THE REALITY OF INTERNATIONAL LAW

Sir Michael Wood, K.C.M.G.

Michael Wood is a Senior Fellow of the Lauterpacht Centre for International Law at the University of Cambridge and a member of the International Law Commission. He is a barrister at 20 Essex Street, and was Legal Adviser to the Foreign and Commonwealth Office from 1999 to 2006.

Public international law has never been as prominent as it is today. This stems from the arrest of the former President of Chile, Augusto Pinochet, in a London clinic in October 1998. That was followed in short order by the controversial decisions to use force against Serbia in March 1999, against Al-Qaeda and their Afghan Taliban supporters in October 2001, and above all against Iraq in March 2003. Then there was the 'global war on terror', proclaimed in the aftermath of 9/11, with accompanying allegations of torture, extraordinary rendition, and detention without trial.

Over the last decade international law has been constantly invoked by politicians and the media, not least in the UK. Domestic courts in many countries are increasingly invited to grapple with international law. The work of international courts and tribunals continually expands, both in substantive range as well as quantitatively.

Does this mean that international law is thriving? Not necessarily. Some six years ago, immediately prior to the invasion of Iraq, writing in *International Law* (edited by Malcolm Evans), I said:

> "Perhaps the two greatest achievements of international law over the last century are, first, the restrictions on the use of force embodied in the Pact of Paris and then in the United Nations Charter; and, secondly, the development of human rights and

humanitarian law and their enforcement. Both these developments are currently under severe challenge."

International law has gained in profile. But has it gained in strength? To some degree it has. Enforcement is still the Achilles heel, but there is far more opportunity for enforcement, including through the domestic courts, than just twenty years ago as the Cold War drew to a close. Yet there remain grave weaknesses. Some weaknesses are inherent in the international system, still largely based on sovereign States. Others could be alleviated. My remedies would include following:

- Better and more international law education is needed, in particular for practitioners and judicial studies. The first decade of the twenty first century is no time to cut back on international law courses, on dubious budgetary grounds and for spurious academic reasons, as sadly happened a few years ago at one law faculty highly regarded in the field.

- International law should form a discrete and compulsory part of practitioner training. Judicial training could concentrate on the sources of international law.

- A more responsible approach to international law on the part of legal advisers, advocates, and the judiciary, is called for. Advocates, in particular, should nor 'use' international law as though it were no more than a debating tool or add-on to a weak or even hopeless case. All concerned should be committed to international law as a system, just as they are to their own domestic legal system.

- There should be somewhat greater restraint on the part of writers in international law, especially those in academe, notwithstanding the pressure to publish inherent in the current university funding system. Not every PhD deserves to be a book; not every MA essay an article. Publishers could be more discriminating,

though there is of course not necessarily a direct correlation between quality and profit. There is much to be said for the non-profit making publisher.

- Writers should take care to distinguish between the 'is' and the 'ought', the *lex lata* and the *lex ferenda* (or as often as not the *lex volenda*). Nothing is more liable to bring international law into disrepute than unthinking idealism. Which is not to say that we should not aim to be realistic idealists.

- And (a rather selfish point of view), writers should write what is useful for practitioners. This, on the whole, is what they do, or seek to do, in other fields of law. Why should international law produce so many theorists, whose writings have little if any grounding in reality? A client is unlikely to be impressed by being told that there are no rules on a particular matter, only a process (which is not to say that process, or procedure, is not often important). Or that some international 'constitution' demands that the answer is so-and-so.

I now return to the one of the great achievements of international law in the twentieth century: the restrictions on the use of force. I have suggested elsewhere (in the 2007 *Singapore Year Book of International Law*) that the existing rules of international law on the use of force, in particular as regards Security Council authorization as well as self-defence, properly understood, remain adequate to address current threats and do not contain significant shortcomings. Put at its lowest, they are better than any conceivable alternative. Efforts radically to amend or reinterpret the current rules are neither desirable, nor likely to succeed. What is needed - and international lawyers could contribute greatly to this - is a broader consensus on the existing rules and on their application in particular circumstances, as well as greater support for international institutions, especially for a Security Council that is effective and seen to be legitimate.

So I cannot agree with Phillip Allott's thoughtful, but typically heterodox, perhaps even tongue-in-cheek, view that '[t]he use of armed force by states can never be unlawful

because it can never be lawful' - a view he could hardly have espoused when we were colleagues at the Foreign and Commonwealth Office, some years ago now. His conclusion is in fact far from a pacifist one. By effectively accepting that states may act on their own if the Security Council is unable to act, Allott may go further than many international lawyers. For Allott, it seems the 'true subject for debate' is a policy one: 'would the *common interest* be better served by some form of behaviour on the part of governments other than the use of force?' (*Inter Alia*, Vol. 6, Issue 1, p. 39-42). That is no doubt an important question, though who is to determine what the 'common interest' is and how it is best served?

To recognise that there are policy questions surrounding any use of force is not to say that there are not also important legal questions. Any other view would have the lawyers surrender entirely to the policy-makers. That would be a return to the nineteenth century, the negation of the last century's achievements in this field. And it would surely be out of line with the reality of international life and international law. Experience shows that Governments do in fact take the rules of international law on the use of force seriously. As the Heads of State and Government reaffirmed in the 2005 World Summit Outcome (GA res. 60/1), 'the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security'.