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The American University in Cairo

School of Global Affairs and Public Policy

**The Interconnectivity of Political and Legal Discourses in the
Assessment of the Invasion of Iraq**

A Thesis Submitted to the

Department of Law

**In partial fulfillment of the requirements for the LL.M. Degree in
International and Comparative Law**

By

Mohamed Hussein Soliman

June 2016

The American University in Cairo
School of Global Affairs and Public Policy

THE INTERCONNECTIVITY OF POLITICAL AND LEGAL
DISCOURSES IN THE ASSESSMENT OF THE INVASION OF IRAQ

A Thesis Submitted by

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to the Department of Law

June 2016

In partial fulfillment of the requirements for the
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THE INTERCONNECTIVITY OF POLITICAL AND LEGAL
DISCOURSES IN THE ASSESSMENT OF THE INVASION OF IRAQ

Mohamed Soliman

Supervised by Dr. Thomas Skouteris

ABSTRACT

As a student of both international relations and international law; I have more often than not come across the same contemporary global issues and had to discuss said issues within a political or legal discourse using their respective vernaculars. I have also, more often than not, found that each discourse relies heavily on aspects of the other to adequately assess a particular phenomenon. The interconnectivity of both discourses is extensive and distinguishing between both proves rather difficult and inconsequential. This is to say that the collaboration of both disciplines within the analysis of a global conflict provides a more in-depth analysis than either discipline could separately. This practice is already present within both fields however the parameters of this approach and a refined methodology are yet to be determined. For that reason, this paper advocates for a formal interdisciplinary approach to the assessment of global conflicts which otherwise utilizes one approach or the other. This multifaceted approach would provide a more practical and more detailed insight and analysis into the causes and effects of the contemporary issues that dominate the international arena and resonate throughout both disciplines.

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Introduction:

As a student of both international relations and international law; I have more often than not come across the same contemporary global issues and had to discuss said issues within a political or legal discourse using their respective vernaculars. I have also, more often than not, found that each discourse relies heavily on aspects of the other to adequately assess a particular phenomenon. As Christian Rues-Smit articulates:

"The discourse of politics is now replete with the language of law and legitimacy as much as *realpolitik*, lawyers are as central to military campaigns as strategists, legal right is as much a power resource as guns and money, and juridical sovereignty, grounded in the legal norms of international society, is becoming a key determinant of state power."¹

The injection of legal terms into political discourse is mirrored within the international legal discipline as political terms and international relations concepts are inescapable when discussing the formation or application of international law within an anarchic global system made up of political actors. As Hans Morgenthau states, "Where there is neither a community of interest nor a balance of power, there is no international law."²

Yet despite the advanced interconnectivity; "politics and law have long been seen as separate domains of international relations, as realms of action with their own distinctive rationalities and consequences."³ Rues-Smit goes on to articulate that this particular view regarding the separation of politics and law has led to the formation of "parallel yet carefully quarantined fields of inquiry."⁴ In other words, political and legal discourses act as separate and distinct lenses, each providing a different view on a particular situation. This idea is not specific to legal and political discourses as Morgenthau also asserts that a "political realist thinks in terms of interest defined as power, as the economist thinks in terms of interest defined as wealth; the lawyer, of conformity of action with legal rules; the moralist, of conformity of action with moral

¹CHRISTIAN RUES-SMIT, *THE POLITICS OF INTERNATIONAL LAW*,2(Cambridge University Press 2004) (2004).

²HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE*, 296(6th ed., McGraw-Hill, 1985) (1985).

³*Supra* note 1, at 1.

⁴*Id.*.

principles."⁵ However in regards to international law, Rues-Smit illustrates that many scholars have "acquiesced in this separation" and presented international law as a "regulatory regime, external to the cut and thrust of international politics."⁶Rues-Smit goes on to articulate that legal philosophers have often set out "to quarantine law from politics for fear that the intrusion of politics would undermine the distinctive character of law as an impartial system of rules."⁷ This perspective of treating international politics and international law as distinct has translated into the respective international relations and international law curriculums as "students of international law have learnt doctrine and process but not politics."⁸

This anachronistic separation of international law and politics is easily exposed for its flaws through the observation of contemporary global events such as the intervention in Kosovo, the ICJ advisory opinion regarding nuclear weapons, the Pinochet case, as well as the war on terror and particularly, the case of the 2003 Iraq War. The major conflicts within the international community are complex and diverse by nature. The entanglement of law and politics is prevalent throughout all these issues and the delineation between the political and legal aspects is not only increasingly difficult, if not impossible, but genuinely irrelevant. The said irrelevance has even warranted a call for bridging the divide between the disciplines of international relations and international law within recent years.⁹ This shift is unsurprising given that the benefits of an interdisciplinary approach to analyzing global conflicts are numerous to say the least. An interdisciplinary approach can be defined as an approach to the assessment of a situation that utilizes more than one branch of knowledge. The process involves the utilization of methods and concepts specific to more than one discipline in answering a question or assessing a situation. The reasons behind employing aspects

⁵*Supra* note 2, at 13.

⁶*Supra* note 1, at 1.

⁷*Id.*

⁸*Id.*

⁹See, for example, Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 (2)Harv. Int'l L.J.,(1997); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 (2)Amr J. Int'l L., (1993); Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 (3) Amr J. Int'l L., (1998); Robert J. Beck, *International Law and International Relations: The Prospects for Interdisciplinary Collaboration*, 1 J. of Int'l L. Std.:Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14(2) Yale J. Int'l L., (1989).

of another discipline, in this case politics or international relations, in answering international legal questions are many and range from attempting to address insufficiency in the law to addressing increasingly complex and multilayered global conflicts. As Articulated in *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, "some proponents of interdisciplinary scholarship saw IL as a patient and IR as the cure."¹⁰ This point is supported further by arguments that suggest that the shifting nature of global conflicts in the modern era, exemplified by the increased role and influence of non-state actors, presents an array of issues that international law is unequipped to handle. International law would thus require politics or international relations theories to help fill in the gaps. I would however argue that the necessity of an interdisciplinary approach stems from the complexities of international conflicts that warrant a multifaceted approach rather than solely from inherent shortcomings of the international legal system. Authors are in fact already utilizing said approach in their analysis of global conflicts; however, said use is informal in the sense that it is not part of a joint discipline or a formal methodology. Authors employing such an approach have relied on their own terms of engagement in addition to their respective differing definitions of international law and politics. In this regard, a formal interdisciplinary approach would focus on establishing parameters and mapping out the terms of engagement between both disciplines in order to refine what is already a beneficial approach. Establishing a clear agenda, with the aim of bridging the gap between the disciplines, for the development of this approach would only enhance the advantages it already offers.

This paper is thus a response to the dichotomization of international law and politics within the international arena as well as a call for deepening the already blooming conversation. I will illustrate that the gap between the two disciplines brought on by this dichotomization between 'law' and 'politics' lacks relevance and pragmatism in the analysis of global conflicts and particularly in regards to the use of force. And thus, an interdisciplinary approach that utilizes international law and international politics as one lens would lead to the most fruitful and detailed assessment of any

¹⁰Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 (3) Am. J. Int'l L., (1998).

international situation. I will also illustrate that this particular approach is already being utilized within the various and differing perspectives included within this paper.

This paper will use the 2003 Iraq War, which represents a fundamental divide within international legal discourse, to illustrate that regardless of the perspective regarding the legality or legitimacy of a conflict; separation of the political and legal components is impossible as well as counterproductive. The Iraq War proves to be a useful example, as it provides for a plethora of differing perspectives regarding the legality and legitimacy of this invasion given that each perspective is premised on a certain understanding of the relationship between international law and politics. It is important to note that regardless of the specific definitions employed for both politics and law respectively, there exists little disagreement, among scholars and international institutions, over the general inherent interconnectivity of the two. This point is illustrated by Martti Koskenniemi's assertion that even an international legal institution such as the ICC, for instance, is not attempting to circumvent politics but to shift politics in a manner that aligns with its doctrine.¹¹ Nouwen and Werner argue that politics is intertwined in every aspect of the ICC, for example, from its creation, to the type of cases it takes, to the ongoing battle of establishing criminal accountability in the face of political bargaining and immunity.¹²

In the case of the 2003 invasion of Iraq, the divide within the discourse is due to the supposed blatant violations by the United States in their supposed disregard of international law in pursuit of their national interests. The US intervention in Iraq divided the international community due to both the nature of the intervention and the manner in which it allegedly conflicts with fundamental legal concepts within international customary law as well as the UN Charter. As important as this debate is to understanding international law, it is important to note that this is not only a question of legality but also legitimacy. As regardless of whether the 2003 invasion of Iraq was legal or illegal, it is important to ask whether it was just.

¹¹MARTTIKOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (Cambridge University Press 2001) (2001).

¹²Sarah MH. Nouwen, and Wouter G. Werner. *Doing justice to the political: The international criminal court in Uganda and Sudan*, 21.4 Eur. J. Int'l L. 942, 942-943 (2010).

This paper seeks to assess the interplay between politics and international law and the subsequent ramifications for the legality and legitimacy of events. In a formal system, the legality of a particular act is subject to the legal norms or principles that regulate it and the legitimacy of the act would stem from its lawfulness. Legitimacy in this regard refers to the political perception regarding a certain act that deems it just or unjust. It is important to note that the diversity within the international community leads to varying political perceptions and ideas of justice which render the task of determining legitimacy, as well as legality quite difficult to say the least.

