
From Unity to Polarization: International Law and the Use of Force against Iraq

Christine Gray*

Abstract

The impact of the use of force against Iraq over the last 10 years on the development of international law involves consideration of the express authorization of force by the Security Council under Chapter VII of the UN Charter, and the limits to be imposed on such authorization; the possibility of implied authorization of force by the Security Council; and the scope of self-defence as a justification for the use of force in the no-fly zones and in response to terrorism. Operation Desert Storm represented the start of a new era for the United Nations: it has become the norm for the Security Council to turn to Member States to take enforcement action under Chapter VII in a wide variety of situations. In contrast, subsequent US and UK actions against Iraq to enforce the no-fly zones have brought deep divisions among states. The USA and UK have become increasingly isolated in their insistence that implied authorization by the Security Council, material breach by Iraq of the ceasefire regime and, for the UK, humanitarian intervention justify their use of force. The same combination of arguments was used regarding the NATO action in Kosovo and raised dramatically the question of how far the actions against Iraq could operate as a precedent.

Introduction

Operation Desert Storm against Iraq may be seen as a revolutionary development, made possible by unprecedented agreement among states, which has proved to be the catalyst for fundamental change in the international regulation of the use of force. Part 1 of this article will focus on its impact on the UN collective security system. In contrast, the subsequent use of force against Iraq by the USA, the UK and, to a lesser extent, France has increasingly polarized states and has highlighted disagreement on the law. The use of force in Iraq to establish and enforce the no-fly zones, to respond to violations of the ceasefire regime established in Security Council Resolution 687, and

* Lecturer, University of Cambridge, United Kingdom.

in reaction to the assassination attempt against former President Bush has proved extremely divisive. This will be discussed in Part 2 of this article.

The unity among states at the time of the initiation of *Operation Desert Storm* against Iraq has proved to be short-lived, as far as agreement on the use of force is concerned. Most recently deep divisions have emerged among states over the legality of the US and UK air strikes against Iraq in February 2001. These divisions are all the more striking given that the US and UK actions were simply the continuation of a policy adopted 10 years ago; President Bush claimed that the operation was merely routine.¹ The current divisions mark the extremity of the polarization of states over the last decade. In public, at least, the USA and the UK seem isolated.

Even more dramatically, the 1999 NATO operation in Kosovo also gave rise to questions about how far the use of force in Iraq had created a precedent or even changed the law. What, if anything, has been the lasting impact of *Operation Desert Storm* and other subsequent use of force against Iraq on the development of the law on the use of force? To what extent have the hopes for a New World Order expressed by President Bush at the time of *Operation Desert Storm* proved evanescent: Were these hopes only a mask for US domination of the Security Council, manipulation of the law and acquiescence by the rest of the world? Is it true that early in the 1990s little in the way of legal justification for the use of force against Iraq was required, but that changed political circumstances have meant that this is no longer so?

1 The Impact of *Operation Desert Storm* on the UN Collective Security System

A *Inter-state Force since Operation Desert Storm*

A quick glance at state practice on the use of force since 1991 seems to indicate that the action taken against Iraq in *Operation Desert Storm* was unique, the product of a never-to-be-repeated set of circumstances. The UN Secretary-General, in his Introduction to the Blue Book on *The United Nations and the Iraq-Kuwait Conflict 1990–1996*, stressed this unique character:

The Iraqi invasion and occupation of Kuwait was the first instance since the founding of the Organisation in which one Member State sought to completely overpower and annex another. The unique demands presented by this situation have summoned forth innovative measures which have given practical expression to the Charter's concepts of how international peace and security might be maintained.²

Certainly the inter-state use of force in the years 1991–2001 has not produced anything like the international response triggered by Iraq's invasion of Kuwait. The conflicts which broke out between Ethiopia and Eritrea, Armenia and Azerbaijan, Tajikistan and Afghanistan, Cameroon and Nigeria, as well as the continuation of

¹ *The Guardian*, 17 February 2001; *Keesings Record of World Events* (2001) 44026.

² The United Nations Blue Book Series Vol. IX, *The United Nations and the Iraq-Kuwait Conflict 1990–1996* (1996), at 3.

longstanding inter-state conflicts such as those between India and Pakistan, did not provoke the UN to identify an aggressor and to authorize action against it. The reaction of the Security Council to the outbreak of inter-state conflict since the end of the Cold War, just as during the Cold War, has been generally to avoid condemnation and the attribution of responsibility and rather to call for a ceasefire and the restoration of peace. Thus, in the case of what the UN Secretary-General called a 'senseless war' between Eritrea and Ethiopia, the Security Council condemned recourse to force by *both* sides; for the first time in an inter-state conflict it imposed sanctions on both countries.³ It is in internal conflicts rather than inter-state conflicts that the experience of Iraq seems to have had a more significant impact.

