

Anxiety and the Sidekick State: British International Law After Iraq

China Miéville*

I. "VERY LARGE QUESTIONS . . ."

In a quirk of parallel evolution, the annual *United Kingdom Materials on International Law* ("UKMIL") is organized according to Marx's methodology, "rising from the abstract to the concrete."¹ For twenty years, however, for all the reams of material the government put out, nothing of substance could be found to fill the first section, the broadest philosophical category on the "nature, basis, [and] purpose" of "international law in general."² Then, in 2003, the UKMIL found its jurisprudential voice.

British Foreign Secretary Jack Straw waxed descriptive and transformative, in a burst of middlebrow messianism:

Events since September 11 . . . raise very large questions about the underlying assumptions of international relations . . . since the Peace of Westphalia . . . that the best guarantor of peace and security was to respect the territorial integrity of sovereign states . . . [W]e have to begin a discussion about how those principles are revisited in the modern environment because of threats posed other than by normally functioning sovereign states, posed by rogue states, posed by international terrorism, posed by others who are acting in an extremely oppressive way.³

* Independent researcher and member of the editorial board of the journal *Historical Materialism*. Ph.D., London School of Economics, 2002; M.Sc., London School of Economics, 1996; B.A., Cambridge University, 1994. My sincere thanks to Shihani DeSilva, Eric Johnson, and David Kennedy for inviting me to submit this piece, and to Jean-Denis Grèze for his invaluable editorial work.

In preparing this piece, I solicited the opinions of several scholars and practitioners of international law as to what they felt to be the key issues in the British field today. I am indebted to Susan Marks, Ralph Wilde, Peter Fitzpatrick, Matthew Craven, Fiona Macmillan, Deborah Cass, Christopher Greenwood, and Gerry Simpson for their invaluable responses. All errors and inadequacies, of course, are mine.

1. KARL MARX, GRUNDRISSE 101 (Martin Nicolaus trans., Vintage Books 1973) (1939). *United Kingdom Materials on International Law* ("UKMIL") is published in the *British Year Book of International Law*. For the Model Plan by which it is organized, see *United Kingdom Materials on International Law*, 2003 BRIT. Y.B. INT'L L. 565.

2. *United Kingdom Materials on International Law*, 2003 BRIT. Y.B. INT'L L. 565, 565.

3. Jack Straw, Remarks to the Select Committee on Foreign Affairs (Apr. 29, 2003), 2003 BRIT. Y.B. INT'L L. 575, 575.

Almost simultaneously with Straw's statement, sixteen scholars of international law signed a letter in *The Guardian* expressing grave reservations about the soon-to-be-launched Iraq War.⁴ This then led to the writing of "*We Are Teachers of International Law*," an extraordinary piece of critical self-examination by four of the original scholars.⁵

In its ten and a half pages, the authors ask sixty-five questions, none of which they answer; indeed, they conclude by asking whether the most important questions are those that should go unanswered. In its critical precision, and in its very angst, this article is perhaps the key document for the understanding of contemporary British thinking in international law, particularly when considered in conjunction with the government's enthusiastic if lumpen analysis, as represented by Straw's speech.⁶

In the United Kingdom, public interest in international law has soared. Paradigmatic of this moment is the tension between the passionate evocation of a "new" international law by perpetrators of a war widely denounced as illegal and the deep anxieties about the law expressed by scholars of the field.

In what follows, I attempt to map the recent moves of British international law, into a putatively new paradigm and back out again, and to the center of political debate. Illustrating how we got where we are might suggest which of the current approaches to the field are the most fruitful and, hopefully, where we might go next.

II. BRITISH TRADITION: FROM COMMON SENSE TO COSMOPOLIS

The stereotype of British international law is that it is "technical and analytical,"⁷ with a long-standing "pragmatism [and] attention to textual interpretation"⁸ reflected in antipathy to theory.⁹ In a vulgarized positivist version of Kant's warning that "subtle reasonings" into the basis of authority are "alto-

4. *War Would be Illegal*, GUARDIAN, Mar. 7, 2003, available at <http://www.guardian.co.uk/letters/story/0,3604,909275,00.html> (last visited Feb. 25, 2005).

5. Matthew Craven et al., "*We Are Teachers of International Law*," 17 LEIDEN J. INT'L L. 363 (2004).

6. Although not all of the authors are British by birth, they are from British institutions and the article is part of the ferment in British international legal debates.

7. Colin Warbrick, *Introduction to the Symposium*, 13 EUR. J. INT'L L. 902, 902 (2002). See also Colin Warbrick, *The Theory of International Law: Is There an English Contribution?*, in THEORY AND INTERNATIONAL LAW: AN INTRODUCTION 47 (Philip Allott et al. eds., 1991).

8. James Crawford, *Public International Law in Twentieth-century England*, in JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 700 (Jack Beaton & Reinhard Zimmermann eds., 2004).

9. See, e.g., Patrick Capps, *Incommensurability, Purposivity and International Law*, 11 EUR. J. INT'L L. 637 (2000) (emphasizing the despair of England occasioned by the British antipathy to theory); Anthony Carty, *A Colloquium on International Law Textbooks in England, France and Germany: Introduction*, 11 EUR. J. INT'L L. 615, 616 (2000) (emphasizing this despair as well). For the long standing of this approach, see Robert Y. Jennings, *An International Lawyer Takes Stock*, 39 INT'L & COMP. L.Q. 513 (1990). Compare Anthony Carty, *Why Theory? The Implications for International Law Teaching*, in THEORY AND INTERNATIONAL LAW: AN INTRODUCTION, *supra* note 7, at 75, 77 (claiming that the early twentieth-century scholars who shaped the British tradition "killed off" theory), with Crawford, *supra* note 8 (arguing convincingly that, whatever their approach, those scholars cannot be so held responsible).

gether pointless and . . . threaten . . . danger,” the British tradition sometimes implies that theory is not just unhelpful but dangerous.¹⁰

This pragmatism has marked the United Kingdom out even in a generally theoretically sluggish field.¹¹ However, despite international law’s lack of interest in social theory, in the 1990s social theory became interested in it. Celebrated political thinkers, notably Rawls and Habermas, engaged with the subject.¹² Their broadly neo-Kantian approach culminated in the project of “liberal cosmopolitanism,” associated with writers such as Held, Kaldor, and Shaw, which waxed in the United Kingdom in the late 1990s and is only now on the wane.¹³

The discourse of cosmopolitanism says that the Western liberal-democratic states are able to, and indeed are . . . spreading across the whole globe liberal-democratic values and regimes. . . . [T]his . . . will bring with it a new kind of world order—a cosmopolitan world order—going beyond the old Westphalian world order . . . characterized by the absolute rights of states.¹⁴

