legal opinions that use of force is justified. This was left to the discretion of the legal adviser. Hence, the problems of neglecting legal advice stem not only from disrespecting domestic processes and international law, but also in a lack of understanding of the meaning of legal advice.

1 Suez Crisis

In Suez, decision makers contested tendered legal advice by suggesting that the legal adviser's interpretation of international law was incorrect. Viscount Kilmuir disputed the legal adviser's opinion by suggesting that government "should be entitled to use whatever force was necessary for the purpose".[148] He felt that use of force is justified when there are "good grounds" based on "logic" that it "cannot be right or good in international law" to allow Egypt's nationalisation of the canal.[149] Viscount Kilmuir's version of

[147] Stephen Tully "Getting it Wrong or Being Ignored: Ten Words on Advice for Government Lawyers" (2009) NZYBIL 51 at 61.

[148] Marston, above n 1, at 800.

[149] At 777, 796, 801.

international law that combines political and legal considerations is reminiscent of the New Haven Approach to international law,[150] which was popular in the 1950's and 1960's.[151] However, as theorist Oscar Schachter posits, the New Haven approach can be "an ideological instrument to override specific restraints of law".[152] Hence, in the Suez context, Viscount Kilmuir's rejection of the legal adviser's opinion may well have been because he wanted the law to support his pre-formed political views, rather than because he felt international law could be interpreted through a policy framework. Viscount Kilmuir was likely able to manipulate the tendered legal advice because of a *gut feeling* that the government "should be entitled" to resort to force.[153]

Moreover, it appears that Viscount Kilmuir simply failed to understand that his *gut feeling* was inconsistent with international law. The majority of the UNSC also shared the legal adviser's opinion that Article 51 did not authorise British intervention.[154] The UNSC tried to secure various resolutions condemning the action, but were stalled by the British and French vetoes.[155] The UNSC referred the matter to the General Assembly,[156] who similarly expressed "grave concern" over the British and French intervention.[157] Therefore, decision makers risked their international reputation and were denounced by some as aggressors because they chose legal arguments that supported their policy preferences.[158] Thus, an understanding that the legal adviser's opinion should be seriously considered would greatly assist the government in making legally compliant decisions.

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[150] Anna Orford "Scientific Reason and the Discipline of International Law" (2014) 25 EJIL 368 at 381.

[151] For a twenty-first century account of the New Haven theory see Harold Koh "Is There a 'New' New Haven School of International Law?" 2007 (32) Yale J.Int'l L 559.

[152] At 563.

[153] Marston, above n 1, at 800.

[154] Department of Public Information *Yearbook of the United Nations* (1956).

[155] Department of Public Information *Yearbook of the United Nations* (1956).

[156] Permissible under the Uniting for Peace Resolution 1950, GA Res 377, A/Res/5/377.

[157] Withdrawal from Suez, GA Res 997, A/RES/997.

[158] See Egypt's request that the Security Council consider that Britain's actions "constitute a danger to international peace and security and are serious violations of the United Nations"- "Establishment of UNEF" <peacekeeping.un.org>.

2 Iraq War

In the Iraq War, there was a general lack of understanding by both decision makers and legal advisers about how legally strong a case for intervention needed to be for use of force to be justified. In 2002 and during the beginning of 2003, Lord Goldsmith was clear that there was no legal basis for intervention in Iraq.[159] Lord Goldsmith's legal advice on 7 March 2003 was that a "reasonable" case could be made for the use of force.[160] On 11 March Lord Goldsmith was asked by Admiral Boyce, Chief of Defence for the Armed Forces, and Treasury Solitary Juliet Wheldon to give a "clear-cut answer" on whether intervention was lawful.[161] On 13 March Lord Goldsmith concluded that the "better view" was that Resolution 1441 did revive the use of force.[162]

However, it seems that even Lord Goldsmith was unclear on what standard of certainty was required. In his Iraq Inquiry witness interview he noted: "it is very clear that the precedent in the United Kingdom was that a *reasonable case* was sufficient".[163] This precedent refers to the use of a *reasonable case* by the British government in authorising No Fly Zones and Operation Desert Fox in Iraq during 1998 and 1999.[164] In his interview, he described a reasonable case as one that "you would be content to argue in court, if it came to it, with a *reasonable prospect of success*".[165] However, in his 7 March formal advice to government Lord Goldsmith noted that: "a 'reasonable case' does not mean that if the matter ever came before a court I would be confident that the court would agree".[166] It is difficult to reconcile these two statements, given the different weighting applied to the reasonableness standard. Moreover, in relation to the No Fly Zones decision makers were also unclear on what standard of certainty to apply to use of force. In a memorandum from David Brummell, then Legal Secretariat to the Law Officers, to Tom McKane, then Defence and Overseas Secretariat, on 12 February 2001, Brummell

