I. INTRODUCTION

The Charter of the United Nations (Charter) saddled the post-war international law enterprise with expectations that, if not necessarily unreasonable, were surely idealistic. This is perhaps nowhere more evident than in the Charter’s preambular language and in its Purposes and Principles.¹ Succeeding generations saved from the scourge of war, international peace and security maintained, friendly relations among nations developed, all of these aspirations and more were set to be achieved, indispensably, of, with, and through law. Indeed, it is ironic that a similar faith in law as an instrument for justice and peace animated the thinking of Ethiopian Emperor Haile Sellassie I: ‘law is the greatest benefit to every man. It is from the equity of law that honour and advantage arise; it is from the deficiency of law that distress and damage result; it is through failure to set up law that violence and injury grow.’²

Haile Sellassie, of course, would find himself so sorely disappointed by the United Nations’ predecessor institution, the League of Nations.³

To say that the Charter acts as the constitutional framework, the undergirding rubric, for international law today, however, begs the question of purpose. What is

¹ See UN Charter, arts 1, 2.
international law for?\textsuperscript{4} The text provides a useful starting point for arriving at an understanding of the Charter, of course, but alone it does not, and cannot, suffice. Contending actors will always insist, as they always have, that theirs are treaty interpretations arrived at ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’\textsuperscript{5} Like any treaty, furthermore, the Charter develops organically, to suit the needs of the interpreter, and it is used as a vehicle to facilitate political struggle, to bludgeon, to shame.

This paper, which views international law as an unfolding discourse between contending actors that defies simple categorisation, examines the false choice often put forward between a strict legal positivism and a natural law approach to understanding the operation of international law today. It begins by briefly describing these two ‘ideal types,’ poles at either extreme, and then argues that international actors actually engage with international law according to both paradigms and neither, in whole and in part, instrumentally and dynamically. To demonstrate this, this paper looks at a number of the testimonies by witnesses before the Chilcot Iraq Inquiry (Inquiry) during the week of 25 January 2010 that grappled with the proper application of the law related to the use of force to the March 2003 invasion of Iraq. In the final analysis, rather than wrapping oneself in the comforting cloak of either legal positivism or natural law, a more chaotic and uncomfortable approach for understanding international law seems to be both preferable and of greater explanatory value.


II. LEGAL POSITIVISM AND NATURAL LAW

In our complex world, perceptions shape one’s engagements with that which lies beyond the self. While never being fully capable of displacing the ‘iron and blood’ in which ‘[h]istorical experience is written,’ how one views external phenomena affects how ‘problems’ are identified, how the ‘other’ is conceptualised. Competing variables and disparate narratives present themselves, and recourse in these debates is often had to the simplistic seductions of binary ‘solutions.’ In this respect, international law scholarship often puts forward a false choice between legal positivism and natural law.7

For legal positivists, the crux of any legitimacy that international law can command, and any concomitant obligation to obey, lies in the concept of consent, the ‘metaprinciple of sovereign liberty.’8 The idea here is that States have consented to, and continue to consent to, international law as such, the idea of international law, an international law, and also that they have consented to, and continue to consent to, specific international law obligations, either to do or to abstain from doing certain acts, within this discourse. Although never quite explaining why consent, once given, should somehow be irrevocable,9 positivists contend that consent, once demonstrated, justifies fealty to particular legal norms. For them, the tabula rasa of law was swept clean at international law’s inception. As the Permanent Court of International Justice

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7 See R Higgins, ‘Ethics and International Law’ (2010) 23 Leiden J Int’l L 277, 279; JI Charney, ‘Universal International Law’ (1993) 87 AJIL 529, 531-32. In a not unrelated context, Kennedy discusses ‘hard’ and ‘soft’ rhetorics in sources of law theory and argues, respectively, that ‘[t]he point of a consent-based source is that it binds; that it is authoritative even when other considerations -- including notions of the good -- push an actor in another direction. The point of soft sources is that they are authoritative: that they bind even the state which does not imagine compliance to be in its interest -- which does not consent.’ D Kennedy, ‘The Sources of International Law’ (1987) 2 Am U J Int’l L & Pol’y 1, 21.
(PCIJ) put it in the *Case of the SS Lotus* (*Lotus*), the presumption lies very much against restrictions on the freedom of States, with ‘[t]he rules of law binding upon States [. . .] emanat[ing] from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.’