These liberals see international law as a key conduit for the changes they see and seek, and they stress not merely its application but its transformation.¹⁵

Like the 1930s “literature of enthusiasts” of Woolf, Russell, and Zimmern, of which it can be seen as a modern variant,¹⁶ much of this work remained somewhat outside classic debates in the field of international law, that in turn, for a

10. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 95 (Mary Gregor, trans., Cambridge Univ. Press 1996) (1797). I am indebted to Peter Fitzpatrick for this point. Peter Fitzpatrick, *An Unavowable Community: Positivism and the Quality of (International) Legal Being* (Dec. 15, 2004) (unpublished paper, on file with the Harvard International Law Journal). Hersch Lauterpacht, a key figure in British international law, implied this in the 1930s by warning that a certain kind of theory can “sanction [international law’s] . . . imperfections[,] . . . prevent its development[,] . . . [and] tend to deprive it of an attainable ideal.” Hersch Lauterpacht, *The Nature of International Law*, 37 *ECONOMICA* 301, 319 (1932). He speaks specifically here about an incorrect theory, but the model is of theoretical interrogation as potentially a danger to its own subject.

11. A comparison of essays in the *British Yearbook of International Law* and the British *International and Comparative Law Quarterly* with those in the much more adventurous *European Journal of International Law*—in which, for example, theoretical issues of state sovereignty thrown up by globalization were raised in 1997—shows the preeminence of pragmatism and technical questions in the United Kingdom compared to a growing philosophical interest elsewhere. See Symposium, *The Changing Structure of International Law Revisited*, 8 *EUR. J. INT’L L.* 399 (1997).

12. See, e.g., JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION* (2001); Jürgen Habermas, *Kant’s Idea of Perpetual Peace: At Two Hundred Years’ Historical Remove*, in *THE INCLUSION OF THE OTHER* 165 (1998); JOHN RAWLS, *THE LAW OF PEOPLES* (1999). For a superb critical overview, see Perry Anderson, *Arms and Rights*, 31 *NEW LEFT REV.* 5 (2005).

13. See, e.g., *COSMOPOLITAN DEMOCRACY* (Daniele Archibugi & David Held eds., 1995); *GLOBAL TRANSFORMATIONS* (David Held et al. eds., 1999); *DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995).

14. PETER GOWAN ET AL., *The State, Globalisation and the New Imperialism: A Roundtable Discussion*, 9 *HISTORICAL MATERIALISM* 3, 4–5 (2001).

15. “[T]his school of thought . . . is basically saying that this is the way we’re moving . . . and we should join this and get involved.” *Id.* at 5. See, e.g., HELD, *supra* note 13, at 269 (discussing the “rule of law”).

16. Crawford, *supra* note 8, at 695.

time, did not engage with it. However, cosmopolitan theory, in its sensitivity to the crisis of 1990s conservatism, operated as a weathervane, pointing where political discourse was headed. Then as these politics became practice, the technical discipline of British international law could engage with the emerging realities. The owl of Minerva may have flown a little late, but this liberal discourse did invigorate international legal thinking.

Liberal cosmopolitanism was an internationalist articulation of the “Third Way,” that nebulous hybrid of watered-down social democracy and globalizing free-market capitalism.¹⁷ The discourse flourished after NATO’s 1999 Kosovo action and British Prime Minister Tony Blair’s exposition of “The Blair Doctrine” of “international community,” according to which humanitarianism undermined a supposedly traditional sanctity of state sovereignty.¹⁸

The Kosovo intervention was the paradigm of this human rights-focused international law, an “almost revolutionary development of humanitarian law.”¹⁹ Political theory, official discourse, and much international law agreed that the traditional conception of sovereignty had been overthrown.²⁰

In fact, it is questionable whether the motives of the Atlantic powers in Kosovo were humanitarian, rather than more traditional power-political concerns in Sunday best.²¹ In addition, the depiction of a previously “absolute” sovereignty was highly suspect. Sovereignty has always assumed the abnegation of its borders, and human rights have for a very long time been an axis on which this can occur.²²

17. See ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* (1999). For a powerful critique, see ALEX CALLINICOS, *AGAINST THE THIRD WAY* (2001).

18. Prime Minister Tony Blair, Address to the Chicago Economic Club (Apr. 22, 1999), available at http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html (last visited Apr. 8, 2005).

19. Dietrich Schindler, *International Humanitarian Law: Its Remarkable Development and its Persistent Violation*, 5 J. HISTORY INT’L L. 165, 173 (2003).

20. See, e.g., KURT MILLS, *HUMAN RIGHTS IN THE EMERGING GLOBAL ORDER: A NEW SOVEREIGNTY?* (1998); RALPH ZACKLIN, *BEYOND KOSOVO: THE UNITED NATIONS AND HUMANITARIAN INTERVENTION* (2000); Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFF. 2 (1999).

21. See, for example, President Clinton’s admission that humanitarianism had far less to do with the action than did geopolitical and economic stability:

[I]f . . . our country is going to be prosperous and secure, we need a Europe that is safe, secure, free, united, a good partner with us for trading; they’re wealthy enough to buy our products; and someone who will share the burdens of taking care of the problems of the world Now, that’s what this Kosovo thing is all about.

CALLINICOS, *supra* note 17, at 72–73.

22. Several years before cosmopolitanism’s heyday, Geoffrey Best pointed out that, as long ago as 1948, the U.N. Charter’s support for “fundamental human rights” led eminent legal scholars to believe that there was “no serious argument” but that state sovereignty as “an imaginary ideal of unfettered freedom of national action” had been fundamentally altered. Geoffrey Best, *Whatever Happened to Human Rights?*, 16 REV. INT’L STUD. 5–6 (1990). See also HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950). In a 1940 article, the notorious Carl Schmitt cited humanitarian intervention as his exemplary case of intervention as a structuring dynamic of international law. Carl Schmitt, *Raum und Großraum im Völkerrecht*, in STAAT, GROSSRAUM, NOMOS (unpublished translation, on file with the Harvard International Law Journal) (1940). In the nineteenth century, “one would have some difficulty finding works which [did] not . . . address the issue of ‘intervention on the grounds of humanity.’” Gábor

This is not to say that there was no change in international law over the 1990s. Even if one concludes that the shift was largely ideological or in perception, it is still significant because it led to theoretical debate and was an important early moment in bringing international law into the cultural mainstream.