[159] Sir John Chilcot *The Report of the Iraq Inquiry- Section 5,* above n 76, at 36.
[160] At 101.
[161] At 4.
[162] At 4.
[163] Lord Goldsmith, above n 142, at 97 (emphasis added).
[164] At 97.
[165] At 98 (emphasis added).
[166] Sir John Chilcot *The Report of the Iraq Inquiry- Section 5,* above n 76, at 101.

noted that while it is questionable whether a "*respectable* legal argument" can be maintained that force is justified, it is "still *possible*" to find justification.[167] However, "judgement as to whether such an argument can still be advanced is a *very fine one*".[168] The differing terms used to describe whether authorisation is legal are confusing and go well beyond semantics.

The generalizable implications of this are that there is sometimes little clarity around what level of certainty is required to justify force. Without such clarity, legal advice, to some extent, loses its strength. Moreover, if legal advisers are not unanimous in their terminology, there is a risk that decision makers will arbitrarily apply advice given and possibly deem illegal action lawful. A legal adviser will only garner the respect of decision makers if their legal advice can be accurately interpreted and applied consistently.

Interestingly, other legal advisers in the Iraq Inquiry provide valuable insight into what standard of certainty should be required before use of force is justified. Wilmshurt suggested that "one would want to have a *strong case*, if one is undertaking an operation so major as invading another country".[169] Hence, domestic standards of proof, such as the balance of probabilities or beyond reasonable doubt may not be strong enough. Wood questioned what type of legal case is required before resorting to war, asking whether a "reasonable", "respectable", "arguable", or "higher degree of legal certainty" is required.[170] The UN Charter does not define a standard of certainty for authorisations of use of force. Equally, other international law tools are similarly unhelpful in determining this standard. For instance, it is unclear whether the International Court of Justice (ICJ) has ruled on a standard of proof.[171] While the ICJ in the *Oil Platforms* case determined that sufficient evidence to establish the lawfulness of use of force was lacking, they did

[167] Letter from David Brummell (Legal Secretariat to the Law Officers) to Tom McKane (Defence and Overseas Secretariat) regarding No Fly Zones (12 February 2001) at [13] (emphasis added).
[168] At [13].
[169] Wilmshurst, above n 117, at 21 (emphasis added).
[170] Sir Michael Wood Witness statement, above n 13, at 10.
[171] James Green "Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice" 58 (2009) ICLC 163 at 169.

not comment on the applicable standard to be applied.[172] However, some legal scholars, such as James Green, suggest that the ICJ has applied the standard of "clear and convincing evidence".[173]

Given these standards are available, it seems Lord Goldsmith and other legal advisers could choose one to adopt. Without clarity on what the various level of certainties mean, this part of the legal adviser's role will remain neglected and not well understood. Consequently, there is the possibility that decision makers will manipulate the standard of certainty in the legal opinion to meet political and policy agendas. Significantly, a uniform standard of certainty will also avoid public and Parliamentary criticism that decision makers are picking and choosing how to apply the law. This essay does not seek to answer this question, but merely raise the issue that if decision makers are to seriously consider legal advice, they need to be aware about what that legal advice is really saying.

VI Where to Next? Suggestions for Ensuring Future Respect for the Legal adviser's Role

In 2015 the British government removed the requirement to respect international law from the Ministerial Code.[174] This signalled a weakening of international law's influence in the domestic sphere.[175] Moreover, the British government is arguably reverting back to Iraq War "closed-door tactics" in the face of Brexit challenges.[176] Some moves have been made towards increasing respect for the legal adviser's role in the decision-making process on whether to use force, namely the ICC's expanded jurisdiction to hear crimes

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[172] At 169; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [1996] ICJ Rep 683.

[173] Andrea Bianchi and Anna Peters Transparency in International Law (Cambridge University Press, Cambridge, 2013) at 338.