Let us consider the two sources of law that the PCIJ referred to in *Lotus*, international treaty law and customary international law. The foundation of the modern law of treaties, the 1969 Vienna Convention on the Law of Treaties (VCLT), very much reflects positivist concerns and understandings of law. According to it, not only do all States possess an international legal personality sufficient to conclude treaties, the principle of ‘free consent’ is said to be ‘universally recognized.’ Consent appears both positively, tying together States and obligations through the *pacta sunt servanda* principle, and negatively, as a defence to such encumbrances.

Although, by default, treaties have no terminal date as such, the VCLT preserves the centrality of consent as a reference point through such provisions as those that govern a ‘fundamental change of circumstances,’ with States being able to withdraw from or terminate a treaty when the change at issue did not exist at the time that the treaty was concluded, the change is unforeseen and the circumstances were essential to the giving of consent to be bound in law, and the change can be regarded as radical vis-à-vis the extant treaty obligations. The VCLT’s codification of the concept of peremptory norms of general international law, or *jus cogens*, also, at least in part,

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10 *Case of the SS Lotus* (*France v Turkey*) [1927] PCIJ Series A No 10 4, 18.
11 See VCLT (n 5) art 6.
12 Ibid preamble.
13 See ibid art 26.
14 See, for example, the VCLT’s rules in articles 34-38 regarding rights and obligations for third States.
15 See VCLT (n 5) art 62(1).
reflects a consent-centric notion of international law obligation, though here the focus is not on determining consent as regards a single State but, rather, with assessing whether a particular norm enjoys sufficient acceptance and recognition ‘by the international community of States as a whole.’

Customary international law, the second source of law that the PCIJ referred to in *Lotus*, appears in article 38(1)(b) of the Statute of the International Court of Justice (ICJ) as ‘evidence of a general practice accepted as law.’ As with international treaty law, here, too, notions of consent underlie the basis for legal obligation, with article 38(1)(b) stressing that the relevant practice must be ‘accepted as law.’ The ICJ’s jurisprudence also points to the consensual nature of customary international law. According to it, to be sustainable, a customary norm must satisfy both a State practice element and a psychological, mental element, the latter element being the sense that States feel that they are acting or refraining from acting out of a sense of legal obligation. It is this second element that most clearly reflects the positivist streak, though this is reinforced by the need for ‘constant and uniform usage practised by the States in question.’ As the ICJ put it in *North Sea Continental Shelf*, the acts at issue must ‘be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.’ Once a case has been made that a particular customary international law norm has emerged,

16 Ibid art 53 (defining such a norm as one that is ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’).
18 *Columbian-Peruvian Asylum Case (Columbia v Peru) (Judgment)* [1950] ICJ Rep 266, 276.
and unless or until a new norm emerges to supplant it, States are bound to comply with it, *ad infinitum*. The only exception to this, an exception that harkens back to the consensualism of positivism, is the case of the ‘persistent objector.’

Where positivism places a premium on consent and presumes States’ freedom to act as they wish absent a demonstration of having agreed otherwise, natural law theorists refuse to perceive of an international legal order with purely voluntarist moorings. According to them, the new paradigm that the Charter can be said to have ushered into being cannot sustain itself on a purely contractual basis. The fear here is that the ‘higher values’ of the post-war era, the values of human rights, peace and security, sustainable development, and economic concern, will inevitably have to be sacrificed in a world order understood in purely horizontal terms, and to ‘check’ the ‘egoistic impulses’ of States in this regard, a vertical ‘reference point’ is needed. ICJ Judge Antônio Augusto Cançado Trindade captured this idea well in his separate opinion in *Case Concerning Pulp Mills on the River Uruguay (Pulp Mills)* when he stated that ‘human conscience, the universal juridical conscience, [. . .] is [. . .] the ultimate material “source” of all Law, and of the new *jus gentium* of our times.’

In this vision, consent, explicit or otherwise, seems to act as but an encumbrance to the great project of international law.