B Security Council Authorization of Force by Member States: From Exception to Norm

Clearly the most dramatic and important impact of the action against Iraq in 1991 on the regulation of the use of force has been manifested in the subsequent readiness of the Security Council to authorize the use of force by Member States. With regard to Iraq, such authorization was given under Chapter VII of the UN Charter: first, in Security Council Resolution 665, which 'called on' those Member States cooperating with the government of Kuwait that were deploying maritime forces to the area to use 'such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward shipping' in order to secure the enforcement of sanctions; and second, in Security Council Resolution 678 the Security Council specifically 'authorize[d]' Member States to use *all necessary means* to ensure that Iraq immediately and unconditionally withdraws all its forces from Kuwait and to restore international peace and security in the area. This was the basis of *Operation Desert Storm*.⁴ Of course these resolutions were not unprecedented: the UN-authorized action in Korea and the UN call to the UK to enforce sanctions against the white minority government in Rhodesia provided models from the Cold War era. But the impact of the action against Iraq has been to alter expectations. There now seems to be general, though not universal, agreement that the original scheme of Chapter VII of the UN Charter, even after the end of the Cold War, is not workable, and that it should not be for the UN itself to conduct enforcement operations. Instead there is consensus that it is for the Security Council to authorize Member States to take enforcement action, even if the precise legal basis for this in the Charter is not clear.⁵

Since *Operation Desert Storm* the Security Council has authorized Member States to take action in Somalia (1992) and Yugoslavia (from 1992), Haiti (1994), Rwanda

³ SC Res. 1298.

⁴ Greenwood, 'New Legal Order or Old? The Invasion of Kuwait and the Rule of Law', 55 *Modern Law Review* (1992) 153.

⁵ D. Sarooshi, *The United Nations and the Development of Collective Security* (1999); Quigley, 'The Privatization of United Nations Enforcement Actions: A Threat to Multilateralism', 17 *Michigan JIL* (1995-6) 249.

(1994), the Great Lakes (1996),⁶ Albania (1997), the Central African Republic (1997), Sierra Leone (1997) and also in Kosovo under Resolution 1244 and East Timor under Resolution 1264; it has not concerned itself with identifying a legal basis for such authorizations beyond a general reference to Chapter VII of the UN Charter. It is striking that these were all internal conflicts, with the controversial exception of the conflict in former Yugoslavia,⁷ or at least were not traditional inter-state conflicts.

The authorizations have been for a variety of purposes. The debate over the constitutionality of Security Council action in Korea and Iraq as to whether, in the absence of full implementation of the UN system under Articles 42 and 43 of the UN Charter, the Security Council was empowered to authorize collective security measures rather than just collective self-defence has thus been overtaken by events. It is now clear that the Security Council's power to authorize measures under Chapter VII is not limited to collective self-defence.⁸ The Security Council has several times authorized the use of force to ensure the implementation of measures under Article 41 of the Charter; it did so with regard to the conflict in Yugoslavia,⁹ Somalia,¹⁰ Haiti¹¹ and Sierra Leone.¹²

The Security Council has not again authorized Member States to use force against an aggressor state in the same way as it did against Iraq. In most cases the host state consented to the UN-authorized operation. The situations nearest to that of Iraq are those where the Security Council authorized the use of force against a group involved in an internal conflict when that group did not comply with its obligations under a UN-brokered or approved ceasefire or peace agreement. This was the situation in Bosnia-Herzegovina, where NATO forces were authorized to enforce the no-fly zones over Bosnia and to protect the 'safe havens'; these measures were in fact directed against the Bosnian Serbs.¹³

Force was also authorized for humanitarian ends in Somalia, where UNITAF was authorized to establish a secure environment for humanitarian relief operations,¹⁴ as well as in the former Yugoslavia where Member States were called on in Resolution 770 to 'take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to

⁶ SC Res. 1080 authorized Member States to use all necessary means to facilitate the return of humanitarian organizations and the delivery of humanitarian aid, but the force was not in fact deployed.

⁷ The International Criminal Tribunal for the Former Yugoslavia has in several cases characterized the conflict as international at the time of a particular crime (between the FRY and Croatia and between the FRY and Bosnia-Herzegovina) for the purposes of international humanitarian law.

⁸ Greenwood, *supra* note 4, at 153; Sarooshi, *supra* note 5.

⁹ SC Res. 757, 787.

¹⁰ SC Res. 794.

¹¹ SC Res. 875.

¹² SC Res. 1132.

¹³ SC Res. 816, 836. After the conflict was over the Security Council in Resolution 1031 authorized IFOR, a multinational force, to use all necessary means to effect the implementation of, and to ensure compliance with, the peace agreement.

¹⁴ SC Res. 794.

Sarajevo and wherever needed in other parts of Bosnia and Herzegovina'; in both of these cases the delivery of humanitarian aid by the UN had been obstructed by parties on the ground. It was to overcome this lack of cooperation that Member States were authorized to use force to ensure the delivery of aid. Member States have also been empowered to protect UN peacekeepers and to assist them in carrying out their mandates, as in Croatia where several resolutions authorized Member States to take all necessary measures, including close air support, in defence of the UN force.¹⁵

In Rwanda the French-led *Operation Turquoise* was to contribute to the security and protection of displaced persons at risk and to use all necessary means to achieve its humanitarian objectives.¹⁶ In Haiti, in response to a military coup in 1991 and after the failure to secure a peaceful solution, Member States were authorized to use all necessary means to facilitate the departure from Haiti of the military junta and the return of the democratically elected president, the restoration of the legitimate government and the establishment of a secure and stable environment to permit implementation of the Governors Island Agreement on the restoration of democratic government.¹⁷

