

# Law and the Use of Force After Iraq

---

Adam Roberts

In the decade before the latest Iraq war, there were numerous crises giving rise to demands for military action, and particularly for intervention in states without the consent of those states' governments. Force has been used in a wide variety of circumstances, and with a wide variety of legal justifications and authorising bodies. Some of these actions have challenged certain aspects of the existing body of international law relating to the resort of force – the *jus ad bellum*. In particular, they have been seen as either violating, moving beyond, or reinterpreting the two principal accepted legal grounds for the use of force: self-defence, as recognised in Article 51 of the UN Charter; and authorisation by the UN Security Council.

The failure of the UN Security Council to agree on any coherent line on Iraq before the outbreak of war on 19–20 March 2003 confirmed, in spectacular fashion, certain limitations of the Council. It also led to some damning obituaries: 'With the dramatic rupture of the UN Security Council, it became clear that the grand attempt to subject the use of force to the rule of law had failed'.<sup>1</sup> This conclusion is too harsh. The Security Council, while having no monopoly on international security issues, did not become entirely irrelevant to the Iraq crisis, in which its existing resolutions were of crucial importance; and international law, while in a state of contestation, has developed significantly in response to events since the end of the Cold War and continues to provide useful criteria for consideration of particular uses of force.

Two doctrines have been the foci of debates about a possibly expanded right of states to use force in circumstances that differ significantly from the two principal accepted legal grounds. Neither doctrine is wholly new, but their articulation has contained new elements:

---

**Adam Roberts** is Montague Burton Professor of International Relations at Oxford University and Fellow of Balliol College. He is co-editor, with Richard Guelff, of *Documents on the Laws of War* (Oxford: Oxford University Press, 2000).

- the doctrine of humanitarian intervention; and
- the doctrine reserving a right to act pre-emptively against emerging threats.

These events and doctrines have involved some expanded justification for intervention within states, and can thus be seen as challenging the twin normative principles of non-intervention and the sovereign equality of states that are enshrined in the UN Charter, especially in its Article 2(4). Further, some of these events, and the doctrine of pre-emption, appear to challenge the meaning of self-defence as outlined in Article 51 of the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

This wording has long been seen as raising a number of questions. Granted that the right of self-defence is 'inherent', to what extent did it continue unaltered into the UN era, or was it restricted by the UN Charter? What exactly constitutes an 'armed attack' or (to take a word used elsewhere in the Charter) 'aggression'? Does Article 51 have to be interpreted narrowly as excluding any self-defence other than that in response to an actual armed attack? Why has the duty to report to the Security Council been of such little practical significance, particularly in terms of the Council exerting its authority on the situation?<sup>22</sup> On each of these questions there is scope for genuine disagreement, whether among lawyers or among states. These disagreements all touch on the question of the extent to which the concept of self-defence can or cannot be understood broadly and can or cannot be a basis for justifying certain acts of intervention.

This survey notes that the doctrine of non-intervention has always suffered from certain limitations, and does so especially in today's unipolar world. It explores the ways in which the rapid development of international law may itself have created certain new occasions for the use of force. It then explores the occasional strengths and conspicuous weaknesses of the UN Security Council as a means of reaching decisions regarding the use of force, and the claim of what might be called 'existing authority' or 'continuing authority' that was put forward by the US and

other states in the 2003 crisis over Iraq. Next it considers the two distinct but similar doctrines of pre-emption and humanitarian intervention, and the reasons why they have failed to command general assent. Finally, it draws some conclusions from the varied and innovative practice of the post-Cold War period, including from the events surrounding the Iraq war in 2003.

### **Non-intervention versus spheres of influence**

The non-intervention rule has long been, and remains, basic to international order; its observance, however, has always been imperfect. Security concerns and related considerations have often in the past led countries to intervene by force in other states, in circumstances different from self-defence against ongoing armed attack. A wide variety of states, by no means confined to great powers, have at times given a no less wide variety of reasons for intervention: self-defence against imminent threats; counter-intervention to prevent a rival state from expanding its power; maintenance of peace and security; protection of their own nationals in other states; and protection of threatened populations within the target state.

Major powers have often made systematic efforts to impose limits on the freedom of action of other states. These efforts have always coexisted uneasily with doctrines recognising the sovereign equality of states and the principle of non-intervention. On certain occasions, as in the 1962 Cuban missile crisis, a state was subjected to coercive measures designed to restrict its freedom to build up whatever armaments it wanted, wherever it wanted, even though the arms concerned were not subject to clear and explicit legal restraints. There have been many comparable examples of coercive restrictions on the rights of states to do as they please. Arguments about preventing a more dangerous situation from developing within a state frequently loomed large as justifications – as much political as legal – for placing restrictions on certain states' freedom of action. In many cases, as with the Monroe and Brezhnev doctrines, such arguments became associated with the concept of 'spheres of influence'.

The current, unprecedented development is that the sphere of influence that now counts is, at last, literally a sphere: the world. If the US can be threatened by terrorists or what it defines as 'rogue states' half a world away, then it seeks some right to intervene half a world away. If shocking abuses of citizens by their own government can be shown on TV screens around the world, the demand arises for some right to intervene in distant continents. Previously, 'spheres of influence' could be viewed as mere

*The sphere of influence that now counts is the world*

regional exceptions to the general norm of non-intervention. Now there is one sphere in which, because it is global in character, any norm justifying intervention seems to pose a more direct and general challenge to the post-1945 normative framework limiting the resort to force.

This challenge to the existing normative framework regarding the use of force is further complicated by the fact that there is one pre-eminent military power, the United States. This fact has naturally given rise to a concern to restore balance to the international system: hence the varying degrees of French, Chinese and Russian attachment to the idea of a multipolar world. These states, and others, when opposing certain US-led interventions, have generally cited the non-intervention norm as the basis for their stance. They are on firm ground in doing so. While in some instances, especially Iraq in 1991, the US has used force for purposes that were perceived as internationally sanctioned and entirely legitimate, some subsequent US-led uses of force have undoubtedly posed problems for the non-intervention norm. The US doctrine of pre-emption adds to the litany of such problems. Thus the different power-political interests of states, and their different visions of how the world should be ordered, go hand in hand with disagreements about the legality of certain types of intervention, adding a layer of bitterness to the debate.

### **Expanding scope of international law**

The numerous crises of the post-Cold War world have exposed a curious and little-noted problem: that the very success of international law may itself have contributed, at least occasionally, to the perceived necessity to use force. Since 1945, international law has developed significantly, with especially notable growth in such areas as arms control, human rights, the laws of war and environmental conservation. The expansion of international law appears impressive in the extent to which it impinges on the lives of individual citizens, the number of countries that are parties to agreements and the range of peaceful measures for which it provides. International and supranational institutions have had important roles in assisting implementation of such law, as well as in election monitoring and other forms of international assistance. Nevertheless, this body of international law and practice presents some problems, which have become evident in the past decade.

