STORMS, FOXES, AND NEBULOUS LEGAL ARGUMENTS: TWELVE YEARS OF FORCE AGAINST IRAQ, 1991–2003

Vaughan Lowe has recently argued that the most important task of international lawyers at times of flux is to identify claims with precision.[1] In order to accomplish this task with regard to the issue of use of force in Iraq, it seems necessary to review the main American and British arguments, including the formal legal arguments presented, as well as the relevant reactions of other States over a longer period of time. This will allow us to reveal patterns of argumentation, similarities, and differences in the American and British justifications as well as in the responses of the international community.

I. THE FRAMING OF THE ISSUE FROM AN AMERICAN PERSPECTIVE: THE ARGUMENT OF (PRE-EMPTIVE) SELF-DEFENCE

Until the initiation of operations in Iraq on 20 March 2003, entitled *Operation Iraqi Freedom*,[2] the main American argument in favour of the use of force was based on the principle of self-defence. Because, according to American intelligence information, Iraq possessed weapons of mass destruction (WMD) in defiance of Security Council resolutions, it posed a great threat to the national security of the US in light of the terrorist attacks of 11 September 2001. [3]

Secretary of State Colin Powell addressed the UN Security Council on 5 February 2003. He presented information indicating Iraqi efforts to evade its disarmament obligations and concluded that Iraq is a threat and in 'material breach' of earlier disarmament resolutions.[4] He clearly connected the self-defence argument with the material breach argument. We will return to a discussion of 'material breach' later. For the moment we will focus on the self-defence arguments put forward by the US, followed by the main arguments of the UK shortly before the initiation of military operations.

[1] V Lowe 'The Iraq Crisis: What Now?' (2003) 52 ICLQ 859–71.

[2] The name of the operation is also used by WH Taft IV and TF Buchwald 'Preemption, Iraq, and International Law' (2003) 97 AJIL 557–63 at n 10.

[3] I will not in this article discuss the issue of pre-emptive self-defence other than assert that most experts have adopted a restrictive attitude in this matter. See M Bothe 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 EJIL 227–40, with further references in n 2; and A Randelzhofer 'Article 51' in B Simma (ed) *The Charter of the United Nations—A Commentary* (2nd edn OUP Oxford 2002) vol 1, 788–806. Bothe concludes that an 'overwhelming majority of legal doctrine' holds 'anticipatory self-defence' to be unlawful. See further the views of several experts interviewed in the summer of 2002 in an expert analysis of the Crimes of War Project, including Thomas Franck, Michael Byers, and Martti Koskenniemi (<http://www.crimesofwar.org> as of 12 Feb 2003). Views opposite to the one represented here by Bothe and Randelzhofer have been expressed mainly by American scholars, such as R Wedgwood 'Unilateral Action in the UN System' 11 EJIL (2000) 349–59 and J Yoo 'International Law and the War in Iraq' (20003) 97 AJIL 563–76. It may be noted that a day before the start of military operations, Anne-Marie Slaughter published an article arguing that the legality deficit of the war could be mended through a legitimacy acquired *ex post facto*. According to Slaughter, the UN 'cannot be a straitjacket, preventing nations from defending themselves or pursuing what they perceive to be their vital national security interests'. See 'Good reasons for going around the U.N.' *New York Times*, 18 Mar 2003.

[4] SC/7658, Press Release, 5 Feb 2003.

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In a news conference on 6 March 2003, President George W Bush referred to Security Council Resolution 1441 and concluded that 'if the world fails to confront the threat posed by the Iraqi regime, refusing to use force even as a last resort, free nations would assume immense and unacceptable risks'.[5]

Already in October 2002, the US Congress had adopted a joint resolution, which was signed into law by President Bush, authorizing the use of military force to *defend* the United States against Iraq and to enforce all relevant Security Council resolutions regarding Iraq.[6] The logic of the resolution is clearly based on the perceived threat posed by Iraq against the United States. It can be argued that the arguments leading to the adoption of the law mentioned above authorizing the use of force against Iraq were fully in line with the very wide notion of pre-emptive self-defence incorporated in the National Security Strategy released by President Bush in September 2002.[7] Section V of the National Security Strategy is entitled 'Prevent our enemies from threatening us, our allies and our friends with weapons of mass destruction' and ends with a declaration that although 'the United States will not use force in all cases to pre-empt emerging threats', it cannot 'remain idle when dangers gather'.[8]

An extensive notion of pre-emptive self-defence has become a doctrine developed by the Bush administration, not only as a response to the specific case of Iraq. It extends to all 'rogue States' and terrorist threats. It is close to what Michael Walzer has described as 'preventive war justified by fear alone' in situations when the relative balance of power is threatened.[9] The final, formal legal justification of the war against Iraq had, however, little to do with the right to self-defence.

II. THE FRAMING OF THE ISSUE FROM A BRITISH PERSPECTIVE: SELF-DEFENCE AND HUMANITARIAN INTERVENTION

Before examining the actual legal justification presented by the US and UK upon the launching of military operations, we can briefly look at the main arguments used by the British leadership. Prime Minister Tony Blair addressed the spring conference of the Labour Party in February 2003, underlining that while the UK had as its first priority the strengthening of the United Nations, the UN needed to 'mean what it says', in particular with regard to the serious threat of 'rogue states with weapons of mass destruction'.[10]

Similarly, Foreign Secretary Jack Straw in a speech given at the International Institute of Strategic Studies went in detail into the weapons of mass destruction allegedly owned by Iraq and referred back to the September 2002 report of the British

[5] SD Murphy (ed) 'Contemporary Practice of the United States Relating to International Law' (2003) 97 AJIL 424.