Subsequently there was a slight shift in the language of the Security Council. In 1997 Member States were authorized to facilitate the safe and prompt delivery of humanitarian assistance in Albania and to provide a secure environment for the missions of international organizations; Chapter VII was invoked only to ensure the freedom of movement and security of the multinational force.¹⁸ Similarly, in the case of MISAB, the multinational force in the Central African Republic, the Chapter VII authorization was not to use all necessary means to carry out the mandate, but only to ensure the security and freedom of movement of their personnel.¹⁹ In contrast the Member State forces sent into Kosovo and East Timor in 1999 were given more far-reaching authority to use force. In East Timor the 8,000 strong, Australian-led force was given a broad mandate under Security Council Resolution 1264: it was to restore peace and security in East Timor, to protect the UN observers and to facilitate humanitarian assistance. The states participating in this force were to use all necessary means to fulfil this mandate.

In Kosovo Member States were authorized under Security Council Resolution 1244 (1999) to establish an international security presence (KFOR) 'with all necessary means to fulfil its responsibilities'. This formulation differs from previous resolutions authorizing the *use* of necessary measures; it does not directly authorize force. The language was designed to secure support from Russia and China for the resolution in the Security Council. According to Russia, the resolution did not itself authorize force, despite its reference to Chapter VII.²⁰ But the Military Agreement endorsed in the resolution between KFOR and the government of Yugoslavia did provide for the

¹⁵ SC Res. 981, 1037, 1120.

¹⁶ SC Res. 929.

¹⁷ SC Res. 940.

¹⁸ SC Res. 1101.

¹⁹ SC Res. 1125.

²⁰ UN Press Release, SC/6686.

deployment of KFOR with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo.

Thus the recourse to Chapter VII of the UN Charter to authorize Member States to use force is now not only possible, it is seen as the model for Security Council action in the future. This position has evolved gradually since *Operation Desert Storm*. In his 1992 *Agenda for Peace*, the UN Secretary-General did not initially envisage Member State action as the main means of enforcement action, even after *Operation Desert Storm*; in his hopes for a new era for the UN, he wrote of the expansion of the traditional institution of peacekeeping.²¹ But since 1994, and in light of the crisis of resources and the difficulties encountered in Yugoslavia and Somalia, he acknowledged the problems with this attempt to change the nature of peacekeeping. By the time of the 1995 *Supplement to the Agenda for Peace*, the Secretary-General still argued that the UN should in the long term develop a capacity for enforcement action against those responsible for threats to, or breaches of, the peace or for acts of aggression, but he advised against doing so at the current time. Limited resources at the disposal of the UN and its inability to mount an enforcement action meant that it had to authorize Member States to take enforcement action. The lack of capacity of the UN to deploy, command and control an enforcement action meant that it would be folly for it to undertake them.²² In this way the operation against Iraq has served as a crucial precedent, a catalyst for a shift in the UN system.

This is very clear in the *Brahimi Report*; the panel of experts set up by the UN Secretary-General in March 2000 to conduct a thorough review of United Nations peace and security activities operated on the premise that ‘while the United Nations has acquired considerable expertise in planning, mounting and executing traditional peacekeeping operations, it has yet to acquire the capacity needed to deploy more complex operations rapidly and to sustain them effectively’.²³ The Panel even went so far as to say that ‘[t]he UN does not wage war. Where enforcement action is required it had consistently been entrusted to coalitions of willing states with the authorization of the Security Council, acting under Chapter VII of the Charter.’²⁴ Thus it has become the new orthodoxy since 1995 that it is for Member States to undertake enforcement action.

States have not in general challenged the constitutionality of this type of authorization; few states have expressed concern about the principle of Security Council authorization under Chapter VII after *Operation Desert Storm*.²⁵ New Zealand is apparently almost alone in the view it put forward in the Special Committee on Peacekeeping Operations in its 2000 session — it did not accept the doctrine that UN peacekeepers should not be given a mandate for the restoration of peace and security in a difficult environment and that such jobs should be reserved for coalitions of the

²¹ 31 *ILM* (1992) 953.

²² S/1995/1; *UN Yearbook* (1995) 175, at 177.

²³ *Brahimi Report*, A/55/305, para. 6(h).

²⁴ *Ibid.*, at para. 53. This was criticized as going too far by White, ‘Commentary on the Report of the Panel on UN Peace Operations (The Brahimi Report)’, 6 *Journal of Conflict and Security Law* (2001) 127.

²⁵ See *infra* note 28.

willing. The position its neighbour, Australia, expressed in the same Committee is more in line with general opinion; in the light of its experience leading INTERFET in East Timor it said that regional countries acting outside the organizational framework of the UN, but with the authority of the Security Council, were better placed to contribute in a timely and effective way in the resolution of regional conflicts.²⁶ Russia took a middle way: in most cases the advantages of UN-led peacekeeping operations versus coalition operations were overwhelming. However, limited UN resources meant that it was sometimes justified for interested states to form an *ad hoc* coalition.²⁷

Even though the experience of 1999 brought a renewed optimism about UN peacekeeping, following the setbacks of Yugoslavia, Somalia and Rwanda, this optimism proved short-lived in the light of the UN's difficulties in the Democratic Republic of Congo and Sierra Leone; the Secretary-General's arrangements for stand-by forces are still limited to peacekeeping forces; permanent members have shown reluctance to submit their forces to UN command, as seen with the USA in Somalia and the UK in Sierra Leone. All these factors mean that it is likely that the Security Council will continue to turn to Member States for enforcement action.