In the six years since Kosovo, two seemingly contradictory things have happened. First, the “new” paradigm of humanitarian intervention has been diluted with surprising speed. Second, however, the enormous interest in international law, of which cosmopolitanism was a pioneering expression, has accelerated. Two events are key to this paradox: one is September 11 and the other is Iraq.

III. THE NEW TRADITIONALISM

The U.S. government’s response to September 11 vividly illustrates how sovereignty, so recently considered “perforated”²³ if not defunct, has remained at least as strong as any supposedly alternative paradigm. Immediately after the attack, Richard Haass of the State Department explained that “America was just intervened against,” and asked rhetorically whether it was “supposed to treat Afghanistan’s sovereignty . . . as absolute.”²⁴ In the recent words of Under Secretary of Defense Douglas J. Feith, “[t]he importance of promoting a well-ordered world of sovereign states was brought home to Americans by 9/11.”²⁵

This is an absolutely traditional model of clashing sovereignty that defines terrorism as “armed attacks” against the United States, justifying self-defense.²⁶ President Bush, in a speech that does not even mention human rights, expressed a similarly old-school formulation in the run-up to the Iraq attack, saying that “[t]he United States of America has the sovereign authority to use force in assuring its own national security.”²⁷ This is not to deny that there are specificities to the current discourse, but, in terms of the state and sovereignty, there is far more continuity with established law than was alleged during Kosovo. Even if one agrees that September 11 led to a “loosening” of

Sulyok, Book Review, 15 EUR. J. INT’L L. 1058, 1059 (2004). Wilhelm Grewe gives several examples of nineteenth century “humanitarian intervention.” WILHELM GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 490 (2000).

23. JULIE MARIE BUNCK & MICHAEL ROSS FOWLER, *LAW, POWER AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* 2 (1995). It is telling that so early an analysis of “changing sovereignty” in international law was not written by international lawyers.

24. *Newsnight* (BBC2 television broadcast, Sept. 14, 2001).

25. Douglas J. Feith, Speech to the Council of Foreign Relations (Feb. 17, 2005), available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=February&cx=20050218163247sjhtrop0.4401972&t=livefeeds/wf-latest.html> (last visited Feb. 24, 2005).

26. Carsten Stahn, *Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35 (2003).

27. President George W. Bush, Address to the Nation (Mar. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> (last visited Feb. 25, 2005).

legal constraints,²⁸ this has more to do with the energetic extension of traditional categories than their reconstitution.

In the United Kingdom, this turn to what one might call “new traditionalism”—decried by those nostalgic for a mythical pure “Blair Doctrine” of yore²⁹—is marked by the incantation of keywords and a certain overblown rhetoric from the millennial days of cosmopolitanism, in what is a reasonably standard sovereignty-based legal paradigm. For example, while Straw’s statement above decries enemies doing “terrible” things within their borders, terrorism conceived as intervention is its main concern. As to “rogue states,” it is permeable and pathological sovereignty that makes them legitimate targets.³⁰

This traditionalism is, however, disguised. One surviving cosmopolitan quality is a stress on supposed novelty by the misrepresentation of previous international law, particularly imputing to it a foundation of impermeable sovereignty. The discourse is inconsistent, stressing the necessity of novelty at one point, while at another emphasizing that, for example, U.S. and U.K. actions in Afghanistan are “entirely within the framework of international law.”³¹

Of course, terrorist organizations are not states and therefore are not “traditional” opponents, but actions against them tend to segue into more juridically conventional wars against states. As one mainstream British examination of “the new war” makes clear, “the only realistic options” for a state wronged by terrorists may be force to bring them before domestic courts or, more simply, to “kill or capture members of the terrorist organization in much the same way as in an international armed conflict involving another state and governed by the laws of war.”³²

The first option resembles the replacement of war by “police action,” as suggested by the cosmopolitan liberals.³³ Yet this will be “difficult to justify under international law,”³⁴ and thus the second option—an attack governed by laws of war—will likely be pursued. In other words, Rowe’s article illustrates how the replacement of human rights abuses by terrorism as the locus of concern pulls away from cosmopolitan “justice” in more traditional directions. In fact, despite claiming that they “do not easily fit” new complexities, the article argues precisely in favor of the application of “well-established

28. Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT’L & COMP. L.Q. 401, 410 (2002).

29. John Sloboda & Chris Abbot, *The “Blair Doctrine” and After: Five Years of Humanitarian Intervention* (Apr. 22, 2004), at <http://www.opendemocracy.net/debates/article-6-28-1857.jsp> (last visited Feb. 25, 2005). See also the unease with which Mary Kaldor, associated with “liberal cosmopolitanism,” has greeted the shift in legal discourse. Mary Kaldor, *American Power: From “Compellance” to Cosmopolitanism?*, 79 INT’L AFF. 1 (2003).

30. See Straw, *supra* note 3, at 575.

31. Elena Katselli & Sangeeta Shah, Note, *Current Developments: Public International Law*, 52 INT’L & COMP. L.Q. 245, 249 (2003).

32. Peter Rowe, *Responses to Terror: The New “War,”* 3 MELB. J. INT’L L. 301, 320 (2002).

33. See MARY KALDOR, *NEW AND OLD WARS* 124 (1999) (“Cosmopolitan law-enforcement is somewhere between soldiering and policing.”).

34. Rowe, *supra* note 32, at 320.

laws,”³⁵ with finessing here and there. This is a scholarly echo of governmental “new traditionalism,” camouflaging essentially well-worn approaches with some neophilic proclamations. “Unusual circumstances,” as another U.K. writer says, have made legal analysis “more than commonly difficult,” but applied with a little virtuosity, the inherited categories of international law can cope perfectly well.³⁶

IV. “INTERNATIONAL LAW HAS BECOME IMPORTANT”³⁷

Iraq, of course, is key to the growth in British public consciousness of international law. The British government’s decision to go to war has been wildly unpopular. The resignations of key British politicians and bureaucrats on the grounds that the government’s actions were illegal have kept these questions alive.³⁸ The claim of the war’s illegality has been a central tenet for many in the anti-war camp, while the government has insisted that the attack was legal. Articles expressing and sometimes berating the opinions of international lawyers regularly appear in the media, marshaled by both sides of the debate.³⁹

Debates about the legality of wars are not new and cannot alone explain the surge of interest. The recent discursive hegemony of liberal cosmopolitanism, the claims over Kosovo, and Britain’s short-lived and much-derided “ethical foreign policy” have all contributed significantly. Having adopted a declamatory attitude to international law, the government has been hoist by its own petard.

Far from being cowed by this turn of events, however, the British government has bullishly put international law at the core of its post-Iraq agenda. Instead of simply reiterating that its actions conform to international law, the British government is asserting a dramatic extension of “juridicalized” relations.