Had the United States acquired authorization prior to its invasion of Iraq and ended the debate surrounding Chapter VII of the UN Charter, would that have changed the outcome of their actions? JanneNijman illustrates the different perspectives on the Iraq War, within the context of legality and legitimacy. Said perspectives include those that perceive it to be: legal and legitimate, illegal but legitimate, illegal and illegitimate and finally as she proposes legal but illegitimate.¹³ These four categories illustrate the various uses of this interdisciplinary approach and the ultimately varying conclusions reached by the authors in each category. The included authors have differing understandings of the relationship between international law and politics and thus do not always utilize each discipline equally within their respective analyses. The authors included in this paper, will be categorized according to said perspectives. Each author assessed the 2003 Invasion of Iraq through an approach that addressed the legality and legitimacy of the conflict, legality being a question of international law, and legitimacy being a question of political opinion or public morality. These interdisciplinary approaches utilized legal and political concepts to reach a conclusion regarding the Iraqi conflict and whether the actions taken by the parties involved were lawful and justified. The authors, regardless of their opinions on the conflict, or their partiality for interdisciplinary approaches, arrived at conclusions that relied on both the international legal and international relations disciplines. I would argue that the authors in each section utilize international legal and international relations concepts in their assessments; however, I would not argue that all the authors are doing so out of a motivation to utilize an interdisciplinary approach. Regardless of the motives

¹³JanneNijman, *After Iraq: Back to the International Rule of Law? An Introduction to the NYIL 2011 Agora*, 42 NYIL 71, 71-94 (2011).

behind the adoption of this approach by the authors, whether it is because they believe in the benefits of the approach, or if they were simply faced with a problem that international law could not solve on its own, it is important to note that that these proponents of various schools of thought ended up using the same approach. This phenomenon illustrates the advantages of such an approach regardless of the conclusions that one draws regarding a global event.

Each of the legality/legitimacy categories is premised on its own definition of international law and politics as well as the relationship between the two concepts. However, these four categories prove to be too encompassing to illustrate the subtle differences of opinions between scholars that share the same overall perspective. For that reason, I will examine the perspectives of each scholar based on this series of questions: Was there Security Council authorization for the invasion? Were there legal grounds for self defense? Was the invasion of Iraq lawful? Was the invasion just? And ultimately, what is the relationship between international law and politics? The paper utilizes this information to illustrate the multifaceted nature of the conflict where the separation of the legal and political aspects is impossible.

Legal and Legitimate:

The first of these viewpoints which I will examine suggests that the invasion of Iraq was both legal and legitimate and authorized by the principle of self-defense as well as the relevant binding Security Council resolutions. The arguments made to support this perception emphasize the importance of respecting the rule of law as well as normative national and international goals and the utilization of international law in achieving those goals. The arguments made focus heavily on legal justifications and one can clearly see the weight allocated to the importance of the international rule of law. In this perspective the law provides all necessary justification for the 2003 Iraq War and the issue lies with the interpretation of the law which requires development in the presence of new and changing threats. However as illustrated by Taft, Buchwald, and Frank, within this section, arriving at conclusion that the 2003 Iraq War was legal and legitimate does not require this particular understanding of the relevant legal justification.

In an article published in the American Society of International Law by John Woo, the author argues that despite the criticisms of many members of the international community, the Iraq war was in fact justified due to the Iraqi violations of the Security Council Resolutions and that it is further justified under the principle of self-defense.¹⁴ This argument is premised on an understanding of self-defense and the related customary law that justifies anticipatory self-defense of preemptive strikes in the absence of an armed attack.¹⁵

Was There Security Council Authorization for the Invasion?

Woo answers yes, as in regards to the argument that cites the Security Council resolutions as justification of the Intervention in Iraq, Woo argues that resolution 678 provided member states with all the justification they needed by authorizing them “to use all necessary means to uphold and implement resolution 660(1990) and all subsequent relevant resolutions to restore international peace and security in the

¹⁴ John Yoo, *International law and the war in Iraq*, Amr. J. Int'l L. 563, (2003).

¹⁵*Id.*, at 564.

area.”¹⁶ This argument may be a bit of a reach given that the resolutions that are being referenced were more than a decade old at the time of the intervention and attempting to present the Iraq intervention as a last chapter to the Gulf War of the early 1990s was not well received. Scholars such as Taft and Buchwald, as well as Thomas Franck, agreed that this particular use of force was legal and legitimate, but they did not believe that the Security Council provided authorization; they instead relied on their understandings of anticipatory self-defense to illustrate the lawfulness of the invasion.

Were There Legal Grounds for Self-Defense?

Woo supplements his arguments that are premised on these particular resolutions with a more general justification based on the right to self-defense outlined in Chapter VII of the United Nations Charter. Article 51 is quite clear in its description of the necessary circumstances for the justification of self-defense by stating “Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measure necessary to maintain international peace and security.”¹⁷ This definition may seem to discredit any argument justifying the intervention in Iraq based on this principle given that an armed attack clearly did not occur. Woo however argues that there is no indication whatsoever that the drafters of the UN charter aimed to limit the concept of self-defense to that which requires an armed attack occur within a nation’s territory in order for the principle to come into effect.¹⁸ Woo supports this argument by citing that anticipatory self defense was a well established aspect of the inherent right of self defense and even goes on to suggest that this aspect of customary law carried over to the Cuban Missile Crisis.¹⁹ Woo also goes on to cite, as most proponents of anticipatory self-defense do, the famous Caroline Incident of 1837.

This is not to say that anticipatory or preemptive self-defense gives states the right to attack another state out of fear that the other state would someday attack it. As

¹⁶*Id.*, at 567.

¹⁷U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, at art. 51.

¹⁸*Supra* note 14, at 571.

¹⁹*Id.*

Taft and Buchwald illustrate in *Preemption, Iraq, and International law*; states must justify their use of force by finding “legitimacy in the facts and circumstances that the state believes has made it necessary.”²⁰ Of course, this interpretation affords states the freedom of justifying their beliefs through garnering any evidence that they deem legitimate. This divide further illustrates the degree to which politics and international law are intertwined as political decisions made by gathering intelligence (of doubtful accuracy) and weighing interests shape the international community’s understanding of legality and illegality.

This particular perspective on self-defense that recognizes state practices and formed customs and not specifically Chapter VII of the UN Charter is not exclusive to Woo, as Thomas Franck also recognizes the importance of the custom surrounding self-defense in *Terrorism and the Right to Self-Defense*.²¹ Franck argues that self-defense is an "inherent right" as stated in the charter, and thus all that self-defense entailed under customary international law prior to the formation of the United Nations is very much still relevant.²² States should thus respond to threats or uses of force without requiring authorization from the Security Council as states did not have to do so before.²³ This perspective seems to undermine the changes to international law that have come about following the creation of the United Nations such as the prohibition on use of force or the outlawing of conquest. Regardless, Franck goes on to argue that states also are not required to provide evidence of the threat or evidence that points to the perpetrators in the aftermath of an attack, prior to its exercise of self defense.²⁴ Franck argues that he is not suggesting that "the question of evidence is irrelevant in law" but rather that a state's inherent right of self-defense does not require a prior demonstration of evidence.²⁵

Was the Invasion of Iraq Lawful/Just?

While the content of the arguments that Franck is making may be controversial it is important to focus on the fact that Franck employs a legal basis for his arguments. He

²⁰William H. Taft and Todd F. Buchwald, *Preemption, Iraq, and international law*, *Amr. J. Int'l L.* 557, 557-563 (2003).

²¹Thomas M. Franck, *Terrorism and the Right of Self-defense*, 95(4)*Am. J. Int'l L.* 839, (2001).

²²*Id.*, at 840.

²³*Id.*

²⁴*Id.*, at 842.

²⁵*Id.*

is not arguing that the law is insufficient in dealing with modern threats but rather the opposite and that the issue is the interpretation of the law.²⁶ In his perspective, international law should be respected and actions should be justified by sufficient legal grounds in addition to normative objectives such as self-preservation.²⁷ Needless to say, this opinion is shared by Woo, Taft, and Buchwald, regardless of the different specifics of their particular reasoning, who all believed that the actions were lawful and thus legitimate. Franck's perspective on the legality of the invasion stems from his perspectives regarding the erosion of Article 2(4) of the United Nations Charter and the subsequent disintegration of the prohibition on the use of force. He goes on to suggest that the "blame for this must be shared by powerful, and even some not-so-powerful, states which, from time to time over the past twenty-five years, have succumbed to the temptation to settle a score, to end a dispute or to pursue their national interests through the use of force."²⁸ Franck cites the inherent flaws within the prohibition on use of force, such as Article 51 and the inability of the international system to determine the aggressor and the aggrieved during international incidents which thus leads to the continuous occurrence of wars.²⁹ Another example Franck utilizes is the definition of force which can include different forms of pressure such as political and economic, which threaten "the territorial integrity or political independence of any state."³⁰ Aside from pointing out the inherent flaws within the prohibition on use of force, Franck also discusses the changing nature of modern warfare and its ramifications on this legal principle. He states in reference to the development of nuclear weapons that "taken literally, Articles 2(4) and 51 together seem to require a state to await an actual nuclear strike against its territory before taking forceful counter measures, if this is what the charter requires, then, to quote Mr. Bumble, the Charter is 'a ass'.³¹ Although Jane E. Stromseth recognizes the difficult state of the international legal system in governing the use of force, she takes on a less pessimistic perspective stating that "it is premature to pronounce the 'death' of the UN Charter or to give up on future prospects for Security Council agreement on

²⁶*Id.*

²⁷*Id.*

²⁸Thomas M. Franck, *Who killed Article 2 (4)? or: Changing Norms Governing the Use of Force by States*, 64.(5) Am J. Int'l L 809,809-837 (1970).

²⁹*Id.*

³⁰*Id.*, at819.