C The Need for Limits on Security Council Authorization

However, the coalition operation against Iraq under Resolution 678 has also in some ways served as a negative precedent, an example to be avoided. This is because *Operation Desert Storm* gave rise to concern among states about the need to limit the discretion of Member States authorized to use force and to a determination not to repeat what came to be seen as flaws in the mandate of the operation. Thus, at the time of the operation there was concern about the lack of UN control over the decision as to when to start the operation and over the conduct of the campaign, about the wide and unclear mandate and about the lack of a time limit on the coalition action.²⁸ Yemen and Cuba voted against Resolution 678, partly on these grounds. Yemen said that the resolution was vague and not related to any specific article of Chapter VII. The Security Council would not have any control over the forces and command was not with the UN. Cuba argued that the text of Resolution 678 violated the Charter in that it authorized Member States to use military force in total disregard of Charter procedures. China abstained because it sought a peaceful solution and had difficulty with accepting the resolution because the phrase 'all necessary means' permitted the use of military action.²⁹

When the Security Council subsequently authorized Member State operations it increasingly took care to ensure a greater degree of Security Council control.³⁰ States which abstained on, or opposed, Security Council resolutions authorizing new

²⁶ GA/PK/165.

²⁷ GA/PK/167.

²⁸ Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy', 85 *AJIL* (1991) 516; Lobel and Ratner, 'Bypassing the Security Council: Ambiguous Authorization to Use Force, Ceasefires and the Iraqi Inspection Regime', 93 *AJIL* (1999) 124; Sarooshi, *supra* note 5, at 174.

²⁹ S/PV.2963.

³⁰ Lobel and Ratner, *supra* note 28, at 124; Sarooshi, *supra* note 5; Quigley, *supra* note 5, at 249.

Member State forces did so, not because of doubt about the constitutionality of such operations, but because they had concerns about the particular operation. China has most often expressed such concerns.³¹

After the operation against Iraq, only those in Somalia and the former Yugoslavia were not time-limited, but even these Member State forces were subject to greater limits than *Operation Desert Fox* had been. Member States were required to act in close coordination with the Secretary-General; in the former Yugoslavia this was interpreted to require the consent of the Secretary-General to any use of force by NATO in order to guarantee coordination and to avoid danger to the UN peacekeeping forces on the ground. The Member State operations in Rwanda, Haiti and Albania were all subject to fixed time limits and all had to be renewed by the Security Council. That there was still some unease about these operations was indicated by the stress in the resolutions on the unique nature of the situations, the exceptional nature of the measures and the requirement for the Member States to act impartially. Member States were also placed under a duty to report regularly to the Security Council on the course of the operation.

The Security Council could not, however, altogether avoid the suspicion that Member States were using the UN to further their own political goals, as was the view of some states with regard to the interventions in Rwanda, Albania and Haiti. And the UN Secretary-General in the *Supplement to the Agenda for Peace* spoke of the danger that the UN might be sidelined and that its stature and credibility might be harmed if it left it to Member States to undertake enforcement action.³² A few states still express concern about ‘coalitions of the willing’ and would prefer the UN to reassume the central role.

2 The Polarization of States

A *Claims of Implied Authorization*

The operation against Iraq has also had a precedential impact in that it made clear the advantages of the legitimacy which only the Security Council could confer. The desire for legitimacy apparently influenced France, Italy and the USA in seeking Security Council authorization for the operations they led, respectively, in Rwanda, Albania and Haiti. The desire for this legitimacy also influenced the USA, the UK and other NATO member states in claiming a Security Council basis for their use of force in Kosovo, even in the absence of any express authority in a resolution. These states preferred to exploit the notion of authorization rather than to rely exclusively on any unilateral right to use force. Such claims have polarized states and seem to many to dangerously overstretch the precedent of the action against Iraq in *Operation Desert*

³¹ As, for example, in China’s abstentions on the resolutions on Rwanda, Albania and Haiti. However, the resolutions authorizing force in the Central African Republic and Croatia were passed unanimously.

³² S/1995/1.

Storm. It is no longer simply a case of interpreting euphemisms such as ‘all necessary means’ to allow the use of force when it is clear from the preceding debate that force is envisaged; the USA, the UK and others have gone far beyond this to distort the words of resolutions and to ignore the preceding debates in order to claim to be acting on behalf of the international community.