- Some of this law is the product of liberal and internationalist impulses that may not be shared in all societies.
- When the norms that it enshrines are plainly violated, particular pressure arises to use force because the offending behaviour is seen as a challenge to international order.

- International law can exacerbate existing disputes or cause new ones. It can contribute to self-righteousness and international misunderstanding. The current chasm of misunderstanding across the Atlantic over the International Criminal Court, and the US refusal to participate in certain other treaty regimes, is a case in point.
- The implementation of international law, being almost always selective in character, leads unavoidably to accusations of 'double standards', which are made with predictable frequency. These accusations have particular salience in the North-South context.

There have been numerous examples of the use of force by states in claimed support of international legal principles whose connection with self-defence is tenuous at best. Even the most multilateralist of states have sometimes used force with such stated purposes. For example, on 9 March 1995, Canadian patrol boats arrested a Spanish trawler, the *Estai*, just outside Canada's territorial waters, accusing it of violating quotas set by the Northwest Atlantic Fisheries Organization (NAFO). The Canadian use of force was memorably condemned by the EU fisheries commissioner, Emma Bonino, as 'an act of organised piracy'.<sup>3</sup>

To suggest that the dense network of international legal agreements can sometimes create occasions for the use of force is not to denigrate the crucially important role that international law plays, but to warn against naïve expectations and simplistic slogans. The idea that law and war are in separate categories has, naturally, been attractive to some lawyers and some soldiers (although for very different reasons). This simplistic view can do great harm and can actually contribute to international recrimination. In reality, law and force have always had, and retain, a complex mutual dependence – especially when it comes to the authorisation of, and justification for, the use of force.

### **Authorisation by the UN Security Council**

Since the end of the Cold War, the UN Security Council has had important roles both in authorising uses of force in a wide range of situations, and in contributing to certain changes in the understanding of *jus ad bellum* as it applies to states. Moreover, the Council has asserted a degree of authority over some recalcitrant states that has subsequently been important in debates concerning the use of force against those states. The idea that the Security Council can, in certain situations, require states to take certain actions inside their own borders (as with the 1998 resolutions requiring Yugoslavia to facilitate the return of displaced persons in Kosovo), and can even authorize a regime change by force (as it did with its resolution on Haiti in 1994) appears to be widely if not

universally accepted. This is proof, if it is needed, that some limitations on state sovereignty may be accepted even when others are not.

*Some  
limitations  
on state  
sovereignty  
may be  
accepted even  
when others  
are not*

The UN Security Council has authorised the use of force in a variety of situations, but has done so in ways somewhat different from those envisaged in certain provisions of the UN Charter. When confronted by situations requiring the large-scale use of force, the Security Council has not generally commanded substantial military action in the ways anticipated in many provisions of Chapter VII. Its primary method for dealing with this problem has been to authorise the use of force by member states (this was compatible with certain provisions in Articles 48 and 53 of the Charter). Security Council resolutions have authorised the use of armed forces by US-led coalitions, rather than under the command of the UN as such, in the cases of Korea (1950), Iraq–Kuwait (1990), Somalia (1992), and Haiti (1994). The Security Council authorised France to lead an operation in Rwanda (1994), Italy in Albania (1997) and Australia in East Timor (1999). UN authorisation of limited use of force by states has also become a common method for enforcing sanctions, air exclusion zones and other restrictions on particular states and activities.

In Bosnia and Herzegovina in 1992–95, the arrangements for authorisation of force were particularly varied and complex. Security Council Resolution 836, passed on 4 June 1993, included a decision that

Member States, acting nationally or through regional organisations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR [UN Protection Force, the peacekeeping force in the former Yugoslavia], all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate.

This was a basis for several NATO military actions in 1994–95. Events exposed difficulties in combining the threat or use of force with humanitarian and peacekeeping activities, and in the system of joint UN and NATO authorisation of force. In August–September 1995, after the Serb conquest of the two ‘safe areas’ of Srebrenica and Zepa, and continuing attacks on others, NATO’s *Operation Deliberate Force* bombing campaign was followed by a ceasefire. The Dayton Accords were concluded on 20–21 November 1995. The NATO-led Implementation Force (IFOR), authorised by the Security Council and deployed in Bosnia in December 1995, had notably broad authority from the UN to use force.<sup>4</sup>

In addition to various forms of authorisation to others, there was also a tendency in the 1990s for the Security Council to grant unusual powers to use force to certain UN peacekeeping operations. Examples included the ill-fated UN Operation in Somalia II (UNOSOM II) and the UN Mission in Sierra Leone (UNAMSIL).<sup>5</sup>

In the 1990s, the UN Security Council addressed the problem of terrorism. Most notably, a resolution was passed six days after the bombings in Nairobi, Kenya and Dar-es-Salaam, stressing 'that every Member State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts'.<sup>6</sup> The general approach was one of firm insistence on state responsibility for stopping terrorist activities on their territory, not a licence for international military action.

The day after the events of 11 September 2001, the Security Council came closer to endorsing the use of force in response to international terrorist acts. Resolution 1368 recognised 'the inherent right of individual or collective self-defence in accordance with the Charter', condemned the attacks of the previous day and stated that it 'regards such acts, like any act of international terrorism, as a threat to international peace and security'. It also expressed the Council's 'readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism'.<sup>7</sup> These key points were reiterated in a resolution later that month, which additionally placed numerous requirements on all states to bring the problem of terrorism under control.<sup>8</sup>

These resolutions were not direct authorisations of force – something not specifically required for the initiation of a self-defence action. However, by recognising the right of self-defence in this context, they helped to clarify that there was an international legal basis for the subsequent US-led intervention in Afghanistan. Further, these resolutions, and various associated statements and actions, can be seen as confirming that the law of self-defence encompassed actions by non-state entities within the concept of 'armed attack'; allowed for the possibility of attacking terrorist bases operating on the soil of states unwilling or unable to prevent terrorist attacks; and recognised that a regime's responsibility was engaged for its failure to prevent and punish acts of terrorism by a movement operating on its soil, and therefore that an attack on that regime itself might be permissible.<sup>9</sup>

Following the main phase of military hostilities in Afghanistan and the fall of the Taliban regime in December 2001, the Security Council again took the path of establishing an authorised but non-UN peacekeeping force – the International Security Assistance Force (ISAF), established in Kabul and

surrounding areas in January 2002. As with SFOR and KFOR in the Balkans, ISAF was conferred with certain powers, including to use force, that are more extensive than those of most UN peacekeeping operations.<sup>10</sup>

The fact that the Security Council has authorised or approved the use of force in a large number of cases, and thereby has an important legitimising role, cannot obscure the no less significant fact that it has frequently been unable to agree on forcible measures.<sup>11</sup> Generally this has been due to threat or use of the veto. Kosovo in 1999 was such a case, but after the war, Security Council Resolution 1244 of 10 June 1999 provided the basis for a NATO-led force in Kosovo (KFOR), and also for a UN administration. Another case in which the Security Council could not agree on the use of force, Iraq in March 2003, is discussed in the next section.