³¹*Id.*, at820.

the use of force."³²Stromseth offers a defense of the ability of the UN Charter to "provide a viable and stabilizing framework for addressing threats to peace and security" and suggests three reasons for her conclusions regarding the premature announcement of the death of the charter.³³ The first of her arguments mirrors that of John Woo as Stromseth argues that:

"based on the language of the Security Council Resolution 1441 and the resolutions and practice that preceded it, the United States, and its allies could plausibly argue that the Security Council had acknowledged the seriousness of the situations and had recognized-or at least had agreed to disagree over-the legal theory that force could be used in response to Iraq's 'material breach' of the disarmament obligations imposed by the Security Council after the 1991 Gulf War."³⁴

The second argument made by Stromseth suggests that although Article 2(4) is consistently undermined, the core of the article is still alive as there is no disagreement regarding the illegality of wars of territorial expansion and conquest.³⁵ She goes on to articulate that the liveliness of the core of this article places the "burden of justification on those who would resort to force" which ultimately affects state decision making.³⁶ The third argument put forth by Stromseth suggests that the UN Charter is capable of evolving to meet the new threats to international peace and security and that the drafters of the Charter designed it to do just that.³⁷Stromseth articulates that states have a duty to combat terrorism and it is of paramount importance that the international legal system adapt to these new threats in order to remain a significant player in what is sure to be a tumultuous period of global affairs.³⁸

³²Jane E Stromseth, *Law and force after Iraq: A transitional moment*, 97(3)Amr. J. Int'l L. 628, 628-642 (2003).

³³*Id.*, at 629.

³⁴*Id.*

³⁵*Id.*, at 632.

³⁶*Id.*

³⁷*Id.*, at 633.

³⁸*Id.*, at 642.

These perspective on the 2003 invasion of Iraq that deem it legal and legitimate or just suggest a very peculiar understanding of law, politics, and the relationship between them. It would seem that the type of politics discussed in the previous arguments refer to the protection of national interests through military action. In this regard the "political" objectives of the United States would be the protection of its national security and the deterrence of future loss of life among its citizens through addressing the perceived potential Iraqi threats.

What is the Relationship between International Law and Politics?

Thus, the legitimization of these actions by the United States after the fact, suggests an inferiority of international law to national interests. International law, in this situation, was not utilized as an instrument in the pursuit of normative objectives, or as an almighty reference point prior to taking action, but rather as a means of defending the actions that the United States deemed necessary. In this situation International could be defined as a legitimizing agent for political actions providing all lawful justification for the actions of the United States. This use of international law after the fact however suggests something in itself. It suggests that international law is not seen by the United States as a nuisance that should just be disregarded if it gets in the way of national interests, as RF Turner would suggest.³⁹ It stands to reason that the United States does in fact exert effort in making sure that their actions are deemed lawful. In this regard compliance with international law would be a political interest would naturally vary between states. Similarly, it would stand to reason, that non-global powers or developing states would comply with international law for the most part out of reciprocity or the possibility of impending sanctions or military action. On the other hand, it would make sense that the reasoning global hegemony would employ for compliance with international law would be the alignment of this particular political interest with their other related interests. In this case, the global powers would be complying with international law simply because it wasn't in its interest not to. As Goldsmith and Posner argue, "[t]he U.S. government is not hostile to international law as such and continues to make and comply with international law

³⁹Robert F. Turner, *Does International Law Matter to Congress?*, *The Amr. Soc. Int'l L.* 321, 321-328 (1998).

when doing so is in its interest."⁴⁰ It is important to note that this perspective is the case regarding the United States, however in the case of other lesser global powers such as, the politically and economically influential Germany; where compliance with international law is not only perceived as democratic but "international law and democracy are an inseparable pair."⁴¹

This understanding lines up with the statements made by former President George W. Bush during the 2004 State of the Union, where he clearly outlined the US perspective on the rule of law by saying "America will never seek a permission slip to defend the security of our people."⁴² This particular understanding of international law does not disregard its importance altogether, however it does subordinate international law to political objectives and values individual interests and normative objectives above the preservation of the rule of law. It is important to note that this particular perspective on international law cannot be adopted by just any state and this exceptionalism can be attributed to the belief that "the United States is the only 800-pound gorilla left on the block, and so gets to make the rules; and if a little thing like international law gets in the way...well, what's a thing like the rule of law between friends anyway?"⁴³ Goldsmith and Posner argue that wealthy liberal democracies tend to be unenthusiastic about international law but that the United States is especially unenthusiastic given its current standing following the fall of the Soviet Union.⁴⁴ They go on to say that "Although the United States continued to seek international legalization, it demanded immunization when the legalization would harm American interests."⁴⁵ This lines up with the argument that the application of international law is uneven given the discrepancy between the legal notion that all sovereign states are equal and the actuality of the international arena which suggests that this legal notion could not be further from the truth. Given the anarchic nature of the international system, it would make sense that the law would be applied unevenly as even in the presence of international institutions with perceived authority over global affairs, one cannot simply ignore the power dynamics at play. This is to say that if a global

⁴⁰JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW*, (Oxford University Press 2005) (2005).

⁴¹*Supra* note 13, at 85.

⁴²George W. Bush, STATE OF THE UNION ADDRESS, 2004 STATE OF THE UNION (2004).

⁴³*Supra* note 39, at 327.

⁴⁴*Supra* note 40.

⁴⁵*Id.*

superpower wishes to circumvent international law, or bend international law, or even extend its own domestic laws into the international sphere, who would or could stop this from happening? Noam Chomsky would argue that the United States simply disregarded international law altogether which is fitting given that the United States views international law as "an annoying encumbrance."⁴⁶ As Franck suggests, "the failure of the UN Charter's normative system is tantamount to the inability of any rule, such as that set out in Article 2(4), in itself to have much control over the behavior of states. National self-interest, particularly the national self interest of the super-Powers, has usually won out over treaty obligations."⁴⁷ This particular perspective seems grounded in pragmatism as the enforcement and respect of international law often seems drowned out by the day to day activities of the global political machine.

However, this supposed disregard is hard to visualize, given the manner in which both the United States and the United Kingdom have attempted to explain and justify their actions using international legal terms. International law is not subordinated in this perspective; in fact it is used as a redeemer of sorts. Although proponents of this particular perspective cite the importance of maintaining peace and security and the prevention of loss of life, the actions taken during the Iraq war are defended on legal grounds.

The legitimacy of invasion of Iraq is also premised on the legality of the actions taken in response to perceived violations to the relevant Security Council resolutions as well as a legal exercise of an inherent right of self-defense. In this perspective, the legitimacy of the invasion of Iraq, although political in nature, is premised on the legality of the actions taken by the United States.

The perspective adopted by Franck as well Taft and Buchwald argues that legal reasoning is not and cannot be separate from moral and political discourse, is defined as legal realism⁴⁸ and is very much a pragmatic approach to law adopted by these authors. As Rues-Smit articulates, realist thought "treats politics as a struggle for material power between sovereign states, and law as either irrelevant or a simple

⁴⁶NOAM CHOMSKY, *DETECTING DEMOCRACY* (Macmillan 1991) (1992).

⁴⁷*Supra* note 28, at 836.

⁴⁸MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY*, 193 (1st edition, Oxford university Press 1994) (1991).

reflection of the prevailing balance of power."⁴⁹ This stems from the notion that states are rational unitary actors in the international arena, who are involved in a continuous struggle with each other to maximize their relative material power. In this regard, "they are unchanging entities with clearly defined national interests that take precedence over the good of international society as a whole."⁵⁰ International law can thus be seen as "epiphenomenal": as it rests on power but when confronted with the actions of determined states it proves to be weak and ineffectual.⁵¹ This realist perspective suggests that politics consists merely of strategic, utility maximizing action, and that law is simply a set of regulatory rules. However this perspective cannot "account for the obligatory force of international law, for the fact that states by and large accept legal rules as binding even in the absence of centralized enforcement mechanisms."⁵² Realists tend to respond to this criticism by suggesting that said obligation stems from the consent of states, however this response fails to address why "states regard consent as obligation inducing"⁵³ or discuss the fact that states can be held accountable regardless of their consent in the case of customary law.⁵⁴ Shiner and Williams also illustrate the positive aspects of the interconnectivity of politics and international law, by arguing that states comply with international law out of their own political self-interests.⁵⁵ Shiner and Williams also went on to argue that customary law does not only reflect self-interested state behavior but also "genuine cooperation or coordination" between pairs or groups of states.⁵⁶

What is important to note here, is not the balance struck between law and politics within this school of thought but rather that regardless of the definitions of law and politics, there exists an understanding that the moral and political factors that influence law are inescapable. As Fuller illustrates, in the case of legal realism, the practicality of this approach stems from the perspective that law is very much affected

⁴⁹MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW*, 15 (Bloomsbury Publishing, 2011) (2011).

⁵⁰*Id.*

⁵¹*Id.*, at 16.

⁵²*Id.*, at 20.

⁵³HERBERT HART AND LIONEL ADOLPHUS, *THE CONCEPT OF LAW*, 224 (Oxford 2012) (2012).

⁵⁴Martha Finnemore and Stephen J. Toope, *Alternatives to Legalization: Richer Views of Law and Politics*, 55.3 *Int'l Org.* 743, 743-758 (2001).

⁵⁵PHIL SHINER AND ANDREW WILLIAMS, *THE IRAQ WAR AND INTERNATIONAL LAW*, 225 (Bloomsbury Publishing, 2008) (2008).

⁵⁶*Id.*

by moral, political, and social conflicts, and denying this has truly adverse ramifications on law as an institution.⁵⁷ Given the advanced degree of interconnectivity between law and politics within this realist perspective, we can extrapolate that politics and law are not only intertwined as many would suggest, but also inseparable and possibly indistinguishable from one another in real world situations. The authors in this section when faced with a real world situation were seemingly unable to resort to solely legal terminology and assess the situation and instead opted for the use of political vernacular and reasoning.

⁵⁷Lon L. Fuller, *American legal realism*, 82 (5)U. Pa. L. Rev. and Am. L. Register 429, 429-462 (1934).