Indeed, in his 2005 General Course on Public International Law at The Hague Academy of International Law, Judge Cançado Trindade, then Judge of the Inter-American Court of Human Rights and not yet at the ICJ, put forward one of the most

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sustained and cogent critiques of positivism in the context of international law.\textsuperscript{22} For Judge Cançado Trindade, consent, although perhaps not without some role to play in the international legal system, can never be allowed to outweigh ‘unselfish’ considerations when ‘fundamental’ imperatives are at stake. As he put it in his separate opinion in \textit{Pulp Mills}, the reference point is not consent but, rather, the ‘universal juridical conscience,’\textsuperscript{23} and it is this, with its ‘irreducible meaning [that] is always present, corresponding to the \textit{recta ratio} of the founding fathers of International Law[. . .], which appears in fact as the \textit{ultima ratio}.\textsuperscript{24} Conscience, though expressed differently in different cultures, is said to act as the common denominator in human experience and in humanity’s seemingly insatiable search for meaning, and such it is said to be with international law.\textsuperscript{25}

Although the natural law impulse permeates many aspects of international law, its influence is perhaps nowhere felt more so than it is in the very concept of \textit{jus cogens}. \textit{Jus cogens} does, as stated above, make some nod to positivist concerns, with such norms having to enjoy sufficient acceptance and recognition ‘by the international community of States as a whole,’ but the fact that the various elements contained in the definition of \textit{jus cogens} themselves seem to raise more questions than they answer and that \textit{jus cogens} norms ‘trump’ States’ obligations in cases of conflict under both treaty law\textsuperscript{26} and customary international law\textsuperscript{27} suggests that this concept conveniently

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\textsuperscript{23} Ibid in 316, 184.

\textsuperscript{24} Ibid 181-82. But see Koskenniemi (n 8) 5 (expressing the liberal scepticism that ‘[a]ppealing to principles which would pre-exist man and be discoverable only through faith or \textit{recta ratio} was to appeal to abstract and unverifiable maximums which only camouflaged the subjective preferences of the speaker. It was premised on utopian ideals which were constantly used as apologies for tyranny.’).


\textsuperscript{26} See VCLT (n 5) arts 53, 64.
\end{footnotesize}
acts to further the natural law instinct of ‘saving’ States ‘from themselves.’ As Judge Cançado Trindade has put it, the substance of *jus cogens* is elastic and flexible, an ‘open category, which expands itself to the extent that the universal juridical conscience (the material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation." One sees in *jus cogens* utopian visions of what law ‘could be,’ what it ‘can be,’ indeed, the possibilities of ‘new man,’ the ‘advent of a new international legal order committed to the prevalence of superior common values, and to moral and juridical imperatives, such as that of the protection of the human being in any circumstances, in times of peace as well as of armed conflict."

Some natural law theorists also argue that persistent objector theory provides no shield to States when certain legal norms are at issue. In *Michael Domingues v. United States*, for example, the Inter-American Commission on Human Rights stated that a State that persistently objects to a *jus cogens* norm will nevertheless remain bound by it. The VCLT makes no reference to this, of course, either in the context of *jus cogens* norms or otherwise, but at least within the context of the Inter-American human rights system, a State’s express lack of consent, indeed, its categorical defiance of consent, cannot shield it from particular obligations under international law. *Lotus* is flipped on its head, with the presumption now lying very much in favour of restrictions on the freedom of States.

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28 See RB Barnidge, Jr., ‘Questioning the Legitimacy of *Jus Cogens* in the Global Legal Order’ (2008) 38 IYBHR 199.
29 Cançado Trindade (n 22) in 316, 360. But see Armed Activities on the Territory of the Congo (New Application: 2002) (Jurisdiction and Admissibility) (Democratic Republic of the Congo v. Rwanda) (Judgment) [2006] ICJ Rep 6, 88 (Judge Dugard, separate) (cautioning that the scope of *jus cogens* is not without limits and that the concept should not be used as an instrument to upend accepted international law doctrine).
30 Cançado Trindade (n 22) in 316, 360.
The development of legal rules governing reservations to treaties reflects the growth of natural law discourse, as well. Classically, this area of law has been mediated by individual States themselves, and the rules on reservations in the 1951 Reservations to the Convention on Genocide Advisory Opinion32 and those contained in articles 19-23 of the VCLT reflect this.33 The fact that the VCLT’s reservation rules have not been amended might suggest the appropriateness of them from the perspective of States, but certain currents of opinion have challenged this. United Nations Human Rights Committee General Comment Number 24 reflects the concerns of natural law advocates in this regard in that it erects a restrictive lex specialis reservations regime for human rights treaties that essentially ‘interprets away’ States’ ability to formulate reservations.34