The greatest problems regarding the legitimacy of uses of force arise when they are *neither* authorised by the Security Council *nor* a straightforward case of self-defence in response to an armed attack. It would be easy to say that, apart from cases of self-defence, force should never be used except when explicitly authorised by the Security Council. In virtually all crises, the argument for attempting to get agreement in the Security Council is strong. However, viewing formal Security Council authorisation as a *sine qua non* of military action poses a number of problems. It means that each of the five permanent members of the Security Council can veto any and every use of force other than self-defence. Even if no veto is threatened, it means that such uses of military force depend on votes from permanent or non-permanent members who may be remote from the crisis. Historically, because of such factors, the Security Council has been more willing to define the ends of policy than to provide or authorise military means for attaining those ends. There have been many cases in which, at least in the view of certain key states involved, there was an overwhelming case for the use of force, but the Security Council did not, and probably could not, formally agree to authorise it. Such cases include the crises in East Pakistan in 1971, in the Kurdish areas of northern Iraq in 1991, and in Kosovo in 1999.

There have been cases, including northern Iraq in 1991, Kosovo in 1999 and Iraq in 2003, in which the Security Council, while unable to authorise the use of force, was also unable (and in some instances clearly unwilling) to condemn it or to demand an immediate ceasefire. In such instances the use of force may be legally precarious, but it is not self-evidently in every case illegal.

Sometimes the willingness of one or more member states to use force in support of proclaimed Security Council objectives may actually galvanise the other Security Council members to take action, because of concern that otherwise they, or the Council as a whole, would look

irrelevant. The Iraq crisis in the months leading up to Resolution 1441 of 8 November 2002 can be read in this way. However, when in March 2003, the US and UK spectacularly failed to secure Security Council support for a so-called 'second resolution' on Iraq, they proved that such a galvanising strategy is by no means assured of success, and may indeed incur resentment.

### **War in Iraq**

In the period before the war, when it became apparent that a specific UN Security Council authorisation was unlikely, states and international lawyers criticised the proposed US-led military action in Iraq as unlawful.<sup>12</sup> Since this action was not a case of self-defence against an actual armed attack by Iraq, and did not have the explicit authorisation of the UN Security Council, it could easily be viewed as having at best a doubtful basis in international law. Nevertheless, in most cases, the expression of this view did not include a detailed response to the strongest part of the legal case for military action against Iraq. Such an omission is not surprising, as the debate about the reasons for, and legitimacy of, attacking Iraq lacked a clear focus.

Especially in the US, discussion of possible action against Iraq had encompassed many different lines of argument. As early as 1998, the joint houses of the US Congress passed the Iraq Liberation Act which, in calling for the US 'to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime', cited Iraq's conduct in the war against Iran, its attack and occupation of Kuwait, its orchestration of a failed plot to assassinate President George H. W. Bush in 1993, its repression of the Kurds, its violation of disarmament conditions of the 1991 ceasefire and its denial of democracy.<sup>13</sup> In the even more intense debate about Iraq from summer 2002 onwards, members of the Bush administration variously suggested that military action was necessary and justified because of the urgent need for an end to the repression of the Iraqi people, for regime change, for preventive war to stop a possible future threat and for pre-emptive attack against an imminent threat. They also spoke of Iraq as the 'next phase' of the war on terrorism. Finally, they stressed the importance of securing the implementation of Security Council resolutions on Iraq, particularly those relating to biological, chemical and nuclear disarmament. The range of rationales reflects accurately the extraordinary number of issues involved in the Iraq crisis. The world is not a tidy place, least of all in Iraq.

In March 2003, when the US and the UK finally took military action against Iraq, the two governments relied on one main legal rationale: Iraq's

failure to implement certain UN Security Council resolutions, and the coalition's continuing authority to use force based on such resolutions. On 17 March, President George W. Bush, while asserting in general terms that the US 'has the sovereign authority to use force in assuring its own national security', indicated that a main basis for the use of force against Iraq was contained in UN Security Council resolutions 678, 687 and 1441.<sup>14</sup> The UK government, in statements issued on the same day, took the same line.<sup>15</sup> Then on 20 March, John Negroponte, US Ambassador to the UN, put the US case in a letter to the President of the Security Council:

The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990).<sup>16</sup>

During the hostilities, the US Congress defended the legitimacy of the US-led use of force on a similar basis.<sup>17</sup> The argument that past Security Council resolutions provide a continuing, or revived, authority to use force, in a different situation and a dozen years after they were passed may seem tortuous, but an examination of their terms suggests that it has substance. In 1990, immediately following the occupation of Kuwait, a Council resolution had affirmed 'the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait'.<sup>18</sup> Against this background, further authorisation was not essential as a basis for military action to achieve the restoration of Kuwait. However, Resolution 678 of 29 November 1990, in authorising member states to use force, specified that this was not just to implement the resolutions demanding Iraqi withdrawal from Kuwait, but also 'to restore international peace and security in the area'. This was a prudent recognition of the need for a range of measures to ensure stability. This resolution, including its reference to restoring peace and security, was reaffirmed in Resolution 686 of 2 March 1991, concluded at the end of the campaign to expel Iraq from Kuwait. Then Resolution 687 of 3 April 1991, 'the mother of all resolutions', spelled out the detailed terms of the ceasefire, covering such matters as boundary demarcation, a demilitarised zone, and renunciation of terrorism. In requiring Iraq to

renounce unconditionally any biological, chemical or nuclear weapons programmes, it provided for a system of international inspection and weapons destruction by the UN Special Commission, and imposed time limits for Iraqi disarmament, much of which should have been completed by August 1991.