[6] Authorization for Use of Military Force Against Iraq, Joint Resolution, Pub L No 107–243, 116 Stat 1498 (2002).

[7] MN Schmitt 'Preemptive Strategies in International Law' (2003) 24 Michigan JIL 513–48.

[8] National Security Strategy, Sept 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf>. In its turn the National Security Strategy is a continuation of the arguments of threat and self-defence found in the Nuclear Posture Review, presented to the US Congress by Secretary of Defence Donald Rumsfeld in December 2001.

[9] M Walzer *Just and Unjust Wars* (3rd edn Basic Books New York 2000) ch 5 entitled 'Anticipations'.

[10] The full text of the speech can be found at <http://www.labour.org.uk/tbglasgow/> (accessed 15 Feb 2003).

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government (often referred to as the 'September dossier').[11] Interestingly, the September dossier, in spite of its title which only refers to weapons of mass destruction, also included a substantive last part on the human rights abuses of Saddam Hussein's regime.

In November 2002 the Foreign and Commonwealth Office published a separate special report entitled *Saddam Hussein: Crimes and Human Rights Abuses*. No direct mention is made of any obligation of the UK or the international community to tackle dictators such as Saddam Hussein, or of any humanitarian intervention on behalf of the Iraqi people, but it is quite clear that the purpose of the report is to emphasize the wish of the British Government to ensure that the Iraqi people are 'free to live fulfilling lives without the oppression and terror of Saddam'.[12]

The notion of humanitarian intervention as used on these occasions is a wide one, not only covering acute and extreme situations of humanitarian catastrophes, but in fact enabling the toppling of regimes perceived as undemocratic. Christine Gray has observed that in discussions in the British Parliament before and after the NATO action in Kosovo in 1998–9, the British Government rested its argument on the justification of 'overwhelming humanitarian necessity' and went as far as justifying the operation in Kosovo by reference to the precedent of the actions to protect the Kurds in Iraq in 1991.[13] Tom Bentley wrote similarly in February 2003 that Tony Blair has come to develop over the years a 'pragmatic' vision of international community, a vision that incorporates the notion of 'just war'. Bentley argues that this view 'is a mix of evangelical concern for the world's dispossessed, and a determination to maximize Britain's influence and strategic significance in a post-colonial era'.[14] So, in 2002/2003 the goals of the American self-defence argument largely converged with the goals of the British humanitarian intervention argument.[15]

III. THE REACTION OF OTHER STATES: SECURITY COUNCIL DISCUSSIONS IN MID-FEBRUARY 2003

Those were the arguments around which the UN Security Council held its open discussion on Iraq on 18–19 February 2003. The discussion took place at the initiative of the Non-Aligned Movement representing 115 States and 15 observers, with South Africa speaking on behalf of the Movement.[16] Several other States spoke at the meeting in a

[11] The full text of the speech can be found at <http://www.fco.gov.uk> (accessed 11 Feb 2003). The September 2002 dossier entitled 'Iraq's Weapons of Mass Destruction. The British Government's Assessment' (and many other relevant documents) can be found at <http://www.guardian.co.uk/Iraq/documents/> and at <http://www.fco.gov.uk/Files/kfile/iraq-dossier.pdf>.

[12] The report can be found at <http://www.fco.gov.uk/Files/kfile/hrdossier.pdf>.

[13] C Gray 'From Unity to Polarisation: International Law and the Use of Force against Iraq' (2002) 13 EJIL 1–20.

[14] T Bentley 'Portrait de M. Anthony Blair en pragmatique' Le Monde diplomatique, Février 2003, 16–17 (English translation is from <http://mondediplo.com/2003/02/04blair>).

[15] One should, however, note that the Bush doctrine of pre-emptive self-defence was preceded by the 'Albright doctrine' of humanitarian military intervention. This pendulum in time and place between pre-emptive self-defence and humanitarian intervention, a move intensified after the end of the Cold War, can be seen as a confirmation of Walzer's theory of 'Just and Unjust Wars' (n 9).

[16] The debates can be found in Security Council Documents, S/PV.4709 and S/PV.4709 (Resumption 1) 18–19 Feb 2003.

collective manner, including Greece representing the European Union, Gambia speaking on behalf of the Group of African States (these overlap partly with the membership in the Non-Aligned Movement but they raised somewhat different points in the discussions), and the representative of Saint Lucia speaking on behalf of the Caribbean Community (CARICOM). A collective statement was also made by the League of Arab States.

At that point, very few States gave their support to the use of force, and then only upon an authorization by the Security Council. Among them, and of course apart from the US and UK, were Australia and Japan, who found that Iraq had failed to meet its obligations. But whereas Australia found 'the intelligence presented by Secretary Powell compelling', Japan still hoped for a peaceful solution even though it revealed doubts about the efficiency of the weapons inspections regime. Australian Prime Minister John Howard had a few months earlier explicitly endorsed the doctrine of pre-emptive self-defence, thereby attracting criticism from other South-Asian countries.[17] Peru, Albania, the former Yugoslav Republic of Macedonia, Georgia, and Latvia concluded that Iraq had violated its obligations and that the Security Council needed to act resolutely, leaving open their position about a possible use of force without a new and explicit Security Council authorization.[18]