Illegal but Legitimate:

Legitimacy takes on a much more normative shape in this perspective as the law is no longer propped up but rather torn down for its inadequacies and obsolescence. Proponents of this perspective would thus not argue that the Security Council provided authorization, that there were legal grounds for self defense, or even that the invasion was in fact lawful. Slaughter and Feinstein are more preoccupied with their arguments regarding "Duty to Prevent" and the ways in which this proposed principle justifies the invasion of Iraq. This particular principle suggests an obligation on powerful democratic states to address global threats and the undemocratic systems that spawn said threats.⁵⁸

Was the Invasion of Iraq Just?

In this particular perspective, the legitimacy of the 2003 invasion of Iraq is premised on the normative objectives that said invasion aimed to fulfill. The legality of the war takes a back seat to the political objectives at play. As Anne-Marie Slaughter articulates the course of action taken by the Bush administration can be called "illegal but legitimate."⁵⁹ In this regard, attempts made to justify the invasion rarely focused on producing legal arguments or justification but rather exposing flaws in the law, that require improvement that this incident clearly pointed out. International Law is thus no longer perceived in terms of the sanctity that a global rule of law entails but rather as a malleable political instrument. This is not to say that this perspective marked a complete and utter abandonment of international law, as politics is seen as the salvation for international law through its utilization towards normative objectives. Slaughter illustrates this point by drawing parallels between the 2003 invasion of Iraq and the intervention in Kosovo following the US circumvention of the United Nations at the turn of the century as well as the conclusion reached by the International Commission on Kosovo.⁶⁰ It is also important to note that despite fears that the intervention in Kosovo would irreparably damage the United Nations and lead

⁵⁸Lee Feinstein, and Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFFAIRS-NEW YORK, Jan/Feb 2004.

⁵⁹Anne-Marie Slaughter, *Good Reasons for Going around the UN*, N.Y. Times, Mar. 18, 2003, at A33.

⁶⁰*Id.*

to it suffering a fate similar to the League of Nations; the UN remained intact. In fact as Antony Anghie argues, preemptive self-defense has furthered the causes that the United Nations is concerned with.⁶¹ The survival of the United Nations despite the undermining of the prohibition of use of force may suggest that the "prohibition on the use of force is not a necessary condition to the legal character of the international order" as Jean d'Aspremont articulates.⁶² He also goes on to argue that the prohibition on use of force may in fact hinder the collective security system and demote it to "a mere political forum where questions of peace and security are discussed but no police measure can be taken."⁶³ This perspective suggests that use of force exists in a grey area which explains why the International Court of Justice has been so reluctant to defend a black and white understanding of its prohibition.⁶⁴ Regardless of whether this perspective is entirely accurate, it is important to derive the effect that suggesting legal principles are clear cut has on the international legal system.

As Illustrated in *We are teachers of International Law*, "For every letter to the paper arguing that the war was legal or illegal, there was another arguing that might makes right: international law is simply irrelevant."⁶⁵ It is thus important to reaffirm that the Iraq War represents a schism in the international legal community in terms of legitimacy as well as legality. The question of legitimacy is a multifaceted one as simply structuring an argument around legitimacy rather than legality suggests a perspective on international law that deems it inferior to political ends. This is the case that Slaughter and Feinstein make in *A Duty to Prevent*, where the authors trace the legitimacy of the use of force from: the fulfillment of the Catholic doctrine, expansion of empires, or the unification of a nation, to the United Nations Charter and the restrictions placed on use of force.⁶⁶ The United Nations restricts the legitimacy of use of force to individual or collective self defense and has attempted to transfer a large extent of the control of self-defense from individual states to the Security

⁶¹Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 OHLJ 46, 45-66 (2005).

⁶²Jean d'Aspremont, *Mapping the concepts behind the contemporary liberalization of the use of force in international law*, 31.4 U. Pa. J. Int'l L. 101, 101-159 (2010).

⁶³*Id.*

⁶⁴*Id.*

⁶⁵Matthew Craven, Gerry Simpson, Susan Marks and Ralph Wilde, *We are teachers of International Law* (2004). 17 *Leiden J Int'l L* 373, 363-374 (2004).

⁶⁶*Supra* note 58, at 136.

Council.⁶⁷ States still retain their inherent right to self-defense, however according to articles 2(4), 51, and Chapter 7, the Security Council acts as the mechanism of authorizing the legitimate use of force. In the case of the 2003 Iraq War, Slaughter and Feinsein derogate from the arguments made by Woo and do not cite previous Security Council resolutions in an attempt to justify the invasion using legal arguments. In fact, the authors further derogate from Woo's arguments by not citing the principle of self-defense in the UN Charter as a legal justification. Feinsein and Slaughter instead argue that the United Nations Charter is outdated and unequipped to handle an issue such as the Iraq War and thus an amendment to these rules or a rewriting altogether is necessary.⁶⁸ The authors cite the changing nature of war as the reasoning for this call for the revitalization of the laws regarding use of force as the threat of armed attack has moved away from standing armies to terrorist organizations and the battlefield no longer has clear boundaries.⁶⁹ There is a clear recognition by the authors that the current legal principles at play do not provide a sufficient legal framework for what took place in Iraq in 2003 and thus what occurred becomes a question of legitimacy.⁷⁰ As articulated by Nijman, "the war might have been illegal but it was politically justifiable because of a vital political interest."⁷¹ Slaughter reaffirms that the legitimization of the intervention in Iraq can come about through the locating of weapons of mass destruction, or even simply through the "Iraqi people welcoming the intervention."⁷² Slaughter believes that global interests take primacy over the rule of law and undermines the necessity of UN approval for use of force to be justified citing the idle nature of the Security Council during the Cold War as an example.⁷³

A shift in the mechanics of modern day warfare has supposedly rendered the legal principles drafted at the end of the Second World War obsolete and the law must thus evolve to allow for the preemptive use of force once a threat has been identified.⁷⁴ The authors thus introduce a concept that they refer to as "a duty to

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Supra* note 13, at 87.

⁷²*Supra* note 59.

⁷³*Id.*

⁷⁴*Supra* note 58, at 136.

prevent", which suggests that states that identify clear and present threats, such as the acquiring of weapons of mass destruction by a closed government, must strike first before an attack is left to occur.⁷⁵ The authors introduced this concept as a response to responsibility to protect or humanitarian intervention as legal principles that often justify extraordinary acts that seemingly create legal grey areas.⁷⁶

This particular discussion regarding the legitimacy of the Iraq War illustrates the power dynamics of the relationship between international law and politics where the international rule of law is not respected and a more critical approach to the law is utilized. In this view, an international rule of law governing the international arena, guaranteeing justice for all is not the end game. This perception of international law as an instrument is one that Slaughter illustrates. She believes international law aims to regulate the interactions between States and their citizens and should aim to develop domestic institutions, strengthen states, and encourage transnational cooperation in the face of international threats.⁷⁷ International law is viewed as a tool that is used to achieve normative objectives such as international peace and security, the prevention of loss of life or damages to civilians, and the fulfillment of national objectives. And like any tool, if it becomes outdated or incapable of fulfilling the task required, it is replaced by a better one. Feinstein and Slaughter argue that DTP is that better tool and can meet the demands of today's world. However, this particular tool comes with a very specific set of instructions that raise a few questions. For instance, the use of the term "closed society" by the authors proves to be an important detail of this proposed legal principle given that Feinstein and Slaughter see it as the key to ensuring the success of this principle⁷⁸. Closed societies or undemocratic nations supposedly lack the system of checks and balances necessary for the just utilization of duty to prevent and thus this principle should not extend to them.⁷⁹ This caveat within DTP is meant to eliminate the dangers that this principle could ultimately lead to if utilized by undemocratic states. One cannot help but draw parallels between this particular political distinction within a legal principle and the distinction between civilized and

⁷⁵*Supra* note 58, at 137.

⁷⁶*Id.*

⁷⁷Anne-Marie Slaughter and William Burke-White, *Future of International Law Is Domestic (or, the European Way of Law)*, 47 *Harv. Int'l LJ* 327, (2006).

⁷⁸*Supra* note 58, at 137.

⁷⁹*Id.*

uncivilized nations during the formation of international law.

The malicious ways in which duty to prevent could be utilized are numerous and the authors recognize this. If perverted, duty to prevent could be used to justify attacking a state under the guise of a supposed perceived threat that could later be found to not have existed in the first place, such as a supposed stockpile of weapons of mass destruction. The lack of weapons of mass destruction in Iraq might render this distinction between democratic states with proper institutions and closed societies moot given that it was a democratic state that ultimately failed to prove that the perceived threat was real.

It would seem that politics not only dominates international law but political factors seek to dictate the formation and application of legal principles. Could this particular perspective suggest that international law is just an extension of politics? This advanced intersection between international law and politics is not necessarily the undoing of international law but rather a departure from a positivist perspective on the law. As Goldsmith and Posner argue, "international law is a part of politics and not a way of eliminating it" and the failure of the advocates of international law to see this has hindered its development."⁸⁰ They further supplement this argument by saying that it would seem that "international law has no life of its own, has no special normative authority; it is just the working out of relations among states, as they deal with relatively discrete problems of international cooperation."⁸¹

What is the Relationship between International Law and Politics?

Despite sharing much of the core principles of realism, such as holding the state as the primary unit of analysis within an international anarchic system, "neoliberals are far less dismissive of international law than their realist counterparts."⁸²This is to say that despite the nature of Feinstein and Slaughter's arguments being centered on legitimacy, the authors focused a great deal on the formation of a legal principle that would justify the actions of the United States in the eyes of the law. It is thus important to view the Iraq War as another test for

⁸⁰*Supra* note 40.

⁸¹*Id.*

⁸²*Supra* note 1, at 18.

international law which it could either pass or fail⁸³, rather than the proverbial straw that broke the camel's back. A more important point of focus would be the relationship between political legitimacy and legality, as had the invasion of Iraq been authorized by the Security Council, thus ending the debate about legality, would that have guaranteed its legitimacy? And if so, what would that mean for international law? Slaughter would have us believe that legitimacy is more important than legality, and if established, can bring about legality as she describes the issue of unauthorized use of force by stating that "Practices have to evolve without formal amendment."⁸⁴ She goes on to say that this would be "the lesson that the United Nations and all of us should draw from this crisis. Overall, everyone involved is still playing by the rules. But depending on what we find in Iraq, the rules may have to evolve, so that what is legitimate is also legal."⁸⁵ Slaughter falls within the scope of liberal legal thought; as in addition to recognizing the effects of domestic and international politics on international law, in the same manner as realists, Slaughter goes a step further and suggests that there exists a distinction between members of the international community. She believes there are key players within the international arena that are capable of influencing the law through their actions and dominance over global affairs and this is very much in line with liberal legal thought which recognizes the alignment of political and legal factors.⁸⁶ Furthermore, Slaughter articulates that given the skewed nature of the contributions of certain players within the international community that democratic states are more likely to abide by international legal obligations than undemocratic states⁸⁷ and this perspective would justify the unequal use of duty to prevent. In this perspective, international law is not an end in itself, and the sanctity of the rule of law is not something that is meant to be protected and perpetuated. In this perspective, international law is meant to facilitate peace and security and in the instances where the law fails to do so, then the law should be amended to reflect the needs of today's world. These "needs" are of course political needs given that the state is the main player within the international arena. In this

⁸³*Supra* note 65, at 373.

⁸⁴*Supra* note 59.

⁸⁵*Id.*

⁸⁶William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 *Ariz. St. LJ* 1243 (2004).

⁸⁷Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *Eur. j. Int'l L.* 503, (1995).

liberal perspective, law is meant to serve democratic ideals, as evident in Slaughter's arguments regarding DTP which suggest that the law should not serve undemocratic states or "closed Societies."⁸⁸ This perspective suggests that international law is malleable and the ways in which it is warped and wrapped in and around politics are many. Given that the powerful democratic states dominate the political arena, it is no surprise that this dominance would spill over into international law. The end result is an erosion of the barriers between international law and politics, where states can utilize both instruments in ways that suit their needs and the needs of global situations that arise. It is important to note that this particular erosion renders the assessment of the conflict of Iraq using a distinctly legal approach impossible and the authors within this section were comfortable invoking political terms and concepts.

⁸⁸*Supra* note 58, at 137.

Illegal and Illegitimate:

In this particular perspective, the included authors argue the 2003 Iraq War was unlawful and illegitimate given that the Security Council very clearly opposed the intervention and in no way provided authorization as illustrated by Richard Falk.⁸⁹ In addition to addressing the lack of Security Council authorization, Falk also discusses the preemptive self-defense argument as well as the arguments relating to Iraq's failure to comply with the Security Council disarmament resolutions.⁹⁰ The failure of Iraq to comply with their disarmament obligations was premised on the understanding that Iraq was harboring WMD's, which history has shown, was not the case. As Falk describes, had Iraq had weapons of mass destruction, wouldn't the regime have used them in order to ensure the survival of the regime?⁹¹

Were There Legal Grounds for Self-Defense?

In regards to the question of self-defense, one must first examine the conventional use of this legal principle as outlined in the United Nations Charter as well as the more controversial use of self-defense which deals with preemption. Although written before the 2003 invasion of Iraq, Frederic Megret's article discusses the conventional understanding of self-defense in the aftermath of the 2001 September 11th Attacks. Megret supplements Falk's arguments greatly by articulating the ways in which the US argument regarding self-defense in the conventional sense are much more convincing in the context of Afghanistan.⁹² Megret, in regards to the 9/11 attacks, focuses on self-defense and whether the requirements specified in the UN Charter have been met. Frederic Megret asks an important question by stating that, "even if a right of self-defense can somehow be squeezed out of the Charter in the present circumstances...the question, in other words, may be less whether self-

⁸⁹Richard A Falk, *What future for the UN Charter system of war prevention?*, 97(3)Am. J. Int'l L. 592, (2003).

⁹⁰*Id.*

⁹¹*Id.*, at 593.

⁹²*Id.*

defense is legal than what it means to say that it is legal in terms of law's systematic sustainability."⁹³

In his arguments regarding the requirements for self-defense, Megret argued that despite the use of box cutters and not actual "arms" during the attacks September 11th, 2001, the attack could still be considered given the use of a commercial airplane as a weapon as well as the legal precedent derived from the storming of the US embassy in Tehran in 1979 being considered an armed attack.⁹⁴ He also states that despite the adoption of Security Council resolutions on the 12th of September, 2001 as well as two weeks later; it could be argued that the resolutions failed to take the necessary measures to restore international peace and security.⁹⁵ This is a difficult point to argue for a number of reasons: the first reason is that it is not explicitly stated that the measures taken by the Security Council are required to be military actions, and Secondly, the effectiveness of said actions in maintaining international peace and security can only be determined retrospectively. Assuming however, that the requirements for legal self-defense were satisfied, and the controversial element of anticipatory or preemptive self defense was not invoked, was the use of force by the United States against Iraq Legal? Megret argues no, given the "temporal and spatial coordinates of self-defense."⁹⁶

In regards to the temporal requirements, self-defense should only be used to repel an armed attack and only when it is absolutely necessary and "anticipatory self defense is not really self-defense at all."⁹⁷ Furthermore, acts of self-defense that do not occur relatively immediately look very much like reprisals which are strictly prohibited given that they simply constitute acts of aggression. As Falk argues, the arguments justifying the 2003 Iraq War by contrast to Afghanistan were unconvincing to say the least.⁹⁸ Falk argues that an intervention in Afghanistan made much more sense relatively given the presence of Al-Qaida (who claimed responsibility)

⁹³Megret Frederic, *War? Legal Semantics and the Move to Violence*, 13 EJIL 327, (2002).

⁹⁴*Id.*

⁹⁵*Id.*, at 373.

⁹⁶*Id.*, at 375.

⁹⁷*Id.*, at 376.

⁹⁸*Supra* note 89, at 597.

strongholds.⁹⁹ This is where the issue of semantics comes in to play, as Megret argues that simply referring to the actions taken by the United States in response to the September 11th attacks as a "'War' on Terror" carries significant weight.¹⁰⁰ This constitutes a prime example of the ways in which political tools such as rhetoric are used to provide legitimacy or guarantee legality of certain actions. War is very much a loaded term, and if the war on terror is seen as a war, then temporal restrictions do not necessarily apply.¹⁰¹ War is also very much an ongoing process and there are points in between the violence that are relatively calmer, in that regard, self-defense could be perceived as ongoing process as well.¹⁰² The political discourse surrounding the attacks on the United States could thus legitimize acts of aggression through the removal of the temporal requirements of the right to self-defense.

In regards to the spatial requirements, a state acting in self-defense would have to identify a clear perpetrator in order to engage and individual or collective self-defense, and said target would have to be a state according to the requirements of Article 51 of the United Nations Charter.¹⁰³ Ideally, the identification of a clear perpetrator would require providing irrefutable evidence to justify such a long and vigorous campaign and not simply stating that sufficient intelligence had been gathered.¹⁰⁴ This deadlock often end in favor of the political side, as the protection of key sources as well as state secrets paramount to national security have primacy over due process. Megret goes on to argue that a link between a state and the terrorist group guilty of an attack would have to be established and said state would have to be sponsoring the terrorist group and not simply harboring them or failing to eradicate them.¹⁰⁵

In regards to preemptive self-defense, Falk argues that a legitimate and imminent threat was not present. In regards to the arguments put forth by the United States/United Kingdom, regarding violations of the Security Council Resolutions relating to Iraq; the supposed failure of Iraq to comply with their disarmament

⁹⁹*Id.*

¹⁰⁰*Supra* note 93, at 370-385.

¹⁰¹*Id.*, at 376.

¹⁰²*Id.*

¹⁰³*Supra* note 17.

¹⁰⁴*Supra* note 93, at 380.

¹⁰⁵*Id.*

obligations was premised on the understanding that Iraq was harboring WMD's, which has history has shown, was not the case. As Falk describes, had Iraq had weapons of mass destruction, wouldn't the regime have used them in order to ensure the survival of the regime?¹⁰⁶ The fact that weapons of mass destruction were not used suggested that they either did not exist or that they did in fact exist and Iraq had no intention of ever using them.¹⁰⁷ Both ways this fact greatly undermines the imminent threat argument as well as the preemptive self-defense argument.

Was the Invasion Lawful/Just?

The important element to derive from the aforementioned arguments regarding the legality of the events is the primacy of national interests and the political rhetoric used to achieve said interests over the rule of law. In terms of the legitimacy of use of force that does not meet temporal or spatial requirements of self-defense or have otherwise been authorized by the Security Council; becomes a question of political motives.. In the case of the US response to 9/11, Megret argues that this constitutes war as a "perversion of justice" through the muddling of the line between justice and revenge. Falk argues that even though "contested uses of force under the Charter are 'illegal, yet illegitimate'" which is very much the case of Iraq given the lack of Security Council authorization and WMD's, the intervention could still be judged legitimate for humanitarian purposes.¹⁰⁸ Had the rule of law been disregarded and the use of force in this particular case occurred for humanitarian purposes, then the acts may have been deemed legitimate enough to redeem their illegality¹⁰⁹ In regards to the arguments suggesting humanitarian intervention; Falk argues that "the claimed humanitarian benefits resulting from the war were emphasized by American officials as a way to circumvent the legality of the American-led recourse to force."¹¹⁰ Falk also goes on to argue that "such post hoc efforts at legalization should not be accorded much respect" especially in the case of a major war.¹¹¹ This process by the United States in particular, marks a departure from the justices supposedly guaranteed by a

¹⁰⁶*Supra* note 89, at 593.