[174] Richard Ekins and Guglielmo Verdirame "The Ministerial Code and the Rule of Law" (6 November 2015) UK Const. L. Blog <www.ukconstitutionallaw.org>.

[175] Melanie Phillips "These Weaselly Tricks Bring Shame On Ministers" (2 November 2015) The Times <www.thetimes.co.uk>.

[176] Jack Maidment "Civil servants 'highlighting Brexit concerns in official emails to guard against Chilcot-style inquiry" (21 September 2017) The Telegraph <www.telegraph.co.uk>; James Moore "We should have learned after Iraq- but Brexit shows we are still willing to blindly follow politicians into disaster" (6 July 2017) Independent <www.independent.co.uk>.

of aggression. Despite this, change is still needed in the overall mentality of the British government.

A Accountability of Decision Makers

The activation of the jurisdiction of the ICC to prosecute crimes of aggression on 17 July 2018 may contribute to greater respect for legal advisors in the future.[177] The crime of aggression applies to leaders of nations who plan, prepare or initiate political or military action of a state where the use of armed force, comprised of its character, gravity and scale, constitutes a "manifest violation of the Charter".[178] The fact that the ICC can now prosecute these crimes "will provide some measure of deterrence, by informing the international community of a legal red line and encouraging public protest when it is in danger of being overstepped".[179] Regardless of whether the Iraq War or Suez Crisis constituted crimes of aggression,[180] this expanded jurisdiction should at least give future leaders "a reason to pause" before using force.[181]

However, one should not expect too much from the ICC's expanded remit. Britain lobbied to block the activation of the crime of aggression, arguing that further "clarity on the ICC's jurisdiction" was warranted.[182] Thus, Britain seems unlikely to domestically ratify the crime of aggression in the near future. Moreover, Britain's Security Council veto means it can block referral of any leader to the ICC if doing so is in its interests.

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[177] "The Crime of Aggression" Coalition for the International Criminal Court <www.coalitionfortheicc.org>.

[178] "The Crime of Aggression", above n 176.

[179] Geoffrey Robertson "At Last, a Law That Could Have Stopped Blair and Bush Invading Iraq" (16 July 2018) The Guardian <www.theguardian.com>.

[180] Claus Kreß suggests that the Iraq War would not fall under the jurisidction, given the "manifest" nature of the provision, see Claus Kreß "On the Activiation of ICC Jurisdiction over the Crime of Aggression" (2018) 16 Journal of International Criminal Justice 1; *See also* Benjamin Duerr "ICC Jurisdiction Set to Expand- Will States be Deterred from War?" (4 December 2017) IPL Global Observatory <www.theglobalobservatory.org>

[181] Geoffrey Robertson "At Last, a Law That Could Have Stopped Blair and Bush Invading Iraq" The Guardian <www.theguardian.com>.

[182] Owen Bowcott "UK Calls for 'Great Clarity' On ICC's New Crime of Aggression" (15 November 2017) The Guardian <www.theguardian.com>.

Pressure from other nations who have ratified the crime of aggression may put some pressure on Britain to more stringently follow international law. Similarly, legal advisers will likely factor in the ICC's expanded jurisdiction when advising government on the legality of future intervention. On balance, the crime of aggression may help create a mind-set that will lead to decision makers *pausing* before bypassing legal advice and resorting to force. Indeed, it is this mentality, over a growth in legal safeguards themselves, which will lead to increased international and public respect for the government.

B Convention to Seriously Consider Legal Advice

Parliamentary developments during and since the Iraq War suggest that the development of a constitutional convention to seriously consider legal advice may encourage a government mind-set change.

The now established constitutional convention granting the House of Commons a vote before using force suggests that decision makers support the creation of new mechanisms to avoid illegally compliant uses of forces. Blair sought the consent of Parliament to use force in Iraq in 2003.[183] While Parliamentary debate on the use of force had occurred prior to 2003, such as during the 1991 Gulf War, the Iraq War represented the most prominent case of Parliament being asked to approve the use of force.[184] Since then, Parliamentary debates on the use of force have occurred in relation to Libya in March 2011 and Syria in August 2013.[185] The use of a vote suggests that British PMs are concerned about Britain's international reputation in use of force situations. By engaging Parliamentarians to decide whether war is justified, we can infer that decision makers want to broaden the decision-making process to include other parts of government.[186] Possibly, a logical leap from this would be broadening the decision-making process to include creation of a convention to seriously consider legal advice. This would encourage

[183] Strong, above n 27, at 604.