The overwhelming majority of States opposed any use of military force at that time. Many emphasized that Iraq had failed to comply fully with Security Council resolutions, including SC Resolution 1441 (2002), but concluded that the regime of weapons inspections re-established in November 2002 had been operating successfully and had failed to find proof of the existence of WMD in Iraq in spite of information to the contrary cited by the United States and United Kingdom. According to all these States there was at the time no immediate threat to peace. Not only would anticipatory self-defence be illegal, but it precluded the adoption of a Security Council resolution authorizing the use of force by one or some countries. Their preferred solution was instead the strengthening of the weapons inspections regime, making inspections more 'robust and intrusive' and emphasizing that the disarmament of Iraq should be seen as a long-term process.[19]

As the representative of the Non-Aligned Movement pointed out, UNMOVIC (the weapons inspectors in Iraq under Hans Blix) had been on the ground in Iraq for only 11 weeks following the adoption of SC Resolution 1441 (2002) and more time should be granted to them to fulfil their task. These were the views not only of the Non-Aligned Movement but also of the Caribbean Community, the League of Arab States, the African Union, several countries of North Africa and Central and Latin America, India, Canada, New Zealand, Switzerland, Indonesia, Ukraine, Belarus, Cuba, and Nigeria.

Some of the specific comments on self-defence are worth citing in detail. On behalf of the African Union, Gambia asserted that:

[17] See Transcript from a discussion entitled 'Self-defence or aggression' 2 Dec 2002, including Australian Prime Minister John Howard, of ABCs 7.30 Report, available at <http://www.abc.net.au/7.30> (accessed 12 Feb 2003).

[18] As an example of such ambivalent statements, FYROM concluded its intervention by the following phrase: 'In that context [ie if Saddam Hussein does not fully cooperate], my country will support action by the international community against this common danger.' This leaves open whether a UN involvement and SC resolution are at all necessary.

[19] The proposals concerning a strengthening of the weapons inspections regime counter the critique that there was no alternative course of action to the US/UK war proposal. See Lowe (n 1) 866.

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> The position taken by African Governments on the issue is clear and is fully consistent with the provisions of the Charter of the United Nations, Article 51 of which permits the use of force only 'if an armed attack occurs', and even then, only 'until the Security Council has taken measures necessary to maintain international peace and security'. We are satisfied that the Council has taken those measures in authorising, and continuing with, the inspections in Iraq.[20]

According to the African States, the absence of an armed attack and the far-reaching measures in SC Resolution 1441 (2002) precluded the use of force on the basis of self-defence. Indeed their wording seems to imply that the right of self-defence is extinguished when the Security Council has adopted sufficient measures to maintain international peace and security. In other words, according to this view, the right to self-defence need not run parallel to the authority and responsibility of the Security Council in maintaining peace and security.[21]

Malaysia was one of the countries explicitly addressing the issue of pre-emptive self-defence. While emphasizing Iraq's obligation to cooperate fully with the UN weapons inspectors and to solve the issue of Kuwaiti prisoners of war and missing third-country nationals, Malaysia strongly opposed the use of force against Iraq for four reasons: (a) peaceful solutions are the aim of the UN Charter, and war cannot be legitimized 'to effect regime change'; (b) the use of force in an unjustified and counterproductive way would 'undoubtedly give rise to the potential for an increasing cycle of violence and further aggravate worldwide terrorism, resulting in a more volatile world order'; (c) the humanitarian consequences for the Iraqi population would be catastrophic; and most important, (d) 'there is no precedent in international law for the use of force as a preventive measure when there has been no actual or imminent attack by the offending State […] the Security Council has never authorised the use of force on the basis of a potential threat of violence'. Malaysia argued also that the inspection regime was already being strengthened, as Iraq had recently accepted reconnaissance flights by United States U-2, French Mirage, and Russian Antonov aircraft to facilitate the work of inspectors.[22]

Some countries made ambivalent statements, including Greece on behalf of the European Union. The EU statement recognized the primary responsibility of the Security Council for dealing with the Iraqi disarmament and asserted that 'war is not inevitable' and 'force should be used only as a last resort'. On the other hand, although it supported the UN weapons inspectors, it concluded that 'inspections cannot continue indefinitely in the absence of full Iraqi cooperation' and that the European Union 'is committed to working with all [their] partners, especially the United States, for the disarmament of Iraq, for peace and stability in the region and for a decent future for all its people'. [23] The position of the EU was formally unclear with regard to a possible strengthening of the inspections regime as well as with regard to the use of military force. This ambivalence resulted from deep divisions among the members of the EU: the UK, Spain, Italy, and Denmark, along with several

[20] S/PV.4709 at 18 (18 Feb 2003).

[21] See, however, Koskenniemi, who concluded that he cannot 'conceive of an actual situation where the Council's action would extinguish the attacked nation's right of self-defence', in Crimes of War Project (n 3). Koskenniemi's argument retains in any case the armed attack requirement, leading to his final rejection of the self-defence argument with regard to Iraq.

[22] S/PV.4709 (Resumption 1, 19 Feb 2003) at 9.

[23] S/PV.4709 at 30–1.

candidate countries, later participated in the military operations in Iraq under US leadership.

The position of various States remained unchanged also during the second open discussion on the situation of Iraq, which took place on 11–12 March 2003, once more at the initiative of the Non-Aligned Movement.[24] A few additional countries expressed their views, but the main thrust of the argument of most statements was that UN weapons inspectors needed more time and resources, as Hans Blix had recommended in his presentations to the Security Council in February and March 2003. In summary, an overwhelming majority of States rejected that there was at the time an imminent threat to peace and security and denied that the justification of self-defence was valid. A number of countries, in particular the coalitions of smaller countries, made several proposals for a strengthening of the weapons inspection regime and the disarmament of Iraq in an effort to find compromise solutions for a UN resolution. These efforts were not supported by the polarized adversaries, namely US and UK on the one hand, nor France and Germany on the other. The myth of no alternative course of action other than war in the spring of 2003, supported the image of a symmetric polarization with the US and UK on one side, and France, Germany, and Russia on the other. As shown above, however, several smaller countries argued for various ways of strengthening the weapons inspection regime. Such efforts did not meet with the approval of the big adversaries. Nevertheless the picture of symmetric polarization is not altogether accurate. The American and British arguments met with the opposition of nearly all countries participating in the debates of February and mid-March 2003.

IV. THE FORMAL LEGAL JUSTIFICATION PUT FORWARD BY THE UNITED STATES AND UNITED KINGDOM (OR PERHAPS THE UNITED KINGDOM AND THE UNITED STATES?)

Military operations started on 20 March 2003. Already on 17 March 2003 the Foreign and Commonwealth Office and the Attorney General, Lord Goldsmith, had presented *The Attorney General's View of the Legal Basis for the Use of Force against Iraq* in the debates taking place in the House of Lords. The rather brief view of Lord Goldsmith was accompanied by a more detailed account prepared by the Foreign and Commonwealth Office. Copies of both were lodged in the UK Parliament (both houses) on 17 March.[25] Here we find no trace of humanitarian intervention or self-defence arguments. The authority to use force against Iraq derives from a combined effect of SC Resolutions 678 (1990), 687 (1991), and 1441 (2002). The crucial elements are:

1) SC Resolution 687 (1991) suspended but did not terminate the authority to use force under SC Resolution 678 (1990).

2) A *material breach* of SC Resolution 687 *revives* the authority to use force under SC Resolution 678 (emphasis added).

[24] S/PV.4717 and Resumption 1, 11–12 Mar 2003. See also Press Releases SC/7685 and SC/7687. See also the same arguments after the war started (and the formal justification had been presented) in SC discussions on 26 Mar 2003, S/PV.4726 (and Resumption 1). The main shift here is towards a strong place for humanitarian concerns.

[25] See statement of Jack Straw in the House of Commons, Hansard Debates of 17 Mar 2003, column 704 (available at <http:/www.publications.parliament.uk>, accessed 26 Feb 2004). Copies of the two documents are on file with the author.

3) The Security Council determined in its Resolution 1441 that Iraq has been and remains in material breach of Resolution 687.

4) SC Resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not. In resolution 1441 the Security Council also decided that if Iraq failed to comply with and cooperate fully in the implementation of Resolution 1441, that would constitute a further material breach. Resolution 1441 does not explicitly require any further decision of the Security Council to sanction force.

The conclusion then drawn by Lord Goldsmith was that 'it is plain that Iraq has failed so to comply and therefore Iraq was at the time of resolution 1441 and continues to be in material breach', and that 'the authority to use force under resolution 678 has revived and so continues today'.

The day operations started, the US Permanent Representative to the United Nations, John D Negroponte, addressed a letter to the President of the Security Council. The letter affirms the exact legal argument presented a few days earlier by the Foreign Office and adds a few points: operations are described as timely, necessary, and appropriate. They are necessary in order 'to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area. Further delay would simply allow Iraq to continue its unlawful and threatening conduct'.[26] The letter lacks, however, the detailed background that formed the basis of the argument as put forward by Lord Goldsmith, that is, it lacks all reference to the reactions of other States and the UN Secretary-General when the same arguments were used on earlier occasions.[27]

At this stage, whereas the UK emphasized the legal argument of 'material breach' and a chain of force authorizations over time, the US again repeated largely the argument of imminent threat and self-defence.

The British argument is, however, not as simple as seems at first glance. The detailed briefing paper summarizing the legal background to the position of the Attorney-General (hereinafter referred to as the Foreign Office briefing paper) not only makes an argument on the basis of the wording of previous Security Council resolutions (Resolutions 678, 687, and 1441), but also discusses the acceptance by other States of military actions undertaken by British and American forces in 1993 and 1998. So the British argument is that not only is force authorized through reference to the resolutions mentioned above, but in practice other States have endorsed the use of force against Iraq after 1991 on the basis of SC Resolutions 678 and 687.

The Foreign Office briefing paper refers to a written statement by the Minister of State at the Foreign and Commonwealth Office in relation to the use of force against Iraq in 1993. That statement in its turn refers further to the Security Council statements of 8 and 11 January 1993 that Iraq was in material breach of SC Resolution 687 and other related resolutions concluding that

> [i]n the light of Iraq's continued breaches of Security Council resolution 687 and thus of the ceasefire terms and the repeated warnings given by the Security Council and members of the coalition, their forces were entitled to take necessary and proportionate action in order to ensure that Iraq complies with those terms.

[26] S/2003/351 (21 Mar 2003).
[27] The Foreign Office briefing paper will be discussed further below.

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The Foreign Office briefing paper refers further to the endorsement of the action by the UN Secretary-General. Boutros Boutros-Ghali had said on 14 January 1993 that the raid conducted by the coalition forces had 'received a mandate from the Security Council, according to resolution 678, and the cause of the raid was the violation by Iraq of resolution 687 concerning the ceasefire'. For those reasons the Secretary-General had concluded that the action was in conformity with the UN Charter and Security Council Resolutions.

The Foreign Office briefing paper argues on two main lines: (a) that there is a line of implied authorizations in SC resolutions and their use has been endorsed not only by the UN Secretary-General but also by a majority of States; and (b) that a 'material breach' of many SC resolutions during a long period of time constitutes a sufficient legal ground for the unilateral use of force.