1 No-fly Zones

The claim of implied authorization was apparently the initial basis for *Operation Provide Comfort* by the USA, the UK and France in protection of the Kurds in northern Iraq in April 1991, although they offered little by way of legal justification at the time.³³ Part of the explanation of their action in providing humanitarian aid in 1991 and in subsequently establishing, extending and policing the northern and southern no-fly zones was that these actions were taken ‘in support of Resolution 688’. But Security Council Resolution 688 was not passed under Chapter VII and it did not authorize the use of force; it demanded that Iraq end the repression of its civilian population and allow access to international humanitarian organizations. This did not stop the USA and the UK from claiming that their actions in the continuing clashes with Iraq over the no-fly zones were ‘consistent with’, ‘supportive of’, ‘in implementation of’ and ‘pursuant to’ Resolution 688.³⁴

This issue of the legal basis of the use of force to secure the no-fly zones arose most recently and most controversially with regard to the February 2001 actions by the USA and the UK. Iraqi activity in the no-fly zones had greatly increased after *Operation Desert Fox* in December 1998; in January 2001 there were more surface-to-air missile attacks on coalition pilots than in the whole of 2000; significant improvements in the Iraqi air defence system had been made. In response, the US and UK aircraft attacked six targets: Iraqi radar installations and command and control centres in and outside the no-fly zones.³⁵ The UN Secretary-General, responding to calls from Iraq for a condemnation of the US and UK air actions against Iraq, emphasized that only the Security Council could determine the legality of actions in the no-fly zones; only the Security Council was competent to determine whether its resolutions were 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 in their enforcement.³⁶ This statement by the Secretary-General implicitly rejects any claim of the USA and the UK to justify unilaterally their action on the basis of Resolution 688. The UK has accepted this; although still invoking Resolution 688 as supporting the legitimacy of its actions, it openly acknowledges that:

The legal justification for the patrolling of the no-fly zones does not rest on Security Council Resolution 688. That has not been the government’s position. In terms of humanitarian justification, we are entitled to patrol the no-fly zones to prevent a grave humanitarian crisis.

³³ Malanczuk, ‘The Kurdish Crisis and Allied Intervention’, 2 *EJIL* (1991) 114; T. Franck, *Fairness in International Law and Institutions* (1995), at 235–236.

³⁴ For example, S/PV 3105; 64 *BYbIL* (1993) 728; 65 *BYbIL* (1994) 683.

³⁵ *Keesings Record of World Events* (2001) 44026.

³⁶ <<http://www.un.org/News/dh/latest/page2.html>> (22 February 2001).

That is the legal justification in international law. It does not rest on Resolution 688, although that resolution supports the position that we have adopted.³⁷

The world response to the US and UK operation in February 2001 showed that they were isolated. Only very few states expressed support for the US and UK action. The permanent members of the Security Council were polarized: Russia, China and France all rejected the legality of the USA and UK action.³⁸ The enforcement of the unilaterally proclaimed no-fly zones has thus come to be seen as illegitimate, despite UK protestations of humanitarian necessity.

The UK saw its actions in 2001 as a continuation of the policy followed since 1991. It has supplemented its initial argument of implied authorization by the further claim that protection of the no-fly zones was a response to a case of extreme humanitarian need; it gradually developed this doctrine over the years since 1991 in an attempt to find a legal basis for the action in the no-fly zones. It disavowed previous doubts about the existence of a doctrine of humanitarian intervention as not constituting government policy and argued that international law develops to meet new situations;³⁹ it has made various attempts to set out the scope of the new doctrine since 1992. One of the most recent is the statement by the Secretary of State in July 2000: armed force should be used only as a last resort to avert overwhelming humanitarian catastrophe that a government has shown it is unwilling or unable to prevent or is actively promoting; it must be objectively clear that there is no practicable alternative to the use of force to save lives; the use of force should be proportionate to the humanitarian purpose and likely to achieve its objectives; any use of force should be collective.⁴⁰ The efforts of the UK government to identify a legal basis for humanitarian intervention seem to have been prompted by domestic political pressure.

It is striking that the USA has been less concerned to provide a reasoned legal explanation for the establishment and enforcement of the no-fly zones. It has not explicitly championed a doctrine of humanitarian intervention or humanitarian necessity. For example, when it undertook an air attack in 1996, 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, it reported its use of force to the Security Council but strikingly offered no specifically legal argument.⁴¹ Russia criticized the USA for seeking to supplant the Security Council and for violating international law.⁴²

Doubts have been expressed as to whether the US and UK actions in protection of the no-fly zone could in fact qualify as humanitarian;⁴³ it is certainly not obvious that

³⁷ House of Commons Hansard, Debates, 26 February 2001. The UK had expressed this position earlier, see Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', 65 *BYbIL* (1994) 135, at 165.

³⁸ *The Guardian*, 21 and 22 February 2001; *The Observer*, 18 February 2001; *Keesings Record of World Events* (2001) 44026; on the divisions on earlier operations in the no-fly zones, see 'Contemporary Practice of the United States', 93 *AJIL* (1999) 471; 94 *AJIL* (2000) 102.

³⁹ 57 *BYbIL* (1986) 614; 63 *BYbIL* (1992) 824; 70 *BYbIL* (1999) 595.

⁴⁰ See C. Gray, *International Law and the Use of Force* (2000), at 41.

⁴¹ S/1996/711.

⁴² S/1996/712; *United Nations Yearbook* (1996) 238.