[184] Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009), at 225.

[185] Strong, above n 27, at 604.

[186] At 605.

decision makers to respect the legal adviser's role and then pause before rejecting legal advice.

VII Conclusion

The British government was condemned domestically and internationally when it failed to provide adequate legal conclusions for the use of force in Suez and Iraq. Eden's government was unwilling to compromise on policy decisions, leaving legal processes entirely out his decision-making. While due attention was paid to ensuring legal boxes were ticked in the lead up to the Iraq War, decision makers remained disrespectful of the legal adviser's role. These conflicts clearly identify disregard for international law and domestic processes. More importantly, they show the consequences of bypassing consultation with legal advisers. While this essay does not suggest that decision makers must always obey the legal adviser's opinion, it has shown that without government appreciation for the legal adviser's role, Britain's respect both domestically and on the world stage suffers. The government mind-set must become more open to hearing legal arguments and working with legal advisers to find legally compliant policy solutions. Without this, we risk similar failings occurring in future crises.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7996 words.

VIII Appendix

A Timeline of Key Dates- Suez Crisis

1956

26 July	Egypt President Gamal Nasser nationalises the Suez Canal[187]
31 July 1956	Lord Chancellor Viscount Kilmiur met with Attorney General Sir Reginald Manningham-Buller, Solicitor-General Sir Harry Hylton-Foster and FCO Deputy Legal Adviser Francis Vallat to discuss the government's legal position.[188]
1-3 August	Britain, France, and the United States confer in London and agree to call a London Conference on Suez[189]
2 August	Eden speaks in the House of Commons on the legality of invading the Suez Canal if Nasser continues to nationalise the Canal[190]
29 August	Fitzmaurice advised FCO Permanent Under-Secretary of State Sir Ivone Kirkpatrick that a wide interpretation of Article 51 could not be justified[191]
12 September	Lord McNair, in referring to the Charter of the United Nations and the Kellogg-Briand Pact in the House of Lord, was "unable to see the legal justification" in the use of force[192]
23 September	Britain and France refer Suez dispute to the UNSC[193]
24 September	Egypt counters the British and French request and brings a claim to the UNSC[194]
9 October	Office of the Lord Privy Seal circulated guidance on the Suez situation to the private secretaries of all ministers on 9 October

[187] Marston, above n 1, at 773.

[188] At 779.

[189] At 781.

[190] (2 August 1956) 557 UKHC 1603–6.

[191] Marston, above n 1, at 784.

[192] At 813.

[193] "Establishment of UNEF", above n 58.

[194] "Establishment of UNEF", above n 58.

	suggesting that force was justified[195]
13 October	Resolution 118 adopted by UNSC calling for Egypt's sovereignty to be respected[196]
12 October	The Attorney General, Sir Reginald Manninghman-Buller, and Solicitor General Sir Hylton-Foster, write in a memorandum to Viscount Kilmuir that use of force cannot be justified[197]
24 October	Sèvres Protocol drafted at Sèvres, France, in secret between France, Britain and Israel[198]
29 October	Israeli forces attack Egyptian Army in Sinai[199]
30 October	Britain and France deliver ultimatum to Israel and Egypt and veto Security Council resolution[200]
31 October	British and French air forces attack Egyptian airfields. Security Council calls emergency General Assembly meeting[201]
1 November	Viscount Kilmuir address the House of Lords, relying on Arthur Goodhart's proposition that Article 51 did not restrict the customary right of self-defence[202]
2 November	General Assembly calls for a cease-fire and withdrawal of forces[203]
7 November	British and French troops cease firing[204]
3 December	Lloyd announces Britain and France will withdraw from Egypt[205]

B Timeline of Key Dates- Iraq War

1 Key Dates in 2002

26 March	Sir Michael Wood wrote to Straw's Private Secretary noting that the Attorney General's advice must be sought before ministerial decisions

[195] Marston, above n 1, at 790.

[196] *Complaint by France and the United Kingdom against Egypt* SC Res 118, S/3675 (1956).

[197] Marston, above n 1, at 792.

[198] Shlaim, above n 138, at 509.