We will not proceed here to a detailed analysis of SC Resolution 1441, as that has been done by many commentators both supporting and opposing the use of force.[28] As Thomas Franck has written, the bottom line 'was not primarily about what to do but, rather, who decides'.[29] Although discussions in the UN Security Council in February and March 2003 reveal that a majority of States found that this was a decision to be taken collectively by the Security Council (even though it is known that this path is regularly blocked by the veto of the permanent members), the UK and the US made the presumption that after some discussion 'the decision would be up to them alone'.[30]

The notion of 'material breach' that, according to some authors, was implicitly accepted by the UN Secretary-General Boutros Boutros-Ghali in his 1993 statement has not been subsequently endorsed by other than the US and UK and it has been criticized by many international lawyers.[31] One ambiguity is that of the object of the 'material breach' in the arguments of the US and UK. Lobel and Ratner argue that the basis of the material-breach argument is to be found in pre-Charter law, namely the Hague Convention (No IV) Respecting the Laws and Customs of War on Land, with regard to the consequences of a material breach of a cease-fire. Serious violations of the ceasefire permit a resumption of fighting.[32]

Although it is true that the Anglo-American arguments always make the link to Resolution 687 and thereby the ceasefire after the Second Gulf War in 1991, their arguments focus on the need for the enforcement of UN Security Council resolutions rather than on the ceasefire. As we saw earlier, Tony Blair argues that the UN has to 'mean what it says'.[33] According to W Taft and T Buchwald, legal advisers at the US Department of State, all along '[t]he U.S. view was that whether there had been a material breach was an objective fact, and it was not necessary for the Council to so determine or state', and further that 'all agreed that a Council determination that Iraq had committed a material breach would authorise individual member states to use force to secure compliance with the Council's resolutions'.[34]

[28] See several contributions in 'Agora: Future Implications of the Iraq Conflict' (2003) 97 AJIL 553–642.

[29] TM Franck 'What Happens Now? The United Nations After Iraq' (2003) 97 AJIL 607–20 at 616.

[30] ibid.

[31] Gray (n 13); J Lobel and M Ratner 'Bypassing the Security Council: Ambiguous Authorisation to Use Force, Ceasefires and the Iraqi Inspection Regime' (1999) 93 AJIL 124–54.

[32] Lobel and Ratner (n 31) 144.

[33] See (n 11).

[34] Taft and Buchwald (n 2) 560.

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The critics argue that the argument 'arrogates to individual states power that properly resides with the Security Council'.[35] This power encompasses both the determination of a breach of the ceasefire and the appropriate consequences of such a breach.[36] So, again, the bottom line is whether the normative starting point is that of a collective and institutionalized security system or of a unilateral and *ad hoc* security system. The attitude of other States to this question can be read partly through the statements accounted for above in the Security Council discussions of February and March 2003 (reviewed above), but also through the reaction of other States when the US and UK made use of military force in Iraq on a number of occasions throughout the 1990s and in 2001. Such a review will be the object of the remaining article.

We will look at the reactions of States to earlier arguments of implied authorization for the use of force against Iraq in 1993, 1996, 1998, and 2001. The US and UK, and originally France as well, used force against Iraq on several occasions in the 1990s and early 2000s. What was the legal argumentation concerning those incidents? Does State practice support the recent argument made by the UK and US that States have accepted and even supported the use of force against Iraq, thereby confirming the continuation of the authorization in SC Resolutions 678 and 687 from 1991 until now? Finally, why does the Foreign Office briefing paper only refer to the 1993 and 1998 incidents and not to the 1996 and 2001 ones?[37]

A. The military action in 1993

Operation Desert Storm, the name given to the military response to Iraq's invasion of Kuwait in 1990, was authorized under SC Resolution 678 (1990) and ended with the so-called 'ceasefire resolution', SC Resolution 687 (1991). On 12 January 1993 President George HW Bush, a few days before the end of his presidency, launched a military strike against Iraq 'in response to continued provocation by Baghdad'.[38] The first strikes targeted missile sites in the southern no-fly zone. On 17 January 1993, President Bush ordered missile strikes against a nuclear facility (some reports said that it was only a factory) near Baghdad in response to 'Iraqi infringements of the terms of the cease-fire'.[39] This action was preceded a few days earlier by air attacks on surface-to-air missile sites in the southern no-fly zone. The first attacks were joined by Britain and France and were undertaken as a response to the moving of such missiles by Iraq to threaten coalition aircraft.[40]

In the midst of the celebrations to mark his inauguration, the new US President, William J Clinton, said he fully backed efforts to make Iraq comply with the UN Security Council resolutions, thus implicitly adding the 'compliance with resolutions

[35] Gray (n 13) including references in n 53.

[36] For one of the most detailed discussions on the notion of 'material breach' and the power to determine when it occurs see P Wrange 'The American and British bombings of Iraq in international law' (2000) 39 Scandinavian Studies in Law 491–514.

[37] Taft and Buchwald as well as Yoo have briefly referred to the 1993 and 1998 incidents, but with no further discussion of the actions of 1996 or 2001.

[38] 'Bush has decided on military strike against Iraq: U.S. official' Agence France Presse 13 Jan 1993 (available at LexisNexis, as of 28 Jan 2004).

[39] J Yoo (n 3) 570 with further references.

[40] 'Allied aircraft attack southern Iraq' Agence France Presse 18 Jan 1993 (available at LexisNexis, as of 28 Jan 2004). French sources were emphasizing at the time that the role had been the protection of the strike aircraft.

argument' to the self-defence argument.[41] These first raids were seen by a majority of States as linked to concrete threats posed by Iraq and concerning the no-fly zones as perceived not only by the US and UK, but also by France and, as we saw earlier, by the UN Secretary-General.

Christine Gray has argued that at that time, and irrespective of the issue of the legality of the establishment of the no-fly zones, the US and the UK did not originally claim an extensive right to self-defence in the no-fly zones.[42] They simply responded to actual attacks on their aircraft, arguing that the locking of Iraqi radar onto US and UK airplanes constituted such an attack (or at least imminent threat of an attack). This rationale seems to have been accepted by other States. Even if they accepted this limited self-defence argument as the main legal justification, many States expressed criticism on various grounds, including the scale of the bombing raids (raising issues of necessity and proportionality) and the lack of specific UN authorization for them. Russia requested a Security Council meeting, many Arab countries voiced disapproval, and France, having participated in the first raid against missile targets, expressed doubts about the legality of the attack outside Baghdad.[43] Already at this early stage the use of force in the no-fly zones, the extent of the right to self-defence, and the authorization required for the use of force were issues of controversy between the US and UK on one hand, and many other countries on the other.

B. The air attack of 1996

In September 1996 the US undertook an air attack in response to intervention by Iraqi government forces in a violent conflict between the two main parties of Kurds in the northern no-fly zone, and at the same time extended the Southern no-fly zone. President Clinton reported the use of force to the Security Council in a letter addressed to its President but offered no specific legal argument. He referred to Iraqi attacks in the Kurdish region and the seizure of the city of Irbil with regard to the northern no-fly zone and the safety of American aircraft with regard to the southern no-fly zone.[44] Russia criticized the US for seeking to supplant the Security Council and for violating international law by extending the southern no-fly zone as well as by ordering the air strike in Kurdish areas.[45] The Security Council did not hold any meetings to discuss the issue, but the US was reported to be isolated in the UN with respect to the strikes.[46] The unilateral action has been viewed by Gray as an effort by the US to prevent Saddam Hussein from taking advantage of the divisions of the Kurds rather than as a genuine response to a humanitarian crisis.[47]

[41] 'Allies strike at Iraqi radar' *Financial Times* 19 Jan 1993 (available at LexisNexis, as of 28 Jan 2004).
[42] Gray (n 13).
[43] 'Confrontation with Iraq: UN sees Baghdad's point of view' *The Independent* 20 Jan 1993; 'France breaks ranks over missile raid on Baghdad' and 'Coalition wavers over US-led attacks on Iraq' reported by The Associated Press 20 Jan 1993 (available at LexisNexis, as of 28 Jan 2004).
[44] UN document S/1996/711 of 3 Sept 1996.
[45] S/1996/712 and 715 of 3 and 4 Sept 1996. The Russian statement of 4 Sept (S/1996/715) refers to the extension of the no-fly zone in the south as being supported and decided by both the US and UK. There was, however, no official statement from the British government.
[46] 'Clinton finds Little Support at the UN for Iraqi Strikes' *New York Times* 5 Sept 1996.
[47] Gray (n 13).

C. Operation Desert Fox

In early 1998 various US officials, including the President, asserted that unless Iraq permitted unconditional access to international weapons inspection it would face a military attack.[48] These declarations were made under the Clinton administration. The debates in the UN Security Council in the spring of 1998 make clear that representatives of other permanent members of the Security Council objected to the US position, as did the Secretary-General of the UN, Kofi Annan, who travelled to Baghdad to negotiate a memorandum of understanding that was later endorsed in SC Resolution 1154 (2 March 1998).

No country assessed at that Security Council meeting on 2 March 1998 that SC Resolution 1154 authorized the unilateral use of force, and a majority emphasized the exclusive authority of the Security Council in the authorization of force.[49] Japan, one of the sponsors of the Resolution, declared that draft paragraph 3 was 'not meant to address the issue of so-called automaticity' and that the draft resolution was 'not designed to prejudge the issues in the future'.[50] Most other participants believed that further action made necessary further authorization by the Security Council. As the representative of Costa Rica put it, the prerogatives and competences under Chapter VII of the UN Charter are 'exclusively of the Security Council and cannot be delegated by it'; and Kenya underlined that draft Resolution 1154 contained nothing that could open the door 'in any eventuality, for any kind of action without the clear authority of the Security Council'.[51] On 3 March 1998, Undersecretary of State Thomas Pickering argued, however, that the use of force was authorized not through reference to SC Resolution 1154 but, as we perhaps can guess, the authorization given indirectly by SC Resolution 678 of 1990.[52] This was also the position expressed at the time by ED Williamson, former Legal Adviser to the State Department.[53]

We can easily recognize the arguments and the actors from our earlier account of debates in February 2003. The 1998 events can indeed be seen as a precursor of the war of 2003. This similarity makes it all the more remarkable that the Foreign Office briefing paper of 17 March 2003 makes no reference to the details of the 1998 operations, other than a reference to the statements of the Parliamentary Under-secretary of State at the Foreign and Commonwealth Office, Baroness Symons of Vernham Dean.[54]

All this diplomatic activity and the Memorandum of Understanding of March 1998 resulted in the temporary postponement of the use of force against Iraq for a few months. In December 1998 the US and the UK undertook *Operation Desert Fox* as a response to Iraq's denial of access to the UN weapons inspectors. The triggering factor