⁴³ S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), at 203–205.

they live up to the UK Foreign Secretary's model. The actions against Iraq cannot plausibly be described as multilateral, although the USA and the UK have recently taken care to speak of 'coalition' action to mask the limited participation and to give a greater impression of legitimacy.⁴⁴ The intervention of the USA in 1996 was made alone and although the ostensible aim was to protect the Kurds by driving Iraqi government forces out of the northern zone, this action does not look like a response to humanitarian necessity. Rather, the USA was intervening on the side of one group of Kurds to prevent Saddam Hussein from taking advantage of the deep divisions between the Iraqi Kurds; the willingness of one group to invite assistance from Saddam Hussein in its conflict with the other group gave him the chance of reasserting sovereignty over the northern no-fly zone. The question has been raised as to how far the USA and the UK are genuinely motivated by humanitarian concern, or whether, despite their protestations that they are not acting to undermine the territorial sovereignty of Iraq, the true aim is the overthrow of Saddam Hussein, an aim openly acknowledged by the USA but disavowed by the UK.⁴⁵ Apart from the initial operation in 1991, the intervention in Iraq has taken the form of air action and, as in Kosovo, the question has been raised whether this is an appropriate means of humanitarian intervention.

2 *Operation Desert Fox*

The doctrine of implied Security Council authorization was also used to justify actions against Iraq for non-cooperation with UN weapons inspectors under the Resolution 687 ceasefire regime. Thus in December 1998 the USA and UK undertook *Operation Desert Fox* in response to the withdrawal by Iraq of cooperation with the UN weapons inspectors; this was a major operation lasting four days and nights and involving more missiles than used in the entire 1991 conflict. The USA and UK referred to Security Council Resolutions 1154 and 1205 as providing the legal basis for their use of force; these resolutions had been passed under Chapter VII, but had not made express provision for the use of force. The first said that Iraq must, under Resolution 687, accord immediate and unrestricted access to UNSCOM and IAEA inspectors and that any violation would have 'the severest consequences for Iraq'. The second resolution condemned the decision by Iraq to stop cooperation with UNSCOM and

⁴⁴ Minister of State, Ministry of Defence (Baroness Symons), in the House of Lords, Hansard, 19 February 2001, Column 510–511.

⁴⁵ House of Commons Hansard Debates for 26 February 2001, columns 622–623. The extent to which the USA now sees itself as unconstrained in its actions against Iraq is also clear in the 1998 Iraq Liberation Act. This requires the USA administration to identify Iraqi opposition groups working for democracy and to give them aid of \$97 million, not only financial aid but also arms. It was signed reluctantly into law by President Clinton at a time when he was politically unable to resist. His administration successfully delayed its implementation but now President G. W. Bush has indicated a determination to press ahead with assistance to opposition groups in pursuit of his avowed aim of securing the overthrow of Saddam Hussein (*The Guardian*, 19 and 21 February 2001). The USA as the only remaining superpower apparently no longer fears that others will invoke the same right to intervene. Even the UK draws the line here; it has refused to support the Iraq Liberation Act and does not openly admit any aim of overthrowing Saddam Hussein (Gray, *supra* note 40, at 76–77).

demanded that Iraq rescind its decision. Although these resolutions did not explicitly authorize force, the UK argued that they provided a clear basis for military action; by Resolution 1205 the Security Council had implicitly revived the authority to use force given in Resolution 678.⁴⁶ The USA also said that its forces were acting under the authority provided by the Security Council resolutions. But this argument of implied authorization was not accepted by other states; in the Security Council debate following the operation only Japan spoke out clearly in its favour.⁴⁷ Russia said that the resolutions provided no grounds whatsoever for such actions; indeed they had been undertaken in violation of Security Council resolutions. China also said that they opposed the unilateral use of force and that the actions contravened international law.⁴⁸ France ended its already limited participation in the patrolling of the no-fly zones at this time.⁴⁹

The argument of implied authorization was not used on its own by the USA and the UK; this justification was supplemented by the claim that the use of force was a lawful response to a breach by Iraq of the ceasefire. Thus the USA argued that Iraq had repeatedly taken actions which constituted flagrant, material breaches of its obligations; following these breaches of its obligations under Resolutions 687, 707, 715, 1154, 1194 and 1205, the ‘coalition’ had exercised the authority given by Security Council Resolution 678 for Member States to employ all necessary means to secure compliance with the Council’s resolutions and restore international peace and security in the area.⁵⁰ The UK, in the Security Council debate, said that Resolution 687 made it a condition of the ceasefire that Iraq destroy its weapons of mass destruction and agree to the monitoring of its obligations to destroy such weapons. By Iraq’s flagrant violation of the ceasefire resolution the Security Council implicitly revived the authority to use force given in Resolution 678 (1990).⁵¹

This argument of material breach reflects the line taken by the UN Secretary-General in response to the January 1993 operation against Iraqi missile sites in the no-fly zones; he argued that the USA and UK action was mandated by the Security Council according to Resolution 678, and the cause of the raid was the violation by Iraq of the ceasefire resolution.⁵² The Secretary-General has not subsequently reverted to this argument and the argument of material breach has been criticized by commentators because it arrogates to individual states power that properly resides with the Security Council.⁵³ It is for the Security Council to determine not only the existence of a breach of the ceasefire, but also the consequences of such a breach in

⁴⁶ ‘UK Materials on International Law’, 69 *BYBIL* (1998), at 591.

⁴⁷ SC 3955th meeting.

⁴⁸ *Ibid.*

⁴⁹ *Keesings Record of World Events* (1998) 42697; 44 *AFDI* (1998), at 742–743.