35. *Id.* at 319.

36. Christopher Greenwood, *International Law and the “War Against Terrorism,”* 78 INT’L AFF. 301, 317 (2002). In Greenwood’s words, the complexities do not mean that contemporary international law “is incapable of providing a satisfactory legal framework.” *Id.*

37. Samuel Estreicher & Paul B. Stephan, *Taking International Law Seriously*, 44 VA. J. INT’L L. 1, 1 (2003).

38. Elizabeth Wilmshurst, deputy legal advisor at the British Foreign Office, resigned in protest at what she called “a crime of aggression.” Richard Norton-Taylor, *Revealed: The Rush to War*, GUARDIAN, Feb. 23, 2005, at 1. Also, Robin Cook resigned as leader of the House of Commons. Robin Cook, *Speech to the House of Commons* (Mar. 17, 2003), available at http://news.bbc.co.uk/1/hi/uk_politics/2859431.stm (last visited Apr. 8, 2005).

39. See, e.g., Richard Norton-Taylor, *Law unto Themselves*, GUARDIAN, Mar. 14, 2003 (pointing out that the mainstream legal view is more critical of the war); Adam Roberts, *The Case for War*, GUARDIAN, Sept. 17, 2002, at 16–17 (arguing, in advance, for the war); *Was the War Legal? Leading Lawyers Give their Verdict*, GUARDIAN, Mar. 2, 2004, at 3; Melanie Phillips, *These Lawyers have no Clothes*, at <http://www.melaniephillips.com/diary/archives/000367.html> (Mar. 2, 2004) (last visited Mar. 24, 2004) (critiquing that mainstream view).

V. TIME, ILLUSION, AND INTERNATIONAL LAW

The mission statement of new British international law was made a year ago by Blair.⁴⁰ In a celebrated speech designed to underscore the United Kingdom's allegiance to the U.S. agenda, Blair laid out all the elements of new traditionalism.

His speech included the reminder of September 11, a repeated invocation of Kosovo and human rights, the emphasis that we live in a changed world, and the representation of "old" international law as inadequate and in need of renewal. In typical fashion, however, he also had recourse to precisely the sovereignty-based *raison d'état* he implied was passé.

There were impassioned references to the "doctrine of international community," and Blair raised the question as to whether it is right that law should allow "a regime . . . [to] brutalize and oppress its own people."⁴¹ But these declamations seem designed to accrete moral kudos by association—substantively these are *not* the given justifications for war.⁴² The actually stated reasons for the Iraq action revolve around the threat of mass destruction, the "threat to our security," and Iraq as a "rogue state"—all ideas predicated on sovereignty.⁴³

From September 11th on, I could see the threat plainly. Here were terrorists prepared to bring about Armageddon. Here were states whose leadership cared for no-one but themselves; were often cruel and tyrannical towards their own people; and who saw [weapons of mass destruction] as a means of defending themselves against any attempt external or internal to remove them and who, in their chaotic and corrupt state, were in any event porous and irresponsible with neither the will nor capability to prevent terrorists who also hated the West, from exploiting their chaos and corruption.⁴⁴

This was an attempt to cook up a kind of bouillabaisse justification in which issues of terrorism and cruelty coagulate with those of porous statehood and weapons of mass destruction. Ultimately, though, Blair's specific justification for the attack was traditional: "the global threat to our security."⁴⁵

It would be wrong to say that the British government has set aside the discourse of cosmopolitanism. However, the routine invocation of humanitarianism is now more moralistic than systematic, and occurs alongside traditional juridical categories. There *is* a real transformation implied in Blair's

40. Prime Minister Tony Blair, Speech Given in Sedgefield (Mar. 5, 2004), available at <http://politics.guardian.co.uk/iraq/story/0,12956,1162991,00.html> (last visited Feb. 24, 2005).

41. *Id.*

42. See Sloboda & Abbot, *supra* note 29.

43. Blair, *supra* note 40.

44. *Id.*

45. *Id.*

vision, but it is a transformation not of traditional categories but in the terms of their application.

When Blair said that “states that proliferate or acquire [weapons of mass destruction] illegally” are a threat, and “we surely have a duty and a right to prevent the threat materializing,” he was supporting Bush’s assertion of a right of preemption.⁴⁶ The category of the attacked state is not transformed but projected into the future, allowing it to get its retaliation in first. While not the first official British support for preemptive action,⁴⁷ this was a bullish assertion of trans-temporal jurisdiction.⁴⁸

An even more startling proposition was buried at the end of Blair’s speech. Discussing “new” war, Blair claimed that “[i]t forces us to act even when so many comforts seem unaffected, and the threat so far off, *if not illusory*.”⁴⁹ According to this extraordinary position, it is not merely permissible to attack an enemy preemptively; it is permissible, and presumably legal, to attack an enemy even when the grounds for that attack are untrue.

Of course Blair’s supporters may claim that the “seem[ingly] . . . illusory” nature of the threats does not mean that they are nonexistent, but that they are impossible for the public to perceive, and that while Blair’s model may therefore be paternalistic, it does not provide him *carte blanche*. In fact, however, this interpretation has been tested, and found wanting: Blair justified the war on the grounds that Iraq possessed weapons of mass destruction, which the Iraq Survey Group have since proved to be “illusory” not in the sense that only the government knew they were there, but in the sense that they did not exist.⁵⁰ According to the generous interpretation of Blair’s words, this should therefore have led to an apology for the war. In fact while the government has accepted that its original claims were untrue, it has assiduously insisted that the war was nonetheless justified and legal.⁵¹

46. *Id.*

47. Preemption was, for example, part of the justification given by the government in 1956 for intervention against Egypt in the case of the nationalizing of the Suez Canal. See Geoffrey Marston, *Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government*, 37 INT’L & COMP. L.Q. 773, 800 (1988).

48. The putative norm of preemption is controversial. For claims that it is neither new nor illegal, see Charles Hill, *Remarks by Charles Hill*, 98 AM. SOC’Y INT’L L. PROC. 329 (2004); Abraham D. Sofaer, *On the Necessity of Preemption*, 14 EUR. J. INT’L L. 209 (2003); William H. Taft IV, *Preemptive Action in Self-Defense*, 98 AM. SOC’Y INT’L L. PROC. 331 (2004). For opposing views, see Hurst Hannum, *Bellum Americanum*, 27 FLETCHER FORUM WORLD AFF., Winter/Spring 2003, at 29, 34–35 (2003); Michael Byers, *A New Type of War*, LONDON REV. BOOKS, May 6, 2004.