Thereafter, numerous Security Council resolutions found Iraq to be in breach of its ceasefire commitments. For example, Resolution 707 of 15 August 1991 condemned Iraq's violations of 687, and stated specifically that the precondition for the ceasefire required by 687 had not yet been met. In 1998, when Iraq ceased cooperation, Security Council Resolution 1205 of 5 November 1998, passed unanimously, condemned Iraq as 'in flagrant violation' of its ceasefire commitments.<sup>19</sup>

Resolution 1441, passed unanimously on 8 November 2002, has been the subject of many conflicting interpretations. It contains many ambiguities, especially its reference to 'serious consequences' if Iraq should fail to comply. Its central meaning, however, is clear. It proclaimed Iraq to be in 'material breach of its obligations under relevant resolutions'; recalled that 'in its Resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution'; offered Iraq 'a final opportunity to comply with its disarmament obligations'; provided for stringent supervision by the UN Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA); and required the Security Council to convene immediately if Iraq failed to comply fully. This resolution, taken on its own, was not a clear authorisation to use force; but, apart from the requirement that the Council reconvene, it did not weaken any authorisation based on earlier resolutions.

The legal justification for the US-led military action initiated in March 2003 would have been significantly simpler, and therefore more persuasive, if the US and UK had succeeded in their efforts to get the UN Security Council to follow up with a so-called 'second resolution' – which would actually have been the eighteenth regarding the use of force and Iraqi compliance with disarmament terms. Such a resolution would have determined (once again) that Iraq was in breach of its obligations, and might also have explicitly authorised the use of force.

However, for many members of the Security Council this was a resolution too far. France, Russia and China, as well as several of the non-permanent members, were plainly sceptical or totally opposed. This was not surprising, given their different interests, their different views of war and their stated concerns about US dominance. It is asking a lot of major states that they should formally approve the initiation of a war by another power, especially when it is a hyper-power about whose policies they in

any case have reservations. The effect, naturally, was to encourage a US belief in the inadequacies of certain international institutions.

At the Security Council meeting on 17 March, the US and UK governments had to face the consequences of defeat in their efforts to obtain a second resolution. It was small consolation that they had stated on several occasions that such a resolution would be politically desirable but was not legally necessary. Kofi Annan remarked, as he left the meeting and announced the withdrawal of UN personnel from Iraq in view of the imminence of war: 'I have also said if the action is to take place without the support of the Council, its legitimacy will be questioned and the support for it will be diminished'.<sup>20</sup>

In principle, can the violation of certain terms of a ceasefire constitute a justification for an eventual use of force against the violator? Although hardly cited during the long crisis over Iraq, a provision in the chapter on armistices in the 1907 Hague Regulations on land war suggests an affirmative answer: 'Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately'.<sup>21</sup>

The argument that there can be a continuity and resumption of the authority to use force contained in previous UN Security Council resolutions was asserted repeatedly in crises over Iraq in the 1990s. Thus, on 14 January 1993, in response to an attack the previous day by the US, UK and France on Iraqi missile launchers, UN Secretary-General Boutros Boutros-Ghali said:

The raid, and the forces that carried out the raid, have 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. So, as Secretary-General of the United Nations, I can say that this action was taken and conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations.<sup>22</sup>

The argument of continuing authority was also advanced at the time of the 1998 crisis over inspections, when the US and UK launched *Operation Desert Fox* against Iraq. It was contested in the Security Council, most notably by Russia, which asserted that the US and UK had no right to act independently on behalf of the UN or to assume the function of 'world policeman'.

Despite such criticisms, the strongest case for the legality of military action against Iraq rested, not on any general propositions about preventive defence, nor on Resolution 1441 taken in isolation, but upon Iraq's violations of specific UN resolutions and on the continuing authority contained in certain resolutions. The resolutions already reflected the wider concerns about the dangers posed by the Iraqi regime:

it was precisely because of the need for preventive action that these particular ceasefire terms had been imposed on Iraq in the first place.

How should the nature of the claimed authorisation be characterised? One academic, who is critical of the concept, has referred to it as a claim of 'implied authorisation to use force'.<sup>23</sup> She has likened the US–UK position in the Iraq crisis in late 2002 to that of the NATO countries in respect of the military action against Serbia in 1999, stating that 'this doctrine of implied authority to use force is itself extremely controversial; it may involve the distortion of the words of the relevant resolutions and ignore their drafting history.'<sup>24</sup> While this warning is important, there is a difference between the cases of Serbia and Iraq. In 1999, the UN Security Council had not specifically authorised the use of force against Serbia, whereas in November 1990 it had authorised force against Iraq. The question regarding Iraq in 2003 was whether that authority dating back to 1990 could be said to have continued or resumed. Thus, what was at issue regarding Iraq in 2003 was as much a claim of 'existing authority' or 'continuing authority' as of 'implied authority'.

If there was continuity of authority from 1990 to 2003, in whom was that authority vested? Resolution 678 had referred to 'Member States cooperating with the Government of Kuwait'. The effective members of the coalition in 2003 were fewer than, and not the same as, those in 1991. However, the core membership remained the same: Kuwait, the UK and US.

How much weight attaches to the past decisions of the Security Council in authorising force? If the Council authorises certain member states to undertake a task, but is then unable to agree on follow-up action, does the original authorisation still stand? Do the current views of the Council, which in March 2003 were, for the most part, against the use of force, trump its past authorisations? Much hangs on the particular issues and resolutions concerned. The simple guiding principle has to be that a resolution, once passed, remains in effect. In the absence of a new resolution repudiating earlier positions (which will always be hard to achieve, granted the existence of the veto) a presumption of continuity is plausible.

At all events, the military action in Iraq did not fall tidily into one or other of the existing categories of 'UN-authorised action' and 'self-defence'. It was not a straightforward case of an action specifically authorised by the UN Security Council. Neither was it, as some have asserted, an essentially 'unilateral' action. Of course, there were notably unilateral elements, and the US and UK by no means excluded self-

*Do the current views of the Council trump its past authorisations?*

defence among their justifications. Yet in key respects it was far from unilateral. Not only was this action being fought by a coalition of sorts, but it was being fought (the coalition claimed) in the name of purposes proclaimed by the Security Council and with its continuing authority.

There remain grounds for doubt. It was reported that the claim that there was authority to use force was questioned by a senior member of the UK Foreign Office's legal staff.<sup>25</sup> Perhaps the greatest difficulty with 'continuing authority' in the light of events in Iraq in 2003 concerns not so much the proposition itself, which is fundamentally strong, but its particular invocation in this crisis, especially in view of the doubtful quality of the evidence that Iraq still possessed weapons of mass destruction in significant quantities. Some unconvincing US and UK reports and presentations before the war weakened the case. There was, inevitably, scope for disagreement as to whether the UN verification system operating under Resolution 1441 should be set aside in favour of a use of force when the disarmament process had produced at least some results. As circumstances change after the war, it is possible that *ex post facto* other justifications for resort to force will look more convincing.