Of course, while natural law arguments attempt to ‘civilise’ States by ‘taming’ their consent, modern proponents of natural law in international law do not justify themselves as such on the basis of what United States Supreme Court Justice Oliver Wendell Holmes would refer to as that ‘brooding omnipresence in the sky.’35 One could be forgiven, however, for sensing something of legerdemain in this approach, though the same could also be said for what ‘counts’ as ‘consent’ under positivist discourse. Are not, to quote Russian Marxist Georgii Plekhanov, ‘[r]eligion, conscience, morality, right, law, family, state, [. . .] but so many fetters forced upon me in the name of an abstraction, but so many despotic lords whom “I,” the individual

33 On reservations to treaties generally, see Cançado Trindade (n 22) in 317, 66-78.
34 See General Comment No 24, CCPR/C/21/Rev.1/Add.6 (1994). ‘Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.’ Ibid para 18.
35 Southern Pacific Company v Jensen, 244 US 205, 222 (1917) (Justice Holmes, dissenting).
conscious of my own “concerns,” combat by every means in my power? Is not this concern with natural law, and consent, but subterfuge, but ‘religion which has changed its supreme beings?’

III. THE CHILCOT IRAQ INQUIRY

An examination of sources of law theory, international case law, and the ‘teachings of the most highly qualified publicists of the various nations,’ then, leaves one convinced of international law’s internal ‘schizophrenia.’ In the abstract, it appears both defiantly positivistic, with no appreciation for that which lies beyond consent, and defiantly naturalistic, with little concern for State consent. Paradoxically, neither of these explanatory paradigms, at least when understood in their purest form, can admit of the existence of the other, much less can it concede that its opposite number can operate simultaneously within what is actually an unfolding discourse of law.

Although the debate between legal positivism and natural law has classically animated international law scholarship, it risks obfuscating a more nuanced and arguably more accurate understanding of the operation of international law today. To support this claim, one could refer to numerous examples from the practice of both State and non-State actors, practice that necessarily permeates and underpins the international law enterprise. What follows is an in depth examination of but one of these examples, namely a number of the testimonies by witnesses before the Inquiry during the week of 25 January 2010 that grappled with the proper application of the law related to the use of force to the March 2003 invasion of Iraq.

37 Ibid. See Koskenniemi (n 8).
38 Statute (n 17) art 38(1)(d).
The testimonies of Sir Michael Wood, Elizabeth Wilmshurst, and Rt. Hon. Lord Goldsmith QC before the Inquiry during that week in late-January 2010 each grappled with the proper application of the *jus ad bellum* to the invasion of Iraq, and implicit in each of them was the conviction of consent, the idea that since the United Kingdom had voluntarily agreed to be bound by use of force law as a general matter that its actions could legitimately be judged according to this rubric as a matter of law. According to this positivist line of thinking, the United Kingdom, having expressed its will as sovereign in becoming a State party to the Charter, had agreed to comply with its general prohibition on the threat or use of force, the only exceptions to this being in cases of self-defence and when the United Nations Security Council has authorised ‘such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.’

Sir Michael, Ms. Wilmshurst, and Lord Goldsmith also took for granted that the self-defence exception did not apply on the facts of Iraq, and thus, their testimonies turned to whether it could be said that the Security Council had somehow authorised the invasion. Here, language became key, the shared position that the United Kingdom had voluntarily agreed to be bound by use of force law having essentially, and simply, made possible a landscape upon which could be painted one’s particular natural law preference. Primarily at issue in this regard was the interpretation that *should* be given to the following paragraph in Security Council Resolution 1441, particularly to its ‘to consider’ language:

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39 In announcing the establishment of the Inquiry in the House of Commons on 15 June 2009, then Prime Minister Gordon Brown set out the Inquiry’s jurisdiction ratione materiae and jurisdiction ratione temporae, covering the events preceding the actual invasion of Iraq in March 2003 through to the invasion itself and the ensuing occupation and reconstruction efforts and ending in late-July 2009. See Hansard HC vol 494 cols 23-24 (15 June 2009).
40 See Charter (n 1) art 2(4).
41 See ibid art 51.
42 Ibid art 42. This, of course, leaves to the side the parallel operation of the customary international law regime related to the use of force. On this, see *Nicaragua* (n 17) 92-97.
The Security Council,

[. . .]

12. Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security. 43

While none of the witnesses formally argued that the express language in Resolution 1441 acted as anything but the controlling law on the facts of Iraq, the way in which they engaged with paragraph 12’s ‘to consider’ language was remarkable for what it revealed about the way in which international actors actually engage with the law in this area. For example, despite the fact that former Legal Adviser in the Foreign and Commonwealth Office (FCO) Sir Michael clearly knew that Resolution 1441’s paragraph 12 had settled on ‘to consider’ language, he testified before the Inquiry that the actual use of force in Iraq would not have been authorised ‘without a further decision of the Security Council;’ 44 that ‘it was for the Security Council, when the matter went back to it in accordance with paragraphs 4, 11 and 12, to take a decision on whether there had been a material breach that was sufficiently grave to justify the use of force;’ 45 that ‘it was for the Council to take the decision on whether force could be used;’ 46 and that ‘you needed the material breach, a report to the Council and a decision by the Council that this was a sufficiently serious breach to merit the resumption of the use of force.’ 47 Earlier, in a 15 January statement to the Inquiry, Sir Michael had concluded that a proper legal interpretation of Resolution 1441 led to the view that the ‘purpose of Council consideration and assessment was for the Council to decide what measures were needed in the light of the circumstances

46 Ibid 26 (emphasis added).
at the time.’\textsuperscript{48} Former Deputy Legal Adviser in the FCO Ms. Wilmshurst was of a similar mind as Sir Michael on the \textit{jus ad bellum} issue, and like him, she also ‘mixed and matched’ as to the ‘to consider’ language: ‘No, I really do think the difference was whether -- was that, in 2002, the Council had said any \textit{decision} on material breach will be for the Council to \textit{consider} and \textit{assess}, and that was the major difference.’\textsuperscript{49} Clearly, then, although recognising the primacy as such of the language that was chosen in Resolution 1441, these perspectives seemed to be less concerned with the \textit{express} language that was used (i.e., ‘to consider’) than with the \textit{meaning} that they wished to attach to it (i.e., ‘to decide’).

In his testimony before the Inquiry on 27 January, Lord Goldsmith, who at the time of the invasion had been Attorney General, expounded upon the ‘revival’ justification for the use of force in March 2003.\textsuperscript{50} He also grappled with the ‘to consider’ language in paragraph 12, but unlike his colleagues, he did not feel himself at liberty to infuse the \textit{express} language that was used (i.e., ‘to consider’) with a meaning that approximated, as he understood the phrase, ‘to decide,’ and his testimony was very clear on this. As he put it, ‘[i]n one sense, the wording is crystal clear, because these members of the Security Council, who know the difference between the word “decide” and “consider the situation”, chose, I believe quite deliberately to use the words “consider the situation”, and they could have said “decide” if that’s what they meant.’\textsuperscript{51} The fifteen States in the Security Council,

furthermore, ‘knew very well the difference between “consider” and “decide” [. . .] a deliberate choice [. . .] you draw the conclusion that it was intended that there should not be a decision.’\textsuperscript{52} Obviously, for Lord Goldsmith, the distinction between ‘to consider’ and ‘to decide’ was key: it was, in effect, the difference between legality and illegality, a difference of substance, a difference of kind.