49. Blair, *supra* note 40 (emphasis added).

50. *US Gives up Search for Iraq WMD*, BBC NEWS UK EDITION, at <http://news.bbc.co.uk/1/hi/world/americas/4169107.stm> (Jan. 12, 2005) (last visited Mar. 28, 2005).

51. See, e.g., *Blair Insists Iraq War Justified*, BBC NEWS UK EDITION, at http://news.bbc.co.uk/1/hi/uk_politics/3699510.stm (Sept. 29, 2004) (last visited Mar. 28, 2005); *Ministers “Sorry” for Iraq Error*, BBC NEWS UK EDITION, at http://news.bbc.co.uk/1/hi/uk_politics/3725380.stm (Oct. 8, 2004) (last visited Mar. 28, 2005); *Straw Withdraws 45 Minutes Claim*, BBC NEWS UK EDITION, at http://news.bbc.co.uk/1/hi/uk_politics/3736086.stm (Oct. 12, 2004) (last visited Mar. 28, 2005).

"[T]he real issue," said Blair, "is not a matter of trust but of judgment."⁵² In this model, the basis for legitimacy is not whether perception of a threat was justified or accurate,⁵³ but whether or not a state judged it so. In deploying cosmopolitanism in the service of an always-already self-justified state will, this approach is the bastard of Kant and Kafka. International law thus appears to mean never having to say you are sorry.

As it happens, even on these vastly elastic grounds there is persuasive evidence that the United Kingdom's actions were unjustified.⁵⁴ However, in its reduction of legal reasoning to a kind of nebulous and unfalsifiable psychology of intentionalism, the revised "Blair Doctrine" undercuts any systemic grounds for legal criticism of state action. Crucially, however, it does so not by denigrating or dismissing law, but by vehemently stressing an international rule of law and extending its remit into new realms of time and potentiality.

VI. LAW UNBOUND

Increasing "juridicalization" of international life is not merely a reflection of increased interest in international law. That interest is itself in part an expression of a genuine existential spread of law's categories. This spread has vitalized debates in several arenas of domestic and international law—all in the shadow of Iraq.

International law has become an increasingly important medium in which to think about social issues. Concern for the environment, for example, has underscored and been expressed in popular anger at the United States' withdrawal from the Kyoto agreement.⁵⁵ The debates over the status of the International Criminal Court ("ICC") keep alive a flicker of cosmopolitanism and imply a continuing penetration of progressive human rights concerns into international law.⁵⁶ The European Union is seen by some as a model for a consensual internationalism, though given the United Kingdom's highly ambivalent relationship to Europe, its impact in the United Kingdom is not uncomplicated.⁵⁷

52. Blair, *supra* note 40.

53. These falsifiable facts are the grounds for judging legitimacy—though not, tellingly, legality. *See, e.g.,* Anne-Marie Slaughter, *The Use of Force in Iraq: Illegal and Illegitimate*, 98 AM. SOC'Y INT'L L. PROC. 262 (2004).

54. Robin Cook, who had access to the same intelligence as the Prime Minister, resigned because Iraq was no real threat and "probably has no weapons of mass destruction." Cook, *supra* note 38.

55. Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617 (2004).

56. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144 (1999).

57. *See, e.g.,* Anand Menon, *Britain and the Convention on the Future of Europe*, 79 INT'L AFF. 963, 977 (2003) (showing the British attempt to remain in Europe while "ring-fencing" "undesirable" aspects of European Union law).

A revived attention to international economic and trade law reflects the recent upsurge in concern for the iniquities of neoliberal globalization.⁵⁸ This economic legal scholarship can be understood in part as a mediated penetration into international law of the upheaval of the anticapitalist movements heralded by the “Battle of Seattle” in 1999.⁵⁹

Overall, and not only in the United Kingdom, globalization has seen a trend toward the juridicalization of everyday life, “the globalization of the law,”⁶⁰ a multiplication of tribunals and legal enquiries,⁶¹ the penetration of international law into domestic law, the spread of jurisdictional range, and an increasing interest in international law.⁶² This is visible in high-profile cases such as *Pinochet* that turn precisely on questions of international versus domestic law—and decide for international law.⁶³ Also relevant here has been the creep of European law into British courts,⁶⁴ and the 1998 Human Rights Act,⁶⁵ which has, well-illustrating the spread of international legal categories, continued “by a kind of osmosis” the slow incorporation of the European Convention of Human Rights into U.K. law.⁶⁶

The various examples of this juridicalization can be understood in very different ways. For example, Kyoto may be seen as evidence of a new international legal concern for the environment, or it might be pointed out that the targets Kyoto proclaims are inadequate, and/or that few of the signatories are on

58. See, e.g., Fiona Macmillan, *If Not This World Trade Organisation, Then What?*, 15 INT'L COMPANY & COM. L. REV. 75 (2004). At the governmental level, the increasing discursive focus on development and Gordon Brown's much-vaunted “Marshall plan” for Africa also reflects this heightened concern.

59. For more direct examinations of this issue in the field, see BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT'L L. 397 (2003).

60. Michael Ignatieff, Power, Lies and the White House, Amnesty Lecture delivered at Trinity College Dublin (Jan. 13, 2005), available at <http://www.thedubliner.ie/template.php?ID=116&PageName=ignatieff> (last visited Feb. 24, 2005). See also Colloquium, *The Legalization of International Relations*, 96 AM. SOC'Y INT'L L. PROC. 291 (2002).

61. Rosalyn Higgins, *The ICJ, the ECJ and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1, 12–17 (2003).

62. See, for example, *Al-Skeini and Others v. Secretary of State* [2005] H.R.L.R. 3 (Q.B. 2004), which has established that the United Kingdom's obligations under the Human Rights Act and European Convention on Human Rights extends to outposts of U.K. state authority, including Iraq.

63. See Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237 (1999). See also Colloquium, *Pinochet Revisited*, 95 AM. SOC'Y INT'L L. PROC. 139 (2001).

64. Even a case expressing limits to European jurisdiction, such as *Bankovic and Others v. Belgium and 16 Other Contracting States*, 2001 Y.B. EUR. CONV. ON H.R. 204 (Eur. Ct. of H.R.), has been highly controversial, a response that itself implies a sense that European jurisdiction, particularly with regard to human rights, is extending, and that this is an anomalous setback. See Kerem Altıparmak, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, 9 J. CONFLICT & SECURITY L. 213 (2004).

65. According to *Jones v. Saudi Arabia* [2005] U.K.H.R.R. 57, victims of Saudi torture could claim compensation in the United Kingdom, despite Saudi Arabia's claim of state immunity. Constructed from a complex lattice of international law, European human rights law, British human rights law, and the prohibition of torture as *jus cogens*, the case vividly illustrates the slippery boundaries between these various elements.

66. Dominic McGoldrick, *The United Kingdom's Human Rights Act 1998 in Theory and Practice*, 50 INT'L & COMP. L.Q. 901, 901–09 (2001).

track to meet those targets, and/or that those very targets can be used as fig leaves by a state intending to revise its environmental aspirations *downward*, as the United Kingdom has just done.⁶⁷

As will become clear, these legal categories, and the very fact of their spread, can also be deployed ideologically.

VII. IDEOLOGY, ANXIETY, AND THE SIDEKICK STATE

The discourse of international law has thrived in part because it can be deployed by opposing sides in political debate—that enthusiastic deployment is, in turn, evidence of international law’s current importance. I have argued that New Labour support for the United States has taken the shape of an aggressive expansion of the scope of juridical categories; at the same time, insistence on the importance of international law is a crucial axis on which the British and European liberal left criticize the perceived U.S. project.

This is visible in the *Guardian* letter and the proliferation of books and articles denouncing Bush and the neoconservatives—and often Blair—for undermining or “degrading” international law⁶⁸ and creating a “lawless world.”⁶⁹ This anxiety is understandable given the disdain in which some neoconservatism holds international law, as exemplified by Richard Perle’s blithe 2003 assertion that the war on Iraq was illegal but that international law had thereby “stood in the way of doing the right thing.”⁷⁰

In fact, there are diverging strands of neoconservative thinking. For every Richard Perle, there is a John Yoo, eruditely justifying U.S. action in international legal terms.⁷¹ It is true, however, that there is—and, contrary to some claims, always has been⁷²—a vein of unapologetic international legal nihilism in U.S. establishment thinking.⁷³

67. “Mr Blair said he was sure the UK would meet its Kyoto targets, despite falling off course on its self-imposed, more ambitious target of cutting carbon dioxide emissions by 20% by 2010.” *US “Is Ready to Talk on Climate,”* BBC NEWS UK EDITION, at http://news.bbc.co.uk/1/hi/uk_politics/4246271.stm (Feb. 8, 2005) (last visited Apr. 8, 2004).

68. For a passionate exposition of this argument in a historical context, see Bill Bowring, *The Degradation of International Law?*, in *LAW AFTER GROUND ZERO 3* (John Strawson ed., 2002).

69. See PHILIPPE SANDS, *LAWLESS WORLD* (2005).

70. *War Critics Astonished as US Hawk Admits Invasion Was Illegal*, *GUARDIAN*, Nov. 20, 2003, at 4. See also Richard Perle, *Thank God for the Death of the UN*, *GUARDIAN*, Mar. 21, 2003, at 26 (denouncing “the liberal conceit of safety through international law”).

71. John Yoo, *International Law and the War in Iraq*, 97 *AM. J. INT’L L.* 563 (2003).

72. See, for example, the reported editorial in the *Wall Street Journal* quoting the opinion that “we are only going to be able to talk sensibly about [the invasion of] Grenada if anyone who is an international lawyer agrees to keep his mouth shut.” Wade Mansell, *Pure Law in an Impure World*, in *THE CRITICAL LAWYERS’ HANDBOOK 2*, 37 (Paddy Ireland & Per Laleng eds., 1997) (alteration in original) (citations omitted).

73. In addition to Richard Perle’s statements, an extraordinary recent example has been the lumping together by the U.S. Department of Defense of those who have recourse to international law with terrorists. UNITED STATES DEPARTMENT OF DEFENSE, *THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5* (2005), available at <http://www.defenselink.mil/news/Mar2005/d20050318nds2.pdf> (last visited Apr. 9, 2005) (“Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”). See also

This nihilism has no strong equivalent in Europe. Not that there has been no *realpolitik*-al disdain for international law,⁷⁴ but with a few exceptions it has tended to be more decorously veiled,⁷⁵ particularly in the United Kingdom, where the technical tradition takes international law for granted. European and British critics of U.S. action, then, often take Perle-ite neoconservatism at its word and attack the United States for undermining international law.

This opprobrium may be heartfelt, but it also performs the ideological function of deflecting criticism from a Europe self-defined as supporting the rule of law onto a whipping-boy unilateralist United States that has seemed resistant to globalizing law.⁷⁶ This is evident, for example, not only with regard to the legality of the Iraq War but in the debates around Kyoto, and the United States' refusal to back the ICC, an attitude which has earned it the opprobrium of much of Europe.⁷⁷

While many European criticisms of the United States are undoubtedly valid, this smug legalism is also an articulation of a self-aggrandizing and nostalgic European perception that obscures both the continuities of U.S. power between Bush and his predecessors, and the political failings of Europe itself.⁷⁸ France's much-trumpeted opposition to the Iraq War, for example, seems

the 1999 claim of John Bolton, at the time of writing, the U.S. administration's preferred candidate for U.S. Ambassador to the United Nations, to *Insight* that "[i]t is a big mistake for us to grant any validity to international law . . . over the long term, the goal of those who think that international law really means anything [is to] constrict the United States." James P. Lucier, *Just What is a War Criminal?*, *INSIGHT*, at <http://www.insightmag.com/news/1999/08/02/SpecialReport/Just-What.Is.A.War.Criminal-215455.shtml> (June 8, 1999) (last visited Mar. 22, 2005).

74. See, for example, Anthony Eden's insistence that Gerald Fitzmaurice be kept out of discussions about Suez, because "[t]he lawyers are always against us doing anything." ANTHONY NUTTING, *NO END OF A LESSON: THE STORY OF SUEZ* 95 (1967).

75. In Britain, *The Daily Telegraph* newspaper has been an unusually forthright exponent of skepticism, bordering on nihilism, about international law. For example, see its op-ed description of international law as "con-trick" and "forgery." *A Legal Fiction*, *DAILY TELEGRAPH*, available at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2004/02/29/dl2901.xml&Sheet=/portal/2004/02/29/ixportal.html> (Feb. 29, 2004) (last visited Mar. 28, 2005). Also, see its recent op-ed supporting the war despite accepting that "[t]he truth is that the war was probably not legal under international law." *Free Saddam and Jail Blair?*, *DAILY TELEGRAPH*, available at <http://opinion.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2005/03/27/dl2701.xml&Sheet=/opinion/2005/03/27/ixopinion.html> (Mar. 27, 2005) (last visited Mar. 28, 2005).

76. See Philippe Sands, *American Unilateralism*, 96 *AM. SOC'Y INT'L L. PROC.* 85, 85–87 (2002). Peter J. Spiro sees constitutional law as central to the United States' resistant unilateralism, but argues that nonetheless, even in the United States, "international law is becoming a prominent force in virtually every area of domestic law." Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 *LAW & CONTEMP. PROB.* 101, 101 (2004).

77. See the exchange between Ruth Wedgwood, *The International Criminal Court: An American View*, 10 *EUR. J. INT'L L.* 93 (1999), and Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, 10 *EUR. J. INT'L L.* 108 (1999). See also Peter Malanczuk, *The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind?*, 11 *EUR. J. INT'L L.* 77, 89 (2000) (remarking critically that the unilateralism of the United States with regard to the International Criminal Court ("ICC") makes it "a bad example").

78. See Perry Anderson, *Casistries of Peace and War*, *LONDON REV. BOOKS*, Mar. 6, 2003, at 25 ("The current execration of Bush in wide swathes of the West European media and public opinion bears no relation to the actual differences between the two parties in the United States.").

to have been more performative than resolute,⁷⁹ and it is hard to respond without scorn to the British government's opposition to the Guantanamo regime, given that its own functionaries "played a key role" in consigning at least one British prisoner to the facility.⁸⁰

Given their close allegiance, it is particularly difficult for the United Kingdom to oppose the United States systematically on such questions. For a Labour Party still linked to a social-democratic tradition that appeals to the rule of law against arbitrary and right-wing power, this might seem a problem. However, it is by no means beyond the gymnastics of the U.K. government to paint itself as the champion of progressive international law *alongside* the United States in the era-defining Iraq conflict,⁸¹ and as the champion of progressive international law *against* the United States vis-à-vis issues such as Kyoto.

As for other European powers, Kyoto and the ICC are useful to the United Kingdom in that they differentiate it as a good global citizen from an unpopular United States. However, when it legally criticizes the United States, the United Kingdom, far more than its neighbors, stresses its influence, arguing that it is tempering the behavior of its brash partner and bringing it slowly within the orbit of an expanding international legal community.⁸² This is an international law articulation of the United Kingdom's long-cherished self-definition as a civilizing Greece to the United States' imperial Rome.⁸³

Whether it is the antagonistic lawyer-critic of the United States, or its governmental legal conscience, mainstream British international law is predicated on uneasy awareness of the United States' overwhelming global power—an awareness which is also having an impact on the theory of international law.⁸⁴ These two wings of British legal opinion share with each other—and, ironically, with the U.S. legal nihilism they decry—this sense of implacable U.S. power. Post-Iraq political and legal discussion in the United Kingdom is defined by the country's simultaneous subordination to and critique of the United States.

The United States' superpower status of course takes on acute relevance for the sidekick state. Whatever the propagandist uses of the ICC, for exam-

79. See John Vinocur, *U.S.-French Rift on Iraq: a Feud That Wasn't*, INT'L HERALD TRIB., available at http://www.iht.com/articles/2002/11/12/battle_ed3_.html (Nov. 12, 2002) (last visited Mar. 28, 2005).

80. *Guantanamo Man "Suing Government"*, BBC NEWS UK EDITION, at <http://news.bbc.co.uk/1/hi/uk/4240107.stm> (Feb. 6, 2005) (last visited Apr. 8, 2004).

81. In fact, the United States seems more precise and less cavalier than the United Kingdom in its use of juridical categories. In his discussion of trends in international law, for example, after a routine mention of humanitarianism-against-sovereignty, Douglas J. Feith points out more clearly than either Blair or Straw that the invocation of a sovereignty model against terrorism is a separate development. See Feith, *supra* note 25.

82. As regards Kyoto, for example, Blair "said reviving talks with the United States was difficult but possible through patient and successful diplomacy." *Guantanamo Man "Suing Government"*, *supra* note 80.

83. CHRISTOPHER HITCHENS, BLOOD, CLASS AND NOSTALGIA: ANGLO-AMERICAN IRONIES 5 (1990).

84. See UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers & Georg Nolte eds., 2003). See also Christopher J. Borgen, *Presidential Panel: The Impact of the United States on International Law*, 96 AM. SOC'Y INT'L L. PROC. 159 (2002).

ple, its differential relationship to the United States and the United Kingdom is a serious issue, given that their forces may face different legal challenges on shared missions.⁸⁵ Similarly, the question of torture, a growing concern in the United Kingdom, is particularly poignant for the U.K. lawyer, given mounting evidence of U.S. willingness to use extreme and questionable interrogation methods (including against British citizens).⁸⁶

In addition to such specifics, at a fundamental level, the United Kingdom's relation to the United States raises the philosophical issue of law's conjunction with political power.

VIII. SIDEKICKISM, SOVEREIGNTY, AND EMPIRE

Seemingly unfettered power tempts some U.S. apparatchiks to turn their backs on law—conceived as a constraint—rendering any theory of it unnecessary. In the United Kingdom, this nihilism is not an option, and, forced to question law's basic relation to power and imperialism, scholars have moved in the opposite direction, *toward* theory. The discourse and investigation of international law has thrived in the United Kingdom because of, not despite, its sidekick anxiety.

There have for years been U.K. scholars specifically concerned with fundamental theoretical issues:⁸⁷ recent events have unsurprisingly acted as a spur to these approaches, and while they are still a minority current, the United Kingdom is currently fertile ground for what is possibly a renaissance of the New Stream.⁸⁸ Perhaps most telling has been the co-hosting with the Foundation for New Research in International Law (FNRIIL) of conferences at

85. This issue can bleed into other international legal questions. It was, for example, concern over this issue that led Lord Boyce, then chief of defense staff, to demand a written guarantee that the Iraq war was legal. See *Revealed: The Rush to War*, GUARDIAN, available at <http://politics.guardian.co.uk/iraq/story/0,,1423304,00.html> (Feb. 23, 2005) (last visited Mar. 28, 2005).

86. David Hope offers a historical overview of the topic while explicitly raising concerns about U.S. interrogation methods. David Hope, *Torture*, 53 INT'L & COMP. L.Q. 807 (2004). Several British former detainees have alleged torture. See *Letter "Shows Guantanamo Torture,"* BBC NEWS UK EDITION, at <http://news.bbc.co.uk/1/hi/uk/3706050.stm> (Oct. 1, 2004) (last visited Feb. 24, 2005).

87. A few examples of recent book-length critical scholarship (clearly a broad category) associated with the United Kingdom include HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000); PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* (2001) (especially chapters 4–6); SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY* (2000); CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2005); GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES* (2004).