[199] Marston, above n 1, at 798.

[200] At 801.

[201] At 801.

[202] At 778.

[203] Robert Bowie *International Crises and the Role of Law: Suez 1956* (Oxford University Press, London, 1974) at xvii.

[204] At xvii.

[205] At xvii.

	are taken[206]
28 July	PM Tony Blair promised to President Bush: "I will be with you, whatever"[207]
8 November	Resolution 1441 adopted, deciding that the Iraqi government remains in material breach of its obligations, including Resolution 687[208]
11 November	Lord Goldsmith telephoned Jonathan Powell, Tony Blair's Chief of Staff, noting that he was "not optimistic" about the legality of intervention[209]
14 November	Jack Straw informed Cabinet that the key aspect of resolution 1441 was that "there was no requirement for a second resolution"[210]
15 November	FCO legal advisers set out a paper on what might constitute a material breach by Iraq to Sir David Manning, Tony Blair's Foreign Policy Adviser, and Sir Jeremy Greenstock, Permanent Representative of the United Kingdom to the UN[211]
6 December	FCO legal advisers noted that there is no agreement in the UNSC on the criteria for material breach, but in their opinion a material breach must be "a violation of a provision essential to achieving the object or purpose of the original Gulf War cease-fire"[212]
9 December	Formal instructions to provide advice to the government were sent to Lord Goldsmith[213]
19 December	Lord Goldsmith met with Powell but was advised he was not being called on to give advice at this stage, but it would be useful for to speak to Sir Jeremy Greenstock "to get a fuller picture" of resolution 1441[214]

2 Key Dates in 2003

14 January	Lord Goldsmith provided Mr Blair with draft advice stating the use of

[206] Letter from Sir Michael Wood (FCO Legal Adviser) to the Foreign Secretary's Private Secretary on Iraq (26 March 2002) at 5.

[207] Letter from Tony Blair (British Prime Minister) to George Bush (United States President) regarding support for the Iraq War (28 July 2002).

[208] SC Res 1441, S/Res/1441 (2002) at 3.

[209] Sir John Chilcot *The Report of the Iraq Inquiry- Section 5,* above n 76, at 6.

[210] At 11.

[211] At 13.

[212] At 16.

[213] At 75.

[214] At 34.

	force in Resolution 678 could only be revived by the UNSC[215]
15 January	Blair stated in Parliament that he would not rule out military action even if a further resolution in response to an Iraqi breach was vetoed[216]
16 January	Lord Goldsmith was not invited to speak at Cabinet when Blair told Cabinet that Britain should not rule out military action without a second resolution[217]
23 January	Lord Goldsmith met with Sir Greenstock but did not agree with his argument that individual nations could take action without a determination by the UNSC[218]
24 January	Wood wrote to Straw noting that "without a further decision by the Council" the UK would not lawfully be able to use force against Iraq[219]
29 January	Straw wrote to Wood, "I note your advice, but I do not accept it"[220]
30 January	Lord Goldsmith wrote to Blair expressing that his view remained that a further determination by the Security Council was needed.[221]
31 January	President Bush agreed to support a second resolution to help Blair[222]
4 February	Lord Goldsmith is asked for urgent advice on whether a second resolution was needed[223]
10 February	Lord Goldsmith visited Washington to discuss the US position that Iraq was in material breach of Resolution 1441 and therefore, the conditions for cease-fire were no longer in place[224]
7 March	Lord Goldsmith delivered formal advice stating that although a "reasonable" case can be made for the revival argument, "the safest legal course would be to secure a second resolution"[225]
13 March	Lord Goldsmith concluded that the "better view" was that the revival argument was met[226]
15 March	The FCO published a paper on the extent of Iraq's non-compliance with

[215] At 36.
[216] At 43.
[217] At 48.
[218] At 53.
[219] At 65.
[220] At 65.
[221] At 55.
[222] At 58.
[223] At 75.
[224] At 76.
[225] At 100.
[226] At 5.

	UNSC resolution 1441[227]
17 March	Lord Goldsmith set out his view of the legal basis for military action in a Written Answer. Straw stated to the House of Commons that Lord Goldsmith's Answer "set out the legal basis for the use of force"[228]
18 March	Parliament voted and approved the use of force in Iraq[229]

[227] At 140.

[228] At 162.

[229] At 133.

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