¹⁰⁷*Id.*

¹⁰⁸*Id.*, at 594.

¹⁰⁹*Supra* note 93, at 386.

¹¹⁰*Supra* note 89, at 597

¹¹¹*Id.*

strong international legal system to a system where powerful states take matters into their own hands and bend the laws around them in order to legitimize their actions. In this regard, the law is being used as a political instrument to serve a larger purpose that aligns with the interests of the global hegemon.

What is the Relationship between International Law and Politics?

This process however might be easier said than done as Stephen Toope argues that the influence that global hegemonies singlehandedly have on international law may be somewhat exaggerated.¹¹² Toope argues that although the US is a hegemon, the largest most powerful one in fact, it is an ineffective one in terms of bending international law to its will.¹¹³ He attributes this ineffectiveness to a number of reasons such as "the imposition of normative constraints even upon the most powerful members of international society."¹¹⁴ This is to say, that if the rule of law has any power whatsoever then the international community should be entirely able to curtail the "entirely self-interested impulses of the powerful."¹¹⁵ This suggests that international law, in terms of a rule of law, requires the political action of states to guarantee its protection from political perversion at the hands of a global superpower. This legal constructivist claim suggests that the status quo is not an inevitability of the international system where the world had no choice but to arrive at this conclusion, but rather that the status quo is a human construct built up through years of political and social practices. In this perspective, smaller states are just as capable, if not more capable, of building a different system through different practices.

Toope argues that this power that the international community supposedly possesses can be found in international customary law as opposed to international treaties, given that treaties reflect to a large extent the unequal bargaining power of global hegemonies.¹¹⁶ Customary international law, on the other hand, contains many instances of non-hegemonic states giving "rise to norms that may not be supported by

¹¹²PHI STEPHEN TOOPE, POWERFUL BUT UNPERSUASIVE? THE ROLE OF THE UNITED STATES IN THE EVOLUTION OF CUSTOMARY INTERNATIONAL LAW, 299-300 (Michael Byers, Georg Nolte ed., Cambridge University Press 2008) (2008).

¹¹³*Id.*, at 287-288.

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*Id.*, at 289.

all powerful states.¹¹⁷" Seeing as how the development of international customary law through the introduction of new norms does not require the consent of all states, and the "persistent objector" rule is becoming increasingly obsolete; the power of the United States in preventing new customs from emerging is very much limited in Toope's perspective.¹¹⁸Toope cites the failed persistent objection of the United States to an emerging custom, which was eventually codified, regarding state jurisdiction over Arctic waters in the 1970s as a precursor to the decline of US hegemonic power over international law.¹¹⁹He goes on to argue that the contribution of weaker states to customary law is better facilitated by the widespread understanding that official statements constitute state practice.¹²⁰ This concept, as Rues-Smit articulates, seems to undermine the realist notion; that law is an instrument of global powers, which "neglects to investigate the ways in which it is used by the weak to achieve more advantageous outcomes."¹²¹

He supplements his arguments by suggesting that the American government and the American people have historically been "ambivalent about the American role in world affairs."¹²² Said ambivalence supposedly culminates in a United States that does not act as a hegemon often, however this point is less about the ineffectiveness of the US in influencing international law and more about its general lack of concern with it. Toope also goes on to describe a redefinition of *opiniojuris* that suggests that states do not necessarily need to consent in order to be bound by international customary law.¹²³Toope's perspective undermines the understanding that the effectiveness of international law is directly correlated to the alignment of the rule of law with the political interests of the global super powers. Neglecting the overwhelming potential for perversion of the law, the supposed ineffectiveness of the US in bending international law to its will as well as its disinterest in the international legal system alone is enough to dispel the notion that the global superpower could be the champion of international law.

¹¹⁷*Id.*

¹¹⁸*Id.*, at 290.

¹¹⁹*Id.*, at 301.

¹²⁰*Id.*, at 290.

¹²¹*Supra* note 1, at 17.

¹²²*Supra* note 112, at 290.

¹²³*Id.*

As far as influence over legality, Toope would argue that the United States is incapable of shaping the law in its own image or even stopping changes in the law that act against its interest.¹²⁴ In regards to legitimacy however, the US has had far more success, given its ability to influence other global powers into allying with the US in its pursuits. It stands to reason, that the US is much more concerned with legitimacy than it is with legality, given its historic disinterest with international law.¹²⁵ Legitimacy, in the US perspective, is a far more useful instrument given that it often provides more justification than the law. This understanding is premised on the belief that the law or the rule of law is not the end result but rather a path among many to the end. As Habermas argues, legitimacy is based on the correspondence of values between the ruler and the ruled¹²⁶ and in the case of 2003 invasion of Iraq said correspondence is most certainly not present. Aside from the supposed illegality of the invasion, the lack of evidence provided to justify the attack and the failure to locate weapons of mass destruction; the "perception" regarding this invasion has largely been that it was illegitimate. This is particularly important as Toope argues that "law depends for its power on congruence with social practice matched with perceptions of legitimacy."¹²⁷ This understanding of international law places much weight on actions taken by states as well as their political perceptions.

An argument could be extracted from his points in support of the principle of preemptive self-defense, which could potentially legitimize the actions taken by the United States against Iraq, as he argues that "when law fosters allegiance, through the process of its creation and its rhetorical persuasiveness, it creates its 'own binding effect.'"¹²⁸ The legitimization of the US actions through the determining of their legality with the introduction of this principle; would be hinged upon the perception of the international community towards this new legal principle. This positively correlated relationship between law and legitimacy poses potential dangers. As in this regard, a state could take action towards actualizing its interests and through political pressure garner widespread support for said action as a legitimate and thus legal act. It stands to reason that the United States as the leading global superpower, through its

¹²⁴*Id.*

¹²⁵*Supra* note 46.

¹²⁶JURGEN HABERMAS, LEGITIMATION CRISIS, (Beacon Press 1975) (1975).

¹²⁷*Supra* note 112, at 314.

¹²⁸*Id.*

economic, strategic, and political prowess, could potentially introduce legal principles that reshape international law such as anticipatory or preemptive self-defense. Proponents of this particular perspective on the issue value the sanctity of the law above all despite any perceived flaws within the legal system. This particular legal positivist perspective would suggest a direct correlation between legality and legitimacy where legality provides for legitimacy. In this regard, a political action could not be the justifier, and the law would be the only appropriate point of reference for determining if an action was just or unjust. The validity of legal norms would thus depend on the legitimate manner in which it came about and not on the successes of law in solving international issues. This is to say that how the law comes about is just as important as the law itself. That is to say that if the law was created legally by a legitimate authority, it is still law, even if it is ineffective or flawed.¹²⁹

The ends would not justify the means in this perspective and international legal principles could thus not be forced into fruition through political or illegitimate means. Regardless of whether global powers could will international legal principles into creation or not; it is important to derive that politics requires law in order to be deemed legitimate while law requires "proper politics" in order to be deemed legitimate as well. Toope adopts a constructivist view which suggests that international politics is a rule-governed as well as a rule-constitutive form of action and reason and international law is a central component of the normative structures that are produced by, and constitutive of, such politics.¹³⁰ In this regard, "International law is central to this framework, and like politics, constructivists see it as 'a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies.'"¹³¹ The difficulty here arises in distinguishing between the two given how highly interconnected and essential to one another they both are. Needless to say, the authors in this section recognized said difficulty and opted instead for a multifaceted approach that utilized both political and legal reasoning within their assessment of the legality and legitimacy of this situation.

¹²⁹ *Supra* note 53.

¹³⁰ *Supra* note 1, at 23.

¹³¹ *Supra* note 54, at 743.

Legal but Illegitimate:

The understanding of legality and legitimacy that suggests positive correlations between the two is not shared by Janne Nijman who proposes that they could at times be negatively correlated.¹³² That is to say that legality and legitimacy as well as illegality and illegitimacy do not go hand in hand. This particular understanding is premised on an understanding of international law that is to a large extent a departure from formal legality. As Nijman argues, "Rather than to stick to the level of formal legality and the relative indeterminacy of the law as a scheme of interpretation, international lawyers participating in the debate must engage with moral and political arguments regarding the use of force."¹³³ Needless to say, Nijman does not dwell on the presence of authorization from the Security Council or even the debate surrounding anticipatory self-defense. Nijman chooses to focus on the understanding of legality that gives weight to the normative actions taken by global leaders.

Was the Invasion of Iraq Lawful/Just?

The building of legal principles on political grounds is not a particularly new principle given that customary international law is made up entirely on political grounds manifested through state practice and official governmental statements. The issue with the utilizing a political foundation for the formation of international law arises when the legal principles introduced are the product of individual state interests rather than shared normative values within the international community. This circumstance might seem difficult, as Toope articulated, given the unpersuasive nature of the US as a global hegemon; however, as Toope also states, no nation has ever been as powerful as the United States is now.¹³⁴ In regards to the Iraq War and the US support for preemptive self-defense, one can observe a controversial emerging principle being pushed towards the forefront of the understanding of the legality of the use of force. This particular principle restores archaic components of international relations and integrates them with the modern understanding of the prohibition on use

¹³²*Supra* note 13, at 87.

¹³³*Id.*, at 88.

¹³⁴*Supra* note 112, at 314.

of force. In this case, the 2003 invasion of Iraq could be deemed as legal but illegitimate.