A strong argument for some concept of continuing authority is as much strategic as legal. If a major power acts on behalf of the Security Council, as the US undoubtedly did in liberating Kuwait in 1991 and in acting in effect as a guarantor of the 1991 ceasefire terms, can its hands then be tied? The question is complicated by the fact that Iraqi compliance has almost always been the result of strong external military pressure. Up to a point, this has been accepted by members of the Security Council, who have at times been prepared to see the US and its partners threaten the use of force. Many, however, have not been willing to countenance full-scale war. The result was a stalemate in which the US found itself keeping large forces tied up in neighbouring countries, its credibility called into question by the drawn-out saga of an Iraqi disarmament process that should have been completed in 1991. In that perspective, the issue was not so much Iraq's actual weapons of mass destruction, but rather its failure to comply fully with the verification process, and the consequent impossibility of reaching any kind of closure.

While the basic concept of existing or continuing authority has considerable strength and may eventually gain wide acceptance, there is no chance of obtaining prompt agreement on its particular application in the Iraq crisis in 2003. The apparent lack of preparedness of the US and UK for the administration of Iraq added to the international scepticism about their role. Those states, including (most damagingly) certain NATO members, which strongly rejected the US-led action, are not likely to reverse their position suddenly. In light of the immediate post-war

failures to uncover major stockpiles of prohibited weapons in Iraq, these states had little incentive to abandon previous positions. There are differences in interpretation of the law that need to be addressed, but as regards Iraq, agreement to disagree seems a more likely and perhaps more prudent course. This could be based on a frank recognition that this was a war of choice, over which there were bound to be divergent views, especially bearing in mind different interests, experiences of war and ideological perspectives.

### **Doctrines of pre-emption**

Discussion of this matter is complicated by different and inconsistent uses of key terms. 'Pre-emption', the term at the heart of recent debates, is based on the idea of preventing an attack by disabling a threatening enemy. It can encompass both anticipatory self-defence (military action against an absolutely imminent threat) and preventive military action (to nip a future threat in the bud).

'Pre-emption' is a distant relation of another concept, 'conflict prevention', that has also been the subject of increased attention in the post-Cold War period. Particularly within the UN system, preventive diplomacy has been widely advocated on the grounds that it is better to prevent conflicts than to manage the consequences. It is no coincidence that the importance of tackling problems at an early stage has been widely recognised, if in different ways.

That force may have to be used by states to address a situation before it develops into an actual attack is not a new idea. As Michael Reisman has written, 'International law has been grappling with the claim of preemptive self-defense for decades'.<sup>26</sup> In some countries, there is a long tradition of thinking about the use of force in broadly preventive terms. For example, in Australia, being remote from many areas of conflict, participation in certain wars in the twentieth century was sometimes justified in such terms. This is not to say that there were not other rationales as well, nor that the cause that Australia was joining was itself basically preventive.

General acceptance of any doctrine of pre-emption would involve a major conceptual shift in international relations. There has been a marked tendency in the post-1945 period to view the right of self-defence narrowly as a right to act against actual attack. For most of this period, US governments, and the international community more generally, have been opposed to anticipatory self-defence or any broader concept of pre-

*During the Cold War, the US resisted the temptation to launch preventive strikes*

emption.<sup>27</sup> During the Cold War, successive US administrations resisted the temptation to launch preventive strikes to stop the Soviet Union and China from becoming nuclear powers. This disinclination to act preemptively is under challenge in an era of international terrorism, especially when there are concerns about weapons of mass destruction getting into terrorist hands. The US administration has probably been right to confront this new reality head-on: states now face certain dangers that cannot be deterred in any conventional sense, and which may need to be tackled before they develop into an actual armed attack.

Bush's advocacy of pre-emption was encapsulated in the September 2002 *National Security Strategy*.<sup>28</sup> The ideas in this document were not entirely new. There were elements of continuity with the policy that had been evolving during the Clinton administration.<sup>29</sup> A number of presidential speeches earlier in the year had provided previews. The document, produced annually as a legal requirement imposed by Congress, had a huge impact nationally and internationally – not because it was wholly new, but because it seemed to set certain contentious propositions in stone.<sup>30</sup>

The document is first and foremost a statement of national strategy, much of which is written in that visionary language which Americans use when they seek to reform the deplorable condition of international relations.<sup>31</sup> However, in redefining US strategic doctrine it also necessarily addresses a number of issues that are self-evidently legal in character. In a key passage the document states:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.<sup>32</sup>

This passage, ignoring the post-1945 tradition of US scepticism about doctrines of pre-emption, claims to appeal to an older body of thought. Its reference to 'imminent threat' harks back to a classic exposition of the right of self-defence in the statement by US Secretary of State Daniel Webster in April 1841 in connection with the *Caroline* dispute. The dispute followed the British capture and destruction of the steamboat *Caroline* on 29 December 1837, which was set on fire and sent adrift over the Niagara Falls. The *Caroline* had been on the US side of the border, and had been used by a group arming and organising in the US in support of a

rebellion within British territory in Canada. Alexander McLeod, a British subject allegedly involved in the destruction of the *Caroline*, had been arrested and detained in the US. The British demanded that he should be released principally on the grounds that the destruction of the ship had been a public act of the British colonial authorities 'for the defence of Her Majesty's territories and for the protection of Her Majesty's subjects'.<sup>33</sup> In response to this British demand, Daniel Webster famously stated: 'It will be for Her Majesty's Government ... to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.<sup>34</sup>

The case thus addresses a modern question. What is the proper response of a state to an unofficial group launching a covert attack against it across international borders? However, except at the tactical level it was not basically about pre-emption, as the rebellion in Canada was actual and ongoing. Moreover, the case for pre-emptive action today could not possibly be confined to the *Caroline* criteria. In particular, a difficulty with the legal rationale for many actual or envisaged pre-emptive military actions (whether on counter-terrorist or other grounds) is that in most cases it is hard to argue that there is 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. That certainly was not the case in the Iraq crisis of 2003. No one can claim that there was 'no moment for deliberation': few military actions can have been the subject of more domestic and international deliberation.

The Bush doctrine suffers from a number of defects. The preemptory manner of its emergence, which may have been due to a congressionally imposed timetable leaving little scope for consultation with allies, added to the confusion surrounding the document. Its focus being almost entirely on the US, it fails to explore the possible merits of pre-emption for other states. Likewise, it fails to consider the consequences for international relations if there were widespread claims by states of a right to act pre-emptively. It fails completely to mention the non-intervention norm, which remains the basic rule of the international system. By transforming the problem of how the US might address a few hard cases into general doctrine, it has appeared to undermine the non-intervention norm more directly than was necessary. Coupled with the proclamation of the 'Axis of Evil' in Bush's January 2002 State of the Union speech, its effect internationally may have been to cause more anxiety and opposition than reassurance. States need reassurance – and some degree of respect – if they

*States need  
reassurance –  
and some  
degree of  
respect*

are to play a significant role as US allies, including in the campaign against terrorism.

The impact of the doctrine on the evolution of the Iraq crisis in 2002–03 was largely negative. The doctrine was not necessary for the war against Iraq in 2003. In the event, official justifications for the war were cast in the sounder and less abrasive terms of Security Council resolutions. It was generally critics of the United States who viewed the war as the first application of the pre-emption doctrine – and attacked it on that basis.

A fundamental question raised by the doctrine concerns whether there can be any international procedure in respect of what must always be particularly contentious decisions to use force. The UN is not ignored entirely in the *National Security Strategy*: it receives a couple of brief mentions.<sup>35</sup> Even after the spectacular failure of the UN Security Council in March 2003 to adopt any coherent line on Iraq, the logic of the Bush doctrine may compel the US to take at least some problems to the UN Security Council. The fact of the matter is that international legitimacy for policies towards emerging threats will not come via an improbable change in international law on when states may use force, but rather, through agreement to specific policy goals (and ultimately action in support of them) by the Security Council and, possibly, other internationally respected bodies with legal standing in respect of particular problems or regions.

### **Doctrines of humanitarian intervention**

A clear example of a case in which law can at times form part of the *casus belli* leading to the resort to force concerns the unanswerable question of ‘humanitarian intervention’. Since 1945, two bodies of law have become deeply entrenched, albeit imperfectly observed: on the one hand, human rights and humanitarian norms, including those in the laws of war; and, on the other, law restricting the use of force largely to the case of self-defence, except where specifically authorised by the UN Security Council. In the case of humanitarian intervention, these two bodies of law clash. Despite the fact that all the NATO member states were able to agree on military action over Kosovo in 1999, it has not been possible to establish a general doctrine on the basis of this precedent. It is not possible to adjudicate in advance which of two great bodies of law trumps the other.

The experience of humanitarian intervention since the end of the Cold War is an object-lesson in the difficulties of turning an occasionally necessary type of action into a fixed doctrine. Humanitarian intervention may be defined as ‘coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and with the purpose of preventing widespread suffering or death

among the inhabitants'.<sup>36</sup> Some definitions of recent decades have encompassed certain elaborations, but do not fundamentally change the basic definition.

Since early 1991, there have been numerous crises in which the question has arisen of whether or not external institutions should, on humanitarian grounds, organise or authorise military action within a state. Within the UN Security Council, in at least nine cases there have been resolutions citing humanitarian considerations as a basis for action, followed by multilateral military action, going well beyond traditional peacekeeping, by armed contingents from outside the country concerned. In four cases (northern Iraq, Somalia, Haiti and Kosovo) military action without the approval of the government of the state, justified largely on humanitarian grounds, was initiated. In the remaining five cases (Bosnia and Herzegovina, Rwanda, Albania, Sierra Leone and East Timor), there was a stronger element of consent to the presence of foreign forces. However, even in the four cases of humanitarian intervention proper, the question of consent was subtle and complex: elements of consent to the international presence did sooner or later play some part. In these cases (unlike in four of the five consent-based operations) US forces took the lead role in the intervening coalitions. In two of these cases (northern Iraq and Kosovo) there was no explicit UN Security Council authorisation of the military action. In the other two (Somalia and Haiti) there was such authorisation, and therefore in terms of international law the initiation of these operations was uncontentious.

Despite this range of practice, all attempts since the early 1990s to get an agreed doctrine favouring humanitarian intervention have failed. A critical test that any emerging norm or practice must pass, if it is to be accepted as part of international law, is that it is generally supported by states. Humanitarian intervention does not pass this test. Several large and powerful states (China, India and Russia) have expressed strong opposition. Equally important, large numbers of post-colonial states, particularly in Africa and Asia, have opposed it, especially as many of them fear that they would be potential targets of intervention. Furthermore, some potential or actual interveners on humanitarian grounds, including the US, have shown no interest in the development of a doctrine of humanitarian intervention, not least because it might tie their hands.

This does not mean that humanitarian intervention is necessarily illegal. In those cases in which it is specifically authorised by the Security Council, as in Somalia and Haiti, its lawfulness seems to be accepted by most states. In certain other cases, from East Bengal in 1971 to Kosovo in 1999, judgements about the lawfulness or otherwise of the action seem to depend heavily on how the particular crisis is viewed. Such judgements

also depend on whether other issues are involved in the intervention. Such additional issues can include self-defence, rescue of nationals of the intervening country, maintenance of international peace and security, and implementation of the goals proclaimed in UN Security Council resolutions.

There are fundamental problems with the idea that states have a general 'right' of humanitarian intervention.<sup>37</sup> It was therefore sensible of the

*Hard cases  
also make a  
bad basis for  
asserting that  
there is no law*

Canadian-sponsored International Commission on Intervention and State Sovereignty, when it reported at the end of 2001, to avoid asserting such a general right. Rather, it emphasised securing an acknowledgement by states that they have a 'responsibility to protect' – which is first and foremost a responsibility of all governments in relation to their own citizens.<sup>38</sup> This is an ingenious attempt at a reformulation of the question of humanitarian intervention, but there is so far little sign of states explicitly accepting such a responsibility.

This reluctance of states is partly due to their nervousness about subscribing to any doctrine that might become a basis for intervention.

### **Gaullism, super-Gaullism and continuing UN roles**

International divisions over the legitimacy of certain uses of force are serious. They have been damaging within the NATO alliance and also more generally. Although the East–West divide largely closed with the end of the Cold War, Russian suspicion of what is perceived as US dominance and willingness to use force abroad remains, and is shared by many other states. The divide between North and South persists, and issues relating to the legitimacy of the use of force have become a major focus of contention.

The Iraq crisis of 2002–03 exposed these divisions in dramatic form. It was a remarkable achievement of Saddam Hussein that, in a crisis over a disarmament process that was meant have been completed more than a decade earlier, his intransigence and the US response to it threatened to bring down the temples of NATO, the EU, the UN and international law.

Hard cases notoriously make bad law. They also make a bad basis for asserting that there is no law. The issues of humanitarian intervention and of pre-emption, and the prolonged crisis over Iraq, have all revolved around cases that are 'hard' in the sense that they raise the question of whether force can be used in circumstances that go beyond self-defence and in which there may be no explicit authorisation by the UN Security Council. That the answers to this question have been messy, in the sense that they have failed to command universal assent, does not mean that international law and

organisation are dead. There is no prospect of general agreement to a new set of black-letter rules regarding the circumstances in which the use of force may be legitimate, nor regarding new institutions that might authorise force. However, that conclusion does not mean that there has been no clear direction to the events since the end of the Cold War, nor does it mean that there are no useful guidelines to be deduced from these events. Indeed, there is an urgent need for governments (including within NATO) to make a serious effort to reach a necessary minimum of understanding on key developments and principles regarding the legitimacy of the use of force.

In a series of crises since the end of the Cold War, there has been some expansion of the rationales seen as justifying the use of force. The UN Security Council has authorised force in more situations than it did in the UN's first 45 years, and this has been largely accepted as within the Security Council's competence. An important, if more contentious, innovation has been the claim, made by the US and others, that there can be a 'continuing authority' from the Security Council to use force, and that, following the 1991 ceasefire, this provided the legal basis for major uses of force in Iraq up to and including the 2003 war. As regards uses of force not specifically authorised by the Security Council, there has also been a degree of cautious advancement of the ideas that force may be used to implement the ends willed by the Security Council even if it could not agree on the means; and that it may on occasion be permissible to protect threatened people in urgent humanitarian crises. Regarding the law on self-defence, there has been recognition that actions by non-state entities can fall within the concept of 'armed attack', that a regime's responsibility was engaged for its failure to prevent and punish acts of terrorism by a movement operating on its soil, and therefore an attack on that regime itself might in exceptional circumstances be permissible.

This expansion of rationales has been heavily dependent on particular contexts, and attempts to turn its innovative aspects into general doctrine have been strongly contested. Hence the conspicuous lack of support from states for either the doctrine of humanitarian intervention, or the Bush doctrine of pre-emption. In both cases, these doctrinal innovations were often presented in a manner that paid insufficient attention to the continued value of the non-intervention norm. This norm remains fundamental to the conduct of international relations, and only in very exceptional combinations of circumstances may it have to yield to other norms and considerations. The failures to emphasise this basic point have contributed to responses ranging from scepticism to outright hostility, and undermined the task of coalition-building in the most recent Iraq crisis.

The well-known weaknesses of the UN decision-making procedure relating to the use of force have remained serious in the post-Cold War

era. They were already evident in the Kosovo crisis in March 1999, when the prospect of a Russian veto led the US and allies to avoid even putting a resolution authorising force before the Security Council. The weaknesses were even more evident in March 2003, when France indicated that it would veto a resolution authorising force against Iraq. Never before has a major power, seeking to act militarily with the claimed purpose of implementing UN Security Council resolutions, faced the openly advertised prospect of veto by an ally. The crisis confirmed the conclusion that, if the UN is valuable in many of its roles, it can fail conspicuously in others. The UN, despite the aspirations of its Charter, will continue to coexist with a system of states that is older, and is rapidly changing because of the unique US role.

It is improbable that the causes of the UN and international law can be assisted by a simple rejection of the US approach to the use of force. Indeed, the element of Gaullism in the French policy over Iraq may have encouraged a super-Gaullism in the US: a belief that the state, at least in its American incarnation, is the supreme and enduring entity in international politics, that the US now has a unique capacity to wage war effectively, and that international law and organisation are of limited importance. The absence of a plausible and appealing concept of how Europe could unite to create an effective military rival to the US confirms that rejectionism leads into a blind alley, undermining the multilateralism it is supposed to protect.

There is no obvious workable way to reform the existing UN decision-making procedure so far as the use of force is concerned. Most proposed changes to the UN Charter's provisions regarding the composition or procedures of the Security Council involve increasing the number of permanent members. If they all had the veto, that would further reduce the already-limited chances of obtaining agreement on controversial measures. Any proposal to reduce the existing number of states armed with the veto, or to limit the occasions on which the veto may be used, has to surmount the major procedural obstacle that, if it is to be passed, each veto-wielding state will have to consent.

Institutions outside the UN may on occasion be able to act, more or less convincingly, as validating authorities for decisions on the use of force. However, no other body commands quite the same degree of international legitimacy. Any proposal for a union of democracies would run up against the objection that the Iraq crisis has exposed huge differences among them. Alliances and regional organisations such as NATO and the EU have also been deeply divided over Iraq. Furthermore, their tradition of operating by consensus means that they are procedurally even less well-equipped than the UN Security Council to take controversial decisions.

The UN therefore remains, damaged but not destroyed, as one vehicle for reaching decisions on the use of force. Paradoxically, even when attempts to obtain UN authorisation for force fail, the appeal to UN principles may have considerable value. In both the 1999 Kosovo crisis and the 2003 Iraq crisis, the US-led coalitions presented as a key part of the legal justification for the use of force the fact that the military intervention had the purpose of ensuring implementation of UN Security Council resolutions. In the case of Iraq there was, additionally, the claim of continuing authority from the UN Security Council to use force. These claims were more than the tribute that vice pays to virtue: they were recognition that even in the new circumstances and hard cases of the twenty-first century, force has an unavoidably close relationship to law.

## Acknowledgements

The author wishes to thank Tony Aust, Simon Chesterman, Sebastian von Einsiedel, Guy Goodwin-Gill, Gur Hirshberg, Melvyn Leffler, David Malone, Thomas Pickering, Terry Taylor and many others for their help with this essay. Responsibility for all opinions and errors is mine alone. A version of this article will appear in David M. Malone (ed.), *The United Nations Security Council After the Cold War* (Boulder, CO: Lynne Rienner, 2004, forthcoming).

## Notes

<sup>1</sup> Michael J. Glennon, 'Why the Security Council Failed', *Foreign Affairs*, vol. 82, no. 3, May/June 2003, p. 16.

<sup>2</sup> For a discussion of these questions see Albrecht Randelzhofer's exegesis on Article 51 in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, second edition (Oxford: Oxford University Press, 2002), pp. 788–806. He concludes, remarkably: 'As regards UN members, it stands that Art. 51, including its restriction to armed attack, supersedes and replaces the traditional right to self-defence'.

<sup>3</sup> *Keesings Record of World Events 1995*, pp. 40447–8.

<sup>4</sup> Security Council resolution 1031 of 15 December 1995, paragraph 14. Under resolution 1088 of 12 December 1996 IFOR was reduced in size and re-named Stabilisation Force (SFOR), while retaining the same authority to use force.

<sup>5</sup> On the extensive powers of these UN peacekeeping forces, see esp. Security Council Resolution 814 of 26 March 1993 (on Somalia); and Resolutions 1270 of 22 October 1999 and 1289 of 7 February 2000 (on Sierra Leone).

<sup>6</sup> Security Council Resolution 1189 of 13 August 1998. This resolution drew on language contained in the 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States' which had been approved by the UN General Assembly on 24 October 1970.

<sup>7</sup> Security Council Resolution 1368 of 12 September 2001.

<sup>8</sup> Security Council Resolution 1373 of 28 September 2001.

<sup>9</sup> See Yutaka Arai-Takahashi, 'Shifting Boundaries of the Right of Self-Defence – Appraising the Impact of the September 11 Attacks on *Jus Ad Bellum*', *The International Lawyer*, Chicago, vol. 36, no. 4 (Winter 2002), pp. 1082-3 and 1101-2.

<sup>10</sup> Under Security Council resolution 1386 of 20 December 2001 the International Security Assistance Force (ISAF) was established in Afghanistan in January 2002. Its command arrangements were unusual. When established, it was not permanently under a single state or alliance, but had a system in which command passed from one country to another: first the UK, then Turkey from 20 June 2002, then Germany and the Netherlands jointly from 10 February 2003. On 16 April 2003, the NATO Council decided that NATO would assume direct responsibility for ISAF's command, coordination and planning. These transitions in ISAF command arrangements were noted in Security Council resolutions 1413 of 23 May 2002 and 1444 of 27 November 2002.

<sup>11</sup> This was argued at greater length in my article 'From San Francisco to Sarajevo: The UN and the Use of Force', *Survival*, International Institute for Strategic Studies, London, vol. 37, no. 4, Winter 1995-96, pp. 7–28.

<sup>12</sup> See e.g. letter from sixteen

- international law teachers, *The Guardian*, London, 7 March 2003, p. 29.
- <sup>13</sup> Resolution of the two houses of the US Congress (H.R. 4655), passed by the House of Representatives on 5 October 1998 and the Senate on 7 October 1998.
- <sup>14</sup> President George W. Bush, Address to the Nation, 17 March 2003, available at <http://www.whitehouse.gov>. This was the speech in which Bush presented the ultimatum that 'Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict'.
- <sup>15</sup> 'Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441'. From the opening paragraph of the short statement by Lord Goldsmith, the UK Attorney General, in the House of Lords, 17 March 2003. See in addition the five-page document entitled 'Iraq: Legal Basis for the Use of Force', also dated 17 March 2003 and provided to the House of Commons Foreign Affairs Committee on that date. *House of Lords Hansard*, written answers, 17 March 2003, Col. WA1. Also available at <http://www.fco.gov.uk>.
- <sup>16</sup> Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council.
- <sup>17</sup> See e.g. concurrent resolution of the two houses of the US Congress (S. Con. Res. 31), passed 9 April 2003, citing seventeen UN Security Council Resolutions: 678, 686, 687, 688, 707, 715, 949, 1051, 1060, 1115, 1134, 1137, 1154, 1194, 1205, 1284, and 1441.
- <sup>18</sup> Security Council Resolution 661 of 6 August 1990.
- <sup>19</sup> On the history of the UN inspections in Iraq, see *Iraq's Weapons of Mass Destruction: A Net Assessment*, International Institute for Strategic Studies, London, 9 September 2002.
- <sup>20</sup> Press Encounter with the Secretary-General at the Security Council stakeout, 17 March 2003. Available at <http://www.un.org/apps/news/infocusnewsiraq.asp>
- <sup>21</sup> Article 30 of the 1907 Hague Regulations on land war, which are annexed to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.
- <sup>22</sup> Boutros Boutros-Ghali, 14 January 1993. Cited in Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001), p. 201, where he comments that 'it is unclear what status should be accorded to such a pronouncement by the Secretary-General'.
- <sup>23</sup> Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000), pp. 191–5.
- <sup>24</sup> Christine Gray, 'The US National Security Strategy and the New "Bush Doctrine" on Preemptive Self-Defense', *Chinese Journal of International Law*, Boulder, Colorado, vol. 1, no. 2 (2002), p. 444. The article was completed on 15 November 2002. Available at <http://www.chinesejil.org/gray.pdf>
- <sup>25</sup> One of the three Deputy Legal Advisers in the Foreign and Commonwealth Office, Elizabeth Wilmshurst, left her post because 'she was unhappy about Tony Blair's argument that he had sufficient basis for war under UN resolutions'. Report in *The Times*, London, 22 March 2003.
- <sup>26</sup> W. Michael Reisman, 'Assessing Claims to Revise the Laws of War', *American Journal of International Law*, Washington DC, vol. 97, no. 1 (January 2003), p. 88
- <sup>27</sup> On the long tradition of international, and US, scepticism about ideas of anticipatory self-defence, see esp. Marjorie Whiteman (ed.), *Digest of*

- International Law*, vol. 12 (Washington DC, US Department of State, 1971), pp. 42-77.
- <sup>28</sup> *The National Security Strategy of the United States of America*, White House, Washington DC, September 2002. Available at <http://www.whitehouse.gov/nsc/nss.html>.
- <sup>29</sup> For an excellent analysis of the US *National Security Strategy* document, drawing particular attention to the antecedents of the policy it outlines and the limitations from which they suffered, see Robert S. Litwak, 'The New Calculus of Pre-emption', *Survival*, London, vol. 44, no. 4, Winter 2002-03, pp. 53-79.
- <sup>30</sup> The statutory requirement for the annual presidential report to Congress on national security strategy is in Title 50, U.S. Code, Chapter 15, Section 404a, enacted on 1 October 1986.
- <sup>31</sup> For a critique of the Wilsonian internationalism of the US National Security Strategy, see Edward Rhodes, 'The Imperial Logic of Bush's Liberal Agenda', *Survival*, vol. 45, no. 1, Spring 2003, pp. 131-53.
- <sup>32</sup> *The National Security Strategy of the USA*, p. 15.
- <sup>33</sup> Letter from Mr H.S. Fox, Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary in Washington, to Mr Daniel Webster, US Secretary of State, 12 March 1841. *British and Foreign State Papers*, vol. 29, p. 1127.
- <sup>34</sup> Letter from Mr Webster to Mr Fox, 24 April 1841, *ibid.*, pp. 1137-8.
- <sup>35</sup> *National Security Strategy of the USA*, pp. vi and 7.
- <sup>36</sup> This definition is consistent with the implicit or explicit definitions in numerous works including W.E. Hall, *A Treatise on International Law* 8th ed., A. Pearce Higgins (ed.) (Oxford: Clarendon Press, 1924), pp. 342-4; Ulrich Beyerlin, 'Humanitarian Intervention', in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 3 (Amsterdam: North-Holland Publishing, 1982), p. 211; and Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague: Kluwer Law International, [1999]), p. 18.
- <sup>37</sup> See the fuller exposition of this argument in my article 'The So-Called "Right" of Humanitarian Intervention', *Yearbook of International Humanitarian Law*, vol. 3, 2000 (The Hague: T.M.C. Asser Press, 2002), pp. 3-51.
- <sup>38</sup> *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 2 vols., (Ottawa: International Development Research Centre, December 2001). (The text of both volumes is available at the commission's website <http://www.iciss.gc.ca> and also on a CD-ROM supplied with the report volume.)