Since Sir Michael, Ms. Wilmshurst, and Lord Goldsmith had reached such diametrically-opposed legal conclusions on the applicability or otherwise of one of the two recognised exceptions to article 2(4) of the Charter, can it be said that one of them had ‘incorrectly’ applied the ‘correct’ rubric for interpreting the law in this area? This begs the question of how Security Council Resolutions are to be interpreted. The ICJ provided some guidance on this in its 1971 \textit{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion (Namibia)}.\textsuperscript{53} In that case, it had to determine how to interpret the binding nature of Security Council Resolutions. It adopted a case-specific approach to language that focussed on the words used in the Resolution at issue, the discussions that lead up to its adoption, which Charter provisions were referred to in the Resolution, and any other considerations that could potentially be regarded as being of use.\textsuperscript{54} Ironically, Sir Michael made a similar point about the interpretation of Security Council Resolutions in his 15 January statement to the Inquiry,\textsuperscript{55} and Lord Goldsmith expressly referred to

\textsuperscript{52} Ibid 155. See ibid 77-80.
\textsuperscript{54} See ibid 53.
\textsuperscript{55} See Sir Michael (n 48) 5. See also Sir Michael (n 44) 25 (stating that ‘[t]he degree of weight, it is quite a subtle thing obviously. The principal thing is the language of the resolution, but the extent to which you can pray in aid other statements made to the side depends very much on the circumstances.’).
the *Namibia* precedent in his testimony.\(^{56}\) Obviously, though, their conclusions could not have been more different.

What must surely be acknowledged, or, to phrase the matter more appropriately for the ideologues on either side in the debate, conceded, is that the witnesses had each invoked the interpretive indicia referred to in *Namibia* with an undeniable degree of rigour in their testimonies before the Inquiry. It was not a matter of any of them having not ‘known the law,’ much less having ‘incorrectly’ interpreted and applied it to the facts of Iraq.\(^{57}\) Each of them sincerely believed that their interpretation of the *jus ad bellum* that the United Kingdom had consented to under international law was ‘correct’ on the facts of Iraq. There was no question of Sir Michael, Ms. Wilmshurst, or Lord Goldsmith having not scrupulously combed the record, as even the most cursory review of the transcripts of their testimonies reveals.

Ms. Wilmshurst, reflecting upon the fact that international law often operates as a ‘court-less’ legal system, argued in her testimony that ‘simply because there aren’t courts, it ought to make one more cautious about trying to keep within the law, not less.’\(^{58}\) Another way of phrasing this in the present context would be to say that in grappling with international law’s general prohibition on the threat or use of force, the *lex generalis*, and its two exceptions, self-defence and when the Security Council has authorised force, the *lex specialis*, particular care should be taken to maintain the default posture of the prohibition and to only exceptionally contemplate the possibility of a legal case for force.

The argument that the *lex specialis derogat generali* principle somehow ‘settles’ the *jus ad bellum* issue on the facts of Iraq, or the related implication that it

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\(^{56}\) See Lord Goldsmith (n 51) 120-22.

\(^{57}\) Likewise, it was not a matter, as the Dutch Committee of Inquiry on Iraq put it in the Dutch context, of the Dutch Ministry of Foreign Affairs’ interpretation of international law on the invasion of Iraq ‘not [having been] based on a thorough, up-to-date legal analysis.’ *Rapport* (n 50) 531.

\(^{58}\) Wilmshurst (n 49) 9.
necessarily makes the legal case for force ‘less tenable,’ is, however, ultimately unconvincing, because of its inherent circularity. The lex generalis and lex specialis are not ‘out there,’ ‘in the sky.’ It is not a matter of ‘carrying out orders,’ much less communing with that ‘brooding omnipresence.’ The law in this context is created by women and men on the ground, and it is modified through the acts and omissions of State and non-State actors alike. The lex generalis and lex specialis are constantly evolving, though, to be sure, there is a jurisprudence and ‘accepted wisdom’ upon which they draw. Neither Lord Goldsmith nor those who found against the lawfulness of the 2003 invasion of Iraq denied the exceptional nature of the use of force under international law. Indeed, both sides in the debate acknowledged it and could not plausibly have articulated their arguments without having done so. Indeed, both sides were sincerely convinced that they were waving the ‘mantle of law,’ that they had kept, to use Ms. Wilmshurst’s phrase, ‘within the law.’

Ultimately, the lawyerly longing for terra firma, that seemingly insatiable desire, in other words, to ‘look[] at a text objectively,’59 to insist upon the ‘objective view,’60 the ‘true legal position,’61 is akin to the quest for the holy grail. As Ago, writing in 1957, put it, ‘words have no meaning of their own, endowed with an objective existence which one has only to specify in order to ensure exact understanding; [. . .] they only have the meaning which is conferred on them by use; and [. . .] therefore one must use them with the greatest care if the meaning one wishes to convey is to be correctly understood.’62 Recourse to ‘objectivity’ and

59 Sir Michael (n 44) 23.
60 Wilmshurst (n 49) 17.
61 Sir Michael (n 44) 47.
‘truth,’ here as elsewhere in the law, too often obscures a ‘hegemony of neutrality’ that seeks to position itself ‘above’ politics even though it is necessarily ‘of’ politics.\textsuperscript{63}

Recognising the ‘mushiness’ of law in this context does not absolve the lawyer from having to ‘take a stand’ for his or her cause or client. As Lord Goldsmith put it in his testimony before the Inquiry, ‘at the end of the day you can’t throw up your hands and say, “I don’t really know what this means.”’\textsuperscript{64} Whether one views this as freedom or as debilitation reflects one’s view of the role of law in international affairs and the efficacy of legal argument. It mirrors Meursault’s sardonic realisation in Camus’ \textit{L’Étranger}, ‘J’ai pensé à ce moment qu’on pouvait tirer ou ne pas tirer.’\textsuperscript{65} ‘Tirer ou ne pas tirer,’ arguing the legal case for or against the March 2003 invasion of Iraq, is an ‘exercise in choice.’\textsuperscript{66} Ultimately, it is also a matter of preference. As Lord Goldsmith candidly put it in his testimony before the Inquiry, it is a matter of asking oneself: “Which side of the argument would you prefer to be on?”’\textsuperscript{67} And lawyers, much less \textit{international} lawyers, have nothing particularly special to say on matters of ‘right’ and ‘wrong.’\textsuperscript{68}

IV. CONCLUSION

Circling this discussion more squarely back to the dynamic between legal positivism and natural law, what conclusions can be drawn? Clearly, as the debate surrounding the lawfulness of the March 2003 invasion of Iraq demonstrates, the

\begin{footnotesize}
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\item \textsuperscript{64} Lord Goldsmith (n 51) 44.
\item \textsuperscript{65} A Camus, \textit{L’Étranger} (Gallimard, Paris, 1953) 84.
\item \textsuperscript{66} \textit{Congo} (Judge Dugard, separate) (n 29) 89 (asserting that, ‘[w]here authorities are divided, or different general principles compete for priority, or different rules of interpretation lead to different conclusions, or State practices conflict, the judge is required to make a choice. In exercising this choice, the judge will be guided by principles (propositions that describe rights) and principles (propositions that describe goals) in order to arrive at a coherent conclusion that most effectively furthers the integrity of the international legal order.’).
\item \textsuperscript{67} Lord Goldsmith (n 51) 118.
\item \textsuperscript{68} In her testimony before the Inquiry, Ms. Wilmshurst famously dismissed the legal opinion of Rt. Hon. Jack Straw MP, Secretary of State for Foreign and Commonwealth Affairs between 2001 and 2006: ‘He is not an \textit{international} lawyer.’ Wilmshurst (n 49) 8 (emphasis added).
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claims of legal positivism and natural law alone are insufficient as explanatory paradigms for understanding the operation of international law today.

The shared position of Sir Michael, Ms. Wilmshurst, and Lord Goldsmith that the United Kingdom had consented to be bound by use of force law tells us very little about that law’s *substance on the facts of Iraq*, and it is only that law, inconclusive and indeterminate as it is, that a positivist would say can legitimately constrain the State as a matter of law. Given this inability of positivism to clarify the substantive law on the facts of Iraq, natural law theorists can, in perfectly predictable fashion, seize upon this space of possibility by ‘reading in’ their particular preferences and arguing, as witnesses before the Inquiry did, that their arrived at interpretative conclusions lay squarely ‘within the law.’

The interplay between legal positivism and natural law leads both sides in legal debate to tighten up their arguments so that they become unequivocal, uncompromising. In doing so, however, they commit the great cardinal sin of international law: idolising law and obfuscating politics for the sake of partisan advantage.