This perspective is very much in line with Third World Approaches to International Law or TWAIL. The field identifies and analyzes the issues within international law from a third world approach. As Fidler defines it, “[TWAIL] critically analyzes international law to promote a more just and equitable approach to the countries and peoples of the developing world.”¹³⁵ TWAIL however often extends beyond just being an academic field as some scholars, such as TWAIL scholar Antony Anghie, would argue that TWAIL could almost be viewed as a political movement that aims to mitigate the challenges that International Law presents to the Third World.¹³⁶

As Antony Anghie articulates, preemption within the context of Iraq, “resurrects a very old set of ideas that were articulated at the beginning of the modern discipline of international law.”¹³⁷ The reintroduction of these norms marks a potential regression of international law to the tumultuous early years of its formation, which act to reassert the aforementioned inherent flaws within it. The argument Anghie puts forth suggests that the 2003 invasion of Iraq may in fact be lawful, due to inherent biases within international law, but that does not make it legitimate or just.¹³⁸

Nijman arrives at a similar conclusion in a manner that marks a transition from the positivist understanding manifested in contemporary *Jus Ad Bellum*, outlined in the charter as well as customary law, to the “just war” doctrine.¹³⁹ This particular transition is not without its merit as Nijman reminds us that “the just war doctrine offers a decision-making model on the use of force that has been developed by political leaders, their advisors, and critics in over 2000 years.”¹⁴⁰ This argument may be particularly difficult to grasp as it suggests that the legality of the use of force in this context would have to be derived from politicians and not international lawyers or

¹³⁵David P. Fidler, *Revolt against or from within the West-TWAIL, the Developing World, and the Future Direction of International Law*, 2 *Chinese J. Int'l L.* 29, (2003).

¹³⁶Antony Anghie, *TWAIL: Past and Future*, 10.4 *Int'l Comm L Rev* 479, 479-481 (2008).

¹³⁷*Supra* note 61, at 46.

¹³⁸ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge University Press 2007)(2007).

¹³⁹*Supra* note 13, at 88.

¹⁴⁰*Id.*

from political criteria and normative values as opposed to a formalist system of the rule of law. Placing such power over international law in the hands of politicians potentially ushers in a system of "might makes right" in determining the legality of certain actions through the shaping of widely accepted legal principles.

In the case of Iraq, the legality of the actions could thus be asserted, but that begs the question, what about the legitimacy of the invasion? In order for a war to be waged legitimately, it would need to have satisfied the following six criteria: a just cause, be waged by a legitimate authority, be waged for the right reasons, be a last resort, have a serious chance of success, and not run the risk of bringing about a greater evil or chaos.¹⁴¹ Many of these points however can only be displayed retroactively and in the case of the 2003 invasion of Iraq, they were not displayed at all. As Nijman illustrates, one need only look to the lack of a "well developed 'state building' plan for the post-war period" which increased the risk of a bringing about a greater evil as proof that the US did not satisfy the criteria.¹⁴² Motives such as oil or corporate instances would not constitute a right reason in the normative sense, given that the perpetrators of the invasion did not clearly outline this prior to taking action. The absence of weapons of mass destruction in the aftermath of the invasion as well as the failure to prove that the invasion was in fact a last resort act would thus lead to the conclusion that the "Iraq War" must be deemed as illegitimate despite even if some argue its legality.

What is the Relationship between International Law and Politics?

In regards to what he believes to be an archaic use of an inherently biased legal principle, Anghie states that "[t]he re- emergence of these themes disturbingly illuminates the imperial dimensions of international law, and the enduring impact of imperialism in the international system."¹⁴³ The reason for Anghie's establishment of a connection between preemption and imperialism is premised on Bush's *National Security Strategy*, and its focus on "Rogue States."¹⁴⁴ These states, many of which

¹⁴¹James F. Childress, *Just-war theories: the bases, interrelations, priorities, and functions of their criteria*. 39 JTS 427, 427–445 (1978).

¹⁴²*Supra* note 13, at 89

¹⁴³*Id.*

¹⁴⁴*Supra* note 61, at 55.

represent the "Axis of Evil" are the most susceptible to preemptive attack given that they allegedly sponsor or promote terrorism as well as the US belief that the solution to issues is the transformation of rogue states into democratic states as articulated by President George W. Bush in his speech at the 2004 Republican National Convention.¹⁴⁵ The connection to the imperialist history of international law can be reaffirmed by drawing parallels to the democratization of rogue states and the civilizing of savage or uncivilized nations as a guise for imperialist motives. In regards to the Iraq War, Anghie cites the pursuing of US interests under the pretext of a preemptive self defense in the face of a real threat as modern day imperialism.¹⁴⁶ In addition to masking political motives, this perception of democracy as the panacea for global terrorism is used to justify the impartiality of international legal principles such as anticipatory self defense and duty to prevent which cannot be exercised by closed societies.¹⁴⁷ It would seem that international law, in this context, is being utilized to perpetuate the democratization agenda, and oppress states that lack the institutions to be deemed capable of defending themselves legally.

This is no surprise as these principles were clearly never meant to be applied equally among the entire international community and how could they? These principles are very much reliant on the political, economic, and military power that comes with being a global superpower. Anghie offers several arguments to illustrate the inherently impartial nature of preemptive self-defense which attempt to answer his own question regarding the topic, "What effect will the instantiation of pre-emption within the framework of international law have on some of the most fundamental tenets of international law?"¹⁴⁸

He asks us to take the examples of the Islamic Republic of Iran and North Korea, both of which are included in the "Axis of Evil", and apply the concept of preemptive self-defense as a new understanding of an inherently sovereign right under the premise that all sovereign states are equal.¹⁴⁹ Iran or North Korea could thus be argued to have been faced with a real threat following the invasion of fellow axis member Iraq, and thus had Iran attacked the United States preemptively. The very notion that either of

¹⁴⁵George W. Bush, 2004 RNC - President George W. Bush Acceptance Speech (Sep. 2, 2004) available at <https://www.youtube.com/watch?v=C2ZGUT4W5-U>.

¹⁴⁶*Supra* note 61, at 55

¹⁴⁷*Supra* note 58, at 136.

¹⁴⁸*Supra* note 61, at 49.

¹⁴⁹*Id.*

these nations could be lawfully permitted in attacking the United States is ludicrous in nature and asserts Anghie's argument that "even though self-defense is the most basic of sovereign rights, pre-emptive self-defense is a right that the United States intends to be confined only to itself and its allies."¹⁵⁰ The principle of preemptive self-defense thus undermines the supposed core principles of international such as sovereign equality and marks a departure from this normative concept to an understanding of international law that reflects the current structure of international relations. States are not equal within international relations, and some states with their political and economic prowess as well as their stockpiles of nuclear weapons are not on equal footing with developing nations. If notions such as preemptive self-defense are allowed to flourish, then the international system would regress to resemble the international legal system that was present among European states at the end of the nineteenth century.¹⁵¹ The implication that the certain legal principles were only meant for the US and its allies is not a farfetched one as Anghie provides a second illustration of these inherent imbalances within the legal system. Anghie draws our attention to the advisory opinion issued by the International Court of Justice "regarding the legality of the use, or threat of use, of nuclear weapons."¹⁵² In this case, the court was unable to definitively determine that the use of nuclear weapons was in fact illegal following persuasive arguments by the United States and the United Kingdom on the legality of the use of nuclear weapons in self-defense.¹⁵³ This argument is in fact reaffirmed, As Anghie states, by the differing nature of the US approach to both Iraq and North Korea regarding the issue of WMDs. In the case of Iraq, the US suspected that Iraq possessed weapons of mass destruction but not actual nuclear weapons and took a very intense approach. However, in the case of North Korea, the US took a far more cautious approach given that it suspected North Korea actually possessed nuclear weapons. Anghie draws the conclusion that these differing approaches suggest "that the acquisition or development of nuclear weapons is essential to the deterrence of the United States."¹⁵⁴ Iran could have thus justified its nuclear program or pursuit of nuclear weapons as an inherent right to self-defense

¹⁵⁰*Id.*

¹⁵¹*Id.*, at 50.

¹⁵²Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ ____, 41 (July 8).

¹⁵³*Supra* note 61, at 54.

¹⁵⁴*Id.*, at 53.

given that nuclear weapons are essential to self-defense in this regard. Furthermore, Iran as a member of the axis of evil could thus justify the development or acquisition of nuclear weapons further as a form of preemptive self-defense in order to avoid sharing a similar fate as Iraq. However, in reality the acquisition or development of nuclear weapons in any Third World state is likely to be construed as a threat to the United States and its allies and thus potentially warrant a preemptive attack. This asymmetrical application of the principle of self-defense and the prohibition on items supposedly necessary to self-defense is reaffirmed by the unequal application of the requirements of the *Non-Proliferation treaty* on states that do not yet possess nuclear weapons as well as the negative implications associated with withdrawing from the treaty. This distinction represents further impartialities within the international legal system and another departure from a positivist vision of an international rule of law. As Anghie states, "It is disconcerting that western attempts to create a new international law should so unerringly return to the colonial origins of the discipline."¹⁵⁵ It would seem that international law in this regard is simply an instrument of imperialism exasperating the divide between the global powers and the third world under the guise of new and changing threats that the United Nations and the international legal system are unequipped to handle. However, Anghie remains cautiously optimistic suggesting that "third-world states and peoples, whatever the difficulties they suffer from, are not likely to acquiesce readily to the return of explicit imperialism."¹⁵⁶ It would seem that any impartiality within the international legal system could be attributed to political imbalances and constructed hierarchies in the global system. On the other hand, said political imbalances and constructed hierarchies would be propped up by reaffirmed legal norms that came to be through state practice. Although this endless loop is very much a social or political construct, its effects on the international arena are not any less real. This cyclical construct however, suggests a muddled mixture of international law and politics, where both have lost their individuality and neither can exist without the other.

Nijman illustrates the potential ramifications of inherently imperfect and biased laws given the suggested positive correlation between legality and legitimacy. That is to

¹⁵⁵*Id.*, at 65.

¹⁵⁶*Id.*

say if a new law were to come into effect, it would be perceived as just or legitimate simply because it is lawful. This undermines the power of the legitimizing power of the international community in regards to international law. What is more troubling about this perspective is the potential ramifications for international law, as building legal principles on political grounds entirely opens the door for potentially malicious uses of the law. In this perspective, international law would no longer be portrayed as a moral compass that points true north and, given the perceived inherent flaws within international law by critical theorists, this is not particularly surprising. Nijman builds on the work of legal realism, in the recognition that the institution of law is very much reflective of the political world, by adopting a more reformative perspective on the international legal system.¹⁵⁷ Nijman differs from the realist legal theorists in that she doesn't believe that the practical nature of the world today legitimizes the actions even if it does legalize them and thus the reforms that she proposes are legal and not political in nature.¹⁵⁸ She goes on to illustrate three differing perspectives on the relationship between international law and politics and examines them closely in *The Case of Iraq: International Law and Politics*.¹⁵⁹ The first understanding is that there exists an international rule of law that prevails over and constrains politics. The second is an understanding that international law and politics exist on equal footing and where there is no primacy of international law. Finally, the third understanding of the relationship between international law and politics is that the compliance with international law is an interest among many that a state takes into account.¹⁶⁰ Nijman offers a perspective on international law that recognizes the weight of global politics in shaping the law but suggests that the legal principles themselves are equally important. In this realist perspective, we can derive that politics and international law would be two sides of the same coin without one taking primacy over the other. The effects that each side has on the other are extensive and thus separation of the two for the purpose of assessing the situation would be futile.

¹⁵⁷ Janne Elisabeth Nijman, *Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality*, Amsterdam Center for International Law Research Paper Series 1, 1-40 (2010).

¹⁵⁸ *Id.*

¹⁵⁹ *Supra* note 13, at 78.

¹⁶⁰ *Id.*, at 78-80.

Conclusion:

The arguments articulated within this paper are thus a response to the dichotomization of law and politics by legal scholars aiming to quarantine law from politics as Rues-Smit illustrates.¹⁶¹ As discussed throughout this paper, the aforementioned interconnectivity of international law and politics that render them virtually indistinguishable from one another is not an inherently destructive quality given the degree of pragmatism that it adds to two highly theoretical concepts. This relationship between international and politics grounds both disciplines in practicality and offers more of an insight into global conflicts than either discipline separately. This position has become abundantly clear regardless of the perspective on the legality or legitimacy of the conflict in question as more and more authors from various schools of thought have adopted interdisciplinary approaches in their assessments of global conflicts. As Shiner and Williams argue that International law works “by integrating the study of international law with the realities of international politics.”¹⁶² This is an important balance to strike given that the theoretical nature of the legal principles of international law often seem detached from their real world applications.

It is therefore unsurprising that the authors behind each distinct perspective resorted to political rhetoric within their respective legal assessments of the 2003 Iraq War. This particular phenomenon is already present and potentially growing in popularity with more and more legal scholars advocating for interdisciplinary approaches.¹⁶³ This particular use of this approach provided a more in depth assessment of the 2003 Iraq War than that of a solely legal or political approach. As Rues-Smit articulates; the distinctive form, practice, and content of international law stems from politics in the same way that “the international legal order shapes politics through its discourse of institutional autonomy, language and practice of justification, multilateral form of legislation and structure of obligation.”¹⁶⁴ As Shiner and Williams

¹⁶¹*Supra* note 1, at 5.

¹⁶²*Supra* note 55, at 3.

¹⁶³Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 (2) *Yale J. Int'l L.*, (1989).

¹⁶⁴*Supra* note 1, at 5.

argue, international legal rhetoric is more often than not used to rationalize political decisions motivated by self-interest.¹⁶⁵

This interconnectivity can be found regardless of whether international law is determinate, and provides sufficient insight into a situation, or whether it is indeterminate and unable to address a situation that was not anticipated when the rules were formulated.¹⁶⁶ International law, however, more often than not finds itself on the indeterminate side of the spectrum, such as in instances of use of force and for that reason, as Dino Kritsiotis argues "debates over legal interpretation have come to structure the politics surrounding situations involving the use of force."¹⁶⁷ The assessments, provided within this paper, of the 2003 invasion of Iraq by legal scholars adopting diverse stances relied heavily on politics.

This situation however was inescapable given that the "dichotomization between 'law' and 'politics' does hold a particular relevance when studied in the context of how states utilize international law in their practices relating to the use of force in international relations."¹⁶⁸ This is to say that even though states are political entities, they regularly resort to "legal reasoning and argumentation within their practices" despite that political operators recognize "law as a distinct system within their own system or sphere of existence."¹⁶⁹ However, as Kristiotis goes on to articulate, that it is apparent from the practices of states that they don't see the supposed divide between law and politics as "monolithic" nor do they set out to define law and politics and their respective parameters.¹⁷⁰ Scholars such as Koskenniemi downplay this supposed divide arguing that "there is no 'essential distinction' between the two."¹⁷¹ Regardless of the presence or extent of the divide between law and politics within political and legal discourses, it has become abundantly clear that outlining the relationship between the two concepts is increasingly difficult and ultimately inconsequential to the assessment of a conflict.

¹⁶⁵*Supra* note 55, at 226.

¹⁶⁶*Id.*

¹⁶⁷*Supra* note 1, at 48.

¹⁶⁸*Id.*, at 46.

¹⁶⁹*Id.*

¹⁷⁰*Id.*

¹⁷¹Martti Koskenniemi, *Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons*, 10 (1) *Leiden J. Int'l L.* 140, (1997).

It is important to thus ask why the authors presented in the thesis insisted on using political terms within their legal assessments of the Iraq War. The decision to utilize political terminology and concepts does not stem from an insufficiency of legal sources or a lack of academic prowess but rather recognition that both the international legal and international relations disciplines provide insights into the developments within the international arena that scholars aim to explain.¹⁷² The incentive to invoke international relations terms is argued to be based "on the claim that an understanding of the sister discipline will enrich an international lawyer's practical and intellectual work, from doctrinal analysis and policy prescriptions to international legal theory."¹⁷³ There are however many reasons why scholars would want to utilize political or international relations concepts, such as the need "to diagnose international policy problems and to formulate solutions to them", the analysis of international institutions, or the assessment of new issues within the international community.¹⁷⁴ By incorporating international relations terms and ideas, this approach offers a closer approximation to the realities of today than each discipline could provide alone. This less detached approach reflects the complexities of global conflicts that international law is ill-equipped to handle on its own. Treaties and customs established over decades often fall short of providing all the necessary tools for handling a situation and thus diplomatic and political tools fill in those gaps.

As Slaughter, Tulumello, and Wood articulate "International Relations and International Law have rediscovered one another."¹⁷⁵ These authors go on to say that "outsiders might categorize them as dividing the study of the international system in terms of positive versus normative, politics versus law. Insiders in both disciplines reject such facile distinctions."¹⁷⁶

The increasingly complex multilayered conflicts within the international community call for an equally multilayered approach to the assessment of the issue that provides a deeper level of insight than one discipline alone. This is not to undermine either discipline but rather recognition of the complexity of global conflicts and the extensive interconnectivity of international law and international

¹⁷²*Supra* note 10, at 369.

¹⁷³*Id.*, at 373.

¹⁷⁴*Id.*

¹⁷⁵*Id.*, at 393.

¹⁷⁶*Id.*

relations. This is not to say that the assessment of a global conflict should ignore the legal framework in place and simply deliberate on the matter using political terms. International law remains an important player within the international arena that supplements debates on the morality or legitimacy of actions with questions of lawfulness. International law in many ways provides a reference for which to hold states accountable for their actions, as an instrument of curtailing blatant and belligerent exercise of power. However it is important not to get carried away and focus too deeply on protecting the sanctity of international law at the cost of exasperating already tumultuous situations. It is important to take into consideration real world factors that potentially outweigh protecting the sanctity of the law, such as civilian casualties and political, humanitarian, and economic ramifications when deciding whether international law is favoring a stance that is on the right side of history.

Given such a deep entanglement of both the legal and political discourses, it is only logical that such an interdisciplinary approach would seem attractive to scholars and politicians alike attempting to dissect the complexities of today's world. An interdisciplinary approach responds to criticisms of international legal analysis that suggests that international law is too detached from the real world situations that have come about decades after the relevant legal principles were created. Said criticisms call for reformation of the international system in order to make it more responsive to the political developments of today's world. This is not to say that focusing on politics is a panacea as this approach also responds to fears that without international law, the larger more powerful states would have no regulation whatsoever. An interdisciplinary approach bridges this gap and thus provides a better fuller description of global conflict that could potentially lead to a better rounded solution in the future. In the case of Iraq, regardless of their views on the legality or legitimacy of the actions taken, the authors within each section provided an assessment of the conflict that utilized both legal and political concepts. It is becoming abundantly clear that this interdisciplinary approach is rightfully growing in popularity and has warranted further attention for the numerous advantages it presents.

It is important to realize that there is more at stake than the rule of law when assessing a situation, as morality and normative concepts inevitably play a part. For that reason, it only seems logical that further refinement and attention to an

interdisciplinary approach that explores the overlap between the two disciplines, should be the next step.¹⁷⁷ It is important to take advantage of this particular phenomenon, which marks a reduction of barriers between both disciplines, brought on by a need to adequately internalize global events, and move towards furthering the discussion. As Slaughter, Tulumello and Wood articulate, "Scholars in both disciplines should profit from the moment to develop a genuinely collaborative research agenda that will generate both practical and theoretical insights."¹⁷⁸ Efforts aimed at bridging the gap between disciplines, establishing parameters and terms of engagement as well as mapping out important points of interest would be extremely beneficial to what is clearly a necessary practice. This incorporation of the international relations and international law disciplines on a better consolidated platform would provide for analyses that reflect the various layers of global conflicts with a level of depth that no single discipline could reach.

¹⁷⁷*Id.*, at 367.

¹⁷⁸*Id.*, at 393.