[48] Lobel and Ratner (n 31) 124.
[49] UN document S/PV.3858 (1998).
[50] S/PV.3858 (1998).
[51] S/PV.3858 (1998). Similar comments by other members of the SC, including China, France, Russia, Sweden, Gabon.
[52] Lobel and Ratner (n 31).
[53] See ED Williamson 'Comment on the Legal Background on the Use of Force to Induce Iraq to Comply with Security Council Resolutions' ASIL Insight of Mar 1998 <http://www.asil.org/insights/insigh16.htm>. Williamson had been Legal Adviser at the time when SC Res 678 and 687 were adopted.
[54] With regard to the issue of the legal basis of the 1998 strikes, Baroness Symons had referred to SC Res 687 and concluded that the conditions of the ceasefire and in particular the requirement on Iraq to eliminate WMD had been broken.

was a report presented to the Security Council on 15 December 1998 by the head of weapons inspectors (United Nations Special Commission, UNSCOM), Richard Butler, in which he expressed strong doubt about the possibility of making progress with regard to the disarmament of Iraq.[55] The Secretary-General's recommendation on the basis of that report included three options, all of which would need time for the assessment of the actual situation. While the Security Council was convening in order to discuss the Butler report and its possible consequences, the US and UK launched a substantial military action against 'military targets in Iraq'.[56] UNSCOM and IAEA had already withdrawn their personnel, apparently warned in time, even though the Security Council had not taken any decision on the issue.[57] Taft and Buchwald admit *ex post facto* that '[t]o be sure, that campaign did not lack critics, who raised questions about whether further Council action was required to authorise it specifically.'[58] The criticism did not seem, however, to have had any inhibiting effect on decision-making in Washington and London.

The American and British justifications offered in the letters addressed to the president of the Security Council are rather vague in legal terms, referring to Iraq's continuous violations of a long series of Security Council resolutions. 'Our objective', said the UK government,

> is compliance by the Iraqi leadership with the obligations laid down by the Council. The operation was undertaken when it became apparent that there was no prospect of this being achieved by peaceful means. It will have the effect of degrading capabilities which have been the subject of Security Council resolutions over the past nine years.

In his statement during the Security Council discussions on 16 December, the representative of the UK, Jeremy Greenstock, referred to SC Resolutions 1154 (1998) and 1205 (1998) as implicitly reviving the authorization to use force in SC Resolution 678 (1990).[59]

In the discussions of 16 December 1998, the members of the Security Council were unusually sharp in their reactions to the military action. Japan was the only country to support the operation.[60] Russia declared that 'the United States and the United Kingdom have grossly violated the Charter of the United Nations, the principles of international law and the generally recognised norms and rules of responsible behaviour on the part of States in the international arena'. Russia also criticized the evacuation of UNSCOM without any consultation with the Security Council. Sweden and Brazil emphasized the primacy of the powers of the Security Council, while France referred to the earlier statement by the UN Secretary-General in which he had called the day 'a sad day for the United Nations'.[61] Even though the Secretary-General originally hoped that the United Nations could still retain its presence in Iraq, a new press release later the same day announced the withdrawal of UN relief workers.[62] None of these reactions and events is discussed in the Foreign Office briefing paper or Taft and Buchwald's *ex post facto* article in the American Journal of International Law.

[55] The report and the recommendation of the Secretary-General are found in document S/1998/1172 (15 Dec 1998).

[56] Letters from the US and UK missions to the United Nations addressed to the President of the Security Council, dated 16 Dec 1998, S/1998/1181 and S/1998/1182.

[57] S/1998/1175 (16 Dec 1998).

[58] Taft and Buchwald (n 2) 559–60.

[59] S/PV.3955 (16 Dec 1998).

[60] ibid.

[61] SG/SM/6841 (16 Dec 1998).

[62] SG/SM/6842 (16 Dec 1998).

D. Air strikes of February 2001

After the December 1998 events, the US and UK continued to attack targets in Iraq in what has been described as a step-up to a low-level conflict following a pattern of slow intensification of attacks by American and British aircraft against radar installations and command-and-control centres in and outside the no-fly zones. Occasionally the right to self-defence was invoked.[63] According to reports, President Clinton had given American pilots 'wider authority to retaliate when threatened, allowing them to strike at any defence system, not just those that actually aimed at American aircraft'.[64] Christine Gray has argued that during this period the US and UK, even though not explicitly invoking a right to pre-emptive self-defence, were in fact using force not only against actual attacks, but also in order to strike command-and-control centres.[65] Meanwhile, Saddam Hussein barred UNSCOM from Iraq. Russia and China were among the countries calling for Richard Butler's dismissal.[66] It took the UN a year to agree upon the creation of a new weapons inspection body, the United Nations Monitoring, Verification, and Inspection Commission (UNMOVIC), headed by Hans Blix.[67]

On 16 February 2001, a month after President George W Bush took office, new raids were conducted by American and British aircraft against Iraqi air defence systems in the no-fly zones. Both countries justified their actions on the basis of self-defence.[68] According to the British Secretary of State for Defence, Geoffrey Hoon, in January 2001 the Iraqis had launched more surface-to-air missile attacks than in the whole of the year 2000, indicating a 'qualitative and quantitive increase in the threat', thereby justifying the strikes as actions of self-defence. Hoon chose, for reasons that will be reviewed shortly, to combine the self-defence argument with that of a 'grave humanitarian crisis'.[69]

The Security Council did not hold a meeting to discuss the events in February 2001, but many countries expressed their disapproval of the strikes.[70] The UN Secretary-General sent a letter to the Minister for Foreign Affairs of Iraq, responding to Iraqi requests of condemnation of the American and British actions.[71] The Secretary-General wrote:

[63] 'U.S. quietly intensifies attacks on Iraq, destroying radar sites' *New York Times* 5 May 1999.
[64] ibid.
[65] Gray (n 13).
[66] 'U.N. fails to reach consensus on Iraq policy' *New York Times* 24 Dec 1998.
[67] UNMOVIC was established by SC Res 1284, 17 Dec 1999.
[68] 'Blair and Bush defy world fury' *The Observer* 18 Feb 2001; 'Doubts over Iraq air strikes' *The Guardian* 19 Feb 2001. Statement of the American Director of Operations, Lt Gen Gregory S Newbold, available at <http://www.defencelink.mil/news/Feb2001/t02162001_t216iraq.html> (accessed 26 Jan 2004). Newbold emphasized the fact that the strikes were within the no-fly zones, why much of the following discussion has focused on the legality of the zones themselves, see Gray (n 13).
[69] Statement of Geoffrey Hoon, in House of Commons, Hansard Debates for 26 Feb 2001, <http://www.publications.parliament.uk> (accessed 27 Jan 2004).
[70] See articles in *The Observer* (reporting Russia, China, France, Algeria, India, Iran, Jordan, Egypt, Malaysia, Syria, Pakistan, Cuba, Turkey, and the Arab League among the critics and Israel as supporting the use of force) and *The Guardian* (n 68). See also 'Hubert Védrine juge illégaux les bombardements américains et britanniques sur l'Irak' in *Le Monde* 21 Feb 2001 and 'New strikes on Iraq confirm US' position-of-strength policy' reported by ITAR-TASS 22 Feb 2001 (available through <http://infoweb.newsbank.com>).
[71] S/2001/160.

> [T]he 'no-fly zones' were declared over parts of the territory of Iraq by certain members of the Security Council, claiming authority under resolution of the Council. In this connection, I should like to recall what has always been, and remains, my consistent position, namely, that it is for the Security Council to interpret its own resolutions. Consequently, only the Council itself is competent to determine whether or not its resolutions are of such a nature and effect as to provide a lawful basis for the 'no-fly zones' and for the actions that have been taken for their enforcement. Therefore, it is for the Council to address the lawfulness or otherwise of the actions to which you refer in your letter.

The letter ends:

> [I]n view of the fact that the United States and the United Kingdom have been conducting military air operations in the region, the United Nations has intervened with representatives of those States urging them to respect the demilitarised zone established by Security Council resolution 687 (1999) of 3 April 1991.

With these words, the Secretary-General disapproved of the argument that previous resolutions of the Security Council, going as far back as 1991, give implicit authorization for the use of force. The letter left open as a matter to be addressed by the Security Council the lawfulness of the no-fly zones. Shortly after the Secretary-General's letter, the House of Commons held a debate on the events in the Iraqi no-fly zones.[72] On that occasion, the British Minister of Defence chose not to overemphasize the self-defence argument. He fell back on the argument of a humanitarian crisis: 'the patrols are justified in international law as a legitimate response to prevent a grave humanitarian crisis'.[73] Some experts have interpreted this statement as a—presumably temporary, and by 2003 forgotten—acceptance of the Secretary-General's position.[74]

In view of the controversy over the events of 2001, internationally and in the UK itself, it is remarkable that the Foreign Office briefing paper and the formal statements of the US and the UK on the legal basis of the war against Iraq in 2003 make no reference whatsoever to them.

V. CONCLUSIONS

While American and British legal arguments do not fully coincide, it is true that with regard to military action in Iraq American arguments and policies have remained more or less constant over time. One of the conclusions to be drawn is that the American administration's republican or democrat character has not affected those policies. On the most recent occasion of use of force against Iraq, the US and UK have used official and unofficial arguments that have been consistently rejected by most States and by the Secretary-General of the UN. The rejections were repeated all through the 1990s and in 2001. The formal legal justification put forward first by the Foreign Office in London in March 2003 and a few days later also officially by the US and the UK does not mention the controversy surrounding this legal argument and omits occasions when unilateral use of force met with great criticism, such as the air strikes in February 2001. The insistence with which the argument (ie, the argument of implied authorization in order to ensure compliance with earlier SC resolutions) is used again and again can only be interpreted as a long-term, conscious plan to transform the foundations of collective security as found in the UN Charter.

[72] Loc cit.
[73] Statement of Geoffrey Hoon, in House of Commons, Hansard Debates for 26 Feb 2001, <http://www.publications.parliament.uk> (accessed 27 Jan 2004).
[74] Gray (n 13).

There are two risks involved in this process:

(1 The first risk is that this effort and its consistent rejection by other States handicap the UN Security Council even more then during the Cold War. The Member States of the Security Council will avoid adopting any condemning resolutions and imposing any substantive conditions upon States if such resolutions can potentially be abused in a distant future through theories of implicit authorization and the unilateral use of force. A more cautious policy in the Security Council will strengthen arguments about the alleged inability of the UN to meet the needs of international peace and security, which is again an argument for the unilateral use of force, with a vicious circle of UN Charter erosions as a plausible consequence. The long-term effects on the work of the Security Council remain to be evaluated in years to come.

(2) The consistent use of the argument of implicit authorization of the use of force and the use of force as an appropriate response to breaches of obligations imposed by SC resolutions may result in the erosion of some of the fundamental principles of the system of collective security: the exclusive power of the Security Council in matters of international peace and security, the need for specific authorization for the use of military force, and the use of force as last resort. As reviewed in this article, State practice rejects this shift.

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