88. This term has been used to describe a disparate and catholic group of writings, broadly constituting the application of the radical techniques of the Critical Legal Studies movement to international law. See Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66 (1991); Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT'L L. 341 (1996); Hilary Charlesworth, *Subversive Trends in the Jurisprudence of International Law*, 86 AM. SOC'Y INT'L L. PROC. 125 (1992); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991).

Birkbeck College in London, which are rapidly looking like crucial arenas for critical theories of the field.⁸⁹

Those theoretical issues in vogue in the United Kingdom vividly reflect contemporary anxieties. For example, one important recent work, Simpson's *Great Powers and Outlaw States*, takes for its subject matter the embedded inequality in juridical sovereignty and the construction of enemies as outlaws.⁹⁰ More broadly, the United Kingdom is important to a renewed scholarly focus on international law and imperialism.⁹¹ Of a crop of recent articles on such topics, several are by scholars associated with the U.K. field, notably Susan Marks's lecture *Empire's Law*⁹² and the contributions to the second FNRIL/Birkbeck conference on *Imperialism and International Law*, which not only took place at a British institution but featured a majority of U.K.-based scholars.⁹³

The United Kingdom is—quite suddenly—heading to the forefront of these approaches and concerns.

IX. THEORY IN THE DEBRIS OF PRACTICE

Current realities have not merely raised fundamental philosophical questions of law and power, nor simply illustrated the limitations of the technical legal critique of political power; they have also undermined the attempts by some theorists to elide the distinction between their critical theories and applied international law. Theory, the most interesting current in the United Kingdom, is currently waxing *specifically as a result of seeming inadequacies of practice*.

The pivotal essay "*We Are Teachers of International Law*," though its authors may not intend it to, reads as anxious, even skeptical, as to the possibility of tying a progressive application of international law to its critical theorizing.⁹⁴

A concern for international law *tout court*, as well as specific disquiet over Iraq, occasioned the *Guardian* letter—"with key figures in the U.S. administration so apparently cynical about international law, and with their supporters in the UK and elsewhere so focused on spin, didn't law really need championing?"⁹⁵

89. See, e.g., *The New International Law*, Birkbeck University of London, at http://www.bbk.ac.uk/law/workshops/international_law.shtml (June 12, 2003) (last visited Feb. 24, 2005) (providing details of the first such conference).

90. See SIMPSON, *supra* note 87 (making explicit this topic's relation to current questions of relative power).

91. The most systematic historical examination of this theme is by Anghie, a U.S.-based scholar, but it is perhaps not coincidence that his book is published in the United Kingdom, by Cambridge. ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

92. Susan Marks, *Empire's Law*, 10 IND. J. GLOBAL LEGAL STUD., Winter 2003, at 449. See also Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383; Colloquium, *Unmasking International Law: Stories and Discourses of Empire, Progress, Exclusion and Inclusion*, 94 AM. SOC'Y INT'L L. PROC. 53 (2000).

93. For details and a list of papers, see *Imperialism and International Law*, Birkbeck University of London, at <http://www.bbk.ac.uk/law/workshops/international2004.shtml> (May 9, 2004) (last visited Feb. 24, 2005).

94. Craven et al., *supra* note 5.

95. *Id.* at 366.

This progressive defense of international law, however, came up against the fact that these scholars were not the only champions of international law—so too were Tony Blair and many in the U.S. administration, as the article acknowledges.

A final line of the *Guardian* letter stresses that “even with” U.N. Security Council authorization, “serious questions would remain” because “[a] legal war is not necessarily a just, prudent or humanitarian war.”⁹⁶ This seeming afterthought quietly undermines the letter’s project of legal critique, stressing that law is *not* the most stable, coherent, or systematic ground for the critique of power.

Several of the authors of “*We Are Teachers of International Law*,” associated with critical theories of the field, recognized the irony involved in their replicating categories that they questioned in their theoretical lives:

How was it that we were now international law’s earnest champions? Had not some of us based our work on the effort to knock international law off its pedestal, and expose its darker dimensions? Had we not routinely criticized sovereignty as purely formal, frequently oppressive, and lacking explanatory power? Yet here we found ourselves invoking international law, and with it state sovereignty, in defence of Iraq.⁹⁷

None of this undermines these writers’ critical analyses. Not only do they remain trenchant, but it is precisely out of fidelity to those analyses and their categories that the writers express anxiety over the efficacy of their “practical” recourse to international law—*anxiety that is proved correct*. It is the theories, not their effort to intervene practically, that retain their teeth.

Though it is illuminating on the problems and ironies raised by the *Guardian* letter, it is telling that the later article’s concluding section, “Lessons for critical practice,” in fact expounds no lessons beyond the slightly vague insistence that “context counts.”⁹⁸ “*We Are Teachers of International Law*” does not explicitly invalidate the attempt at progressive practice;⁹⁹ however, in acknowledging the failings of even a “critical practice” informed and motivated by the very perspective that underpins the writers’ theory, the article illustrates the necessity of conceptually disaggregating critical theories from practice.

Theory’s job is to make sense of the world. While of course international legal theory must *make sense* of practice and will have *ramifications* for it (and may in some cases have a more direct relationship), we should no more demand that it prove itself in narrowly utilitarian terms than that political theory be judged by how easily a government can “apply” it in day-to-day politics,

96. *Id.*

97. *Id.*

98. *Id.* at 374.

99. See MIÉVILLE, *supra* note 87, at 295–304 (discussing the problems facing any potential progressive practice).

or that theology justify itself by proving that it can be “applied” to the running of a church service. Indeed to insist that “applicability” is the key ground for judging theory is deeply ideological: by assuming the practice of international law as the endpoint of analysis, it renders it theoretically irreducible and opaque. This is to make a black box of the very phenomenon of which theory should make sense.

There is then no reason to bemoan the U.K. theory-practice split, *so long as* theory is being pursued. That it currently is, with more verve than for some time, is a positive response to the upheaval in international law in the United Kingdom.

As moments of cultural anxiety go, this is peculiar. It is not a reflection of the marginalization of international law but of its neurotic expansion. International law’s “fear of the periphery”¹⁰⁰ has been eclipsed by the *anomie* of the mainstream. Theory is wrestling not with the usual issue of law being ignored, but with law’s missionary application at the service of imperialist power and its simultaneous, furious, and impotent assertion against imperialism. The task for the scholar of international law is above all to make sense of this extraordinary conjuncture: it is thankfully to that, in defiance of pragmatism, that many in the sidekick state and elsewhere are turning.

100. Gerry Simpson, *On the Magic Mountain: Teaching Public International Law*, 10 EUR. J. INT’L L. 70, 73 (1999).