⁵⁰ SC 3955th meeting; ‘Contemporary Practice of the United States Relating to International Law’, 93 *AJIL* (1999) 471, at 472.

⁵¹ SC 3955th meeting; ‘UK Materials on International Law’, 69 *BYBIL* (1998) 587.

⁵² M. Weller (ed.), *Iraq and Kuwait: The Hostilities and their Aftermath* (1993), at 741; Gray, *supra* note 37, at 135; Chesterman, *supra* note 43, at 201.

⁵³ Thouvenin, ‘Le jour le plus triste pour les Nations Unies, les frappes anglo-américaines de Décembre sur l’Iraq’, 44 *AFDI* (1998) 208; Lobel and Ratner, *supra* note 28, at 124.

cases where there is a binding ceasefire imposed by the Security Council. Moreover, it seems doubtful whether any breach of Resolution 687 not itself involving the use of force can justify the USA and UK in turning to force in response. Those who support this doctrine of material breach seem impatient of disagreement in the Security Council; they revive Cold War arguments that when the Security Council is unable to act because of a permanent member then the USA and the UK can go ahead to use force, if there has been a breach of a prior resolution passed under Chapter VII, even in the absence of express authorization.⁵⁴ But this has dangers for the Security Council: it discounts the words of the resolutions reserving the Security Council's right to consider further action; it also discounts statements in debates that it is for the Security Council to take further action. This undermines the authority of the Security Council and ignores the careful negotiations between states attempting to reach agreement on controversial issues. It makes it more unlikely that members of the Security Council will be able to determine breach of earlier resolutions or agreements because Russia and China will fear that this would provide an opportunity for the USA and the UK to use force unilaterally. These problems can be seen again with regard to Kosovo.

B Kosovo

The combination of arguments — of implied authorization by the Security Council, of response to violation of a ceasefire regime and of humanitarian necessity — used by the USA and the UK with regard to action against Iraq surfaced again in justification of the NATO action over Kosovo in 1999. Here the issue of the precedential status of the earlier use of force against Iraq could be seen as playing a decisive role. NATO's official statements at the start of *Operation Allied Force* against Yugoslavia in March 1999 were not particularly clear on legal argument, but there are indications of a claim to implied authorization in NATO's assertion that it is taking action 'to support the political aims of the international community'.⁵⁵

Certain NATO states suggested that there had been implied authorization for their bombing campaign on the basis of Security Council Resolutions 1160, 1199 and 1203.⁵⁶ These resolutions, like those relating to Iraq referred to above, were all passed under Chapter VII. The first, Resolution 1160, called for a political solution to the problem of Kosovo and imposed an arms embargo on Yugoslavia; it said that additional measures would be considered if progress was not made towards the peaceful resolution of the dispute. The second, Resolution 1199, determined that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region and demanded an end to hostilities; it set out certain measures to be taken by Yugoslavia and concluded that if these measures were not taken it would consider

⁵⁴ Henkin, 'Kosovo and the Law of Humanitarian Intervention', 93 *AJIL* (1999) 824; Wedgwood, 'NATO's Campaign in Yugoslavia', *ibid.*, at 828.

⁵⁵ Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1; Franck, 'Lessons of Kosovo', 93 *AJIL* (1999), at 857.

⁵⁶ Gray, *supra* note 40, at 34, 193.

further action and additional measures to maintain or restore peace and stability in the region. The third, Resolution 1203 (on which both China and Russia abstained) welcomed the agreements between Yugoslavia and NATO and the OSCE, determined that the situation constituted a continuing threat to peace and security in the region and demanded full implementation of the agreements. It ended by deciding to remain seized of the matter.

This argument of implied authorization is open to serious criticism on the facts.⁵⁷ As Russia and China made clear in the debate leading up to the resolutions, they voted for the resolutions, or abstained, on the understanding that the resolution did not authorize force and that the Security Council would decide on further action. Thus on Resolution 1203 Russia said that enforcement elements had been excluded from the resolution and there were no provisions in it that would directly or indirectly sanction the automatic use of force.⁵⁸ Attempts to justify the use of force on the basis of implied authorization in cases where the debates make clear that no such authorization was intended, like arguments on material breach, undermine the authority of the Security Council and could deter states from agreeing to determine the existence of a threat to the peace and from passing resolutions under Chapter VII.

But in this instance the doctrine of implied authorization was used in conjunction with humanitarian necessity; NATO's justification for the start of *Operation Allied Force* invoked humanitarian necessity and certain states in the Security Council took up this argument.⁵⁹ The main significance of the argument of implied authorization thus seems to have been to stress that the intervention should not be seen as unilateral, that its aims were consistent with those of the Security Council, and to limit any doctrine of humanitarian intervention by a requirement of Security Council determination under Chapter VII of a threat to international peace and security.

The UK government seems to have been alone in expressly relying on the use of the action against Iraq as a precedent for the intervention in Kosovo, and it was prompted to do so by domestic pressure. When asked to justify the NATO action, the UK government said in Parliament that the precedent for the use of force to avert humanitarian catastrophe was the action against the Kurds in 1991. In 1998, when questioned on the legality of any future use of force against Serbia, a Foreign and Commonwealth Office Minister answered that the use of force could be justified on the grounds of overwhelming humanitarian necessity, without Security Council authority. At this stage he remarked that '[t]here is no general doctrine of humanitarian necessity in international law', but cases had arisen as in northern Iraq in 1991 where, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of

⁵⁷ Simma, *supra* note 55; Weller, 'The Rambouillet Conference', 75 *Int. Affairs* (1999) 211.

⁵⁸ SC 3937th meeting; China said that the resolution just adopted did not entail any authorization to use force or to threaten to use force against the FRY.

⁵⁹ Gray, *supra* note 40, at 33–35.

things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.⁶⁰

In 1999 after the NATO operation the Secretary of State for Defence said that there were some who doubted that there was a legal base for the NATO campaign, but the government was in no doubt that NATO was acting within international law. The legal justification rested upon the 'accepted principle' that force may be used in extreme circumstances to avert a humanitarian catastrophe. The use of force in such circumstances could be justified as an exceptional measure in support of purposes laid down by the UN Security Council, but without the Council's express authorization, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe. Several Members of Parliament had asked for a precedent for attacking a sovereign nation from the air in the light of the legal provisions. The Secretary of State replied that 'I was here when there were calls from all over the country and all over the world to save the Kurds who were being systematically exterminated by Saddam Hussein. The precedent, the principle and the emergency situation were the same and we took action to save the Kurds.'⁶¹

The USA was less concerned to offer a detailed legal argument; like NATO its main stress rested on moral and political considerations.⁶² In contrast to the UK, it has not been concerned to develop a legal doctrine of humanitarian intervention, and it does not use Iraq as a precedent for the Kosovo action. This marks a reversal of the normal practice during the Cold War when the USA generally offered lengthy legal justification for controversial uses of force.⁶³

It is also striking that in the case on the *Legality of Use of Force* brought to the International Court of Justice by Yugoslavia against 10 NATO states, the defendant states in their pleadings did not at the provisional measures stage rely on the action by the USA and the UK in protection of the Kurds as a precedent. Most of them did not go into the merits of the case, but Belgium produced a fairly lengthy argument on the law on the use of force. It invoked past practice to justify a right of humanitarian intervention, and argued that the action of India in Bangladesh, Tanzania in Uganda and Vietnam in Cambodia were all examples of humanitarian intervention that could be used to establish in customary international law the existence of a right for NATO to use force against Yugoslavia. It also referred to the ECOWAS intervention in Liberia and Sierra Leone and the UN-authorized action in Yugoslavia and Somalia. But it did *not* mention the US, UK and French action in establishing and patrolling the no-fly zones in Iraq.⁶⁴ This is a very striking omission and illuminates the controversial nature of this action and its lack of persuasiveness as a precedent. The UK and USA themselves did not in their pleadings in this case refer to this practice in their brief

⁶⁰ 'UK Materials on International Law', 69 *BYBIL* (1998), at 592–593.

⁶¹ 'UK Materials on International Law', 70 *BYBIL* (1999), at 582.

⁶² 'Contemporary United States Practice on International Law', 93 *AJIL* (1999) 628; see Franck, *supra* 55, 93 *AJIL* (1999), at 857.

⁶³ As for example in the case of Grenada, SC 2491st meeting.

⁶⁴ Oral Pleadings CR9915, 10 May 1999.

discussions of the use of force. Similarly, in the Security Council debates on the NATO action over Kosovo, states did not treat the US, UK and French action with respect to the no-fly zones in Iraq as practice helping to establish a right of humanitarian intervention.⁶⁵ The converse seems rather to be the case: the action against Kosovo, insofar as it may have greater international legitimacy because it was taken by NATO collectively, may be used (retroactively) to strengthen the ongoing claim for the use of force in Iraq for reasons of humanitarian necessity.

The arguments of implied authorization and humanitarian necessity were supplemented by that of breach by Yugoslavia of the agreement reached in 1998. The USA accused Yugoslavia of serious and widespread violations of international law; it had failed to comply with the OSCE and NATO verification agreements and had violated UN Security Council resolutions.⁶⁶ The combination of arguments used by the USA and the UK to justify their actions against Yugoslavia over Kosovo — implied authorization, material breach by Yugoslavia of Security Council resolutions and humanitarian necessity — reflects the combination of arguments used to justify force against Iraq in the no-fly zones; they all remain controversial. The combination of a series of weak arguments in the hope that cumulatively they will be persuasive is typical legal reasoning, and common in the area of the use of force. The lawfulness of humanitarian intervention not authorized by the Security Council is still strongly contested by the Non-Aligned Movement, China and Russia at every opportunity. Unless states and commentators are willing to ignore the position of these states, it is difficult to see how events in Iraq and Kosovo have changed the law.

C The Impact of the Actions against Iraq on the Right of Self-defence

There are other areas where the question has arisen whether, and how far, the actions against Iraq can be regarded as significant in the development of the law on the use of force. In particular, the scope of the right to self-defence remains problematic.

1 Self-defence in the No-fly Zones

Where possible both the USA and the UK prefer to avoid discussion of the difficult question of the legal basis for the establishment of the no-fly zones and to shift the debate to the right of self-defence of the US and UK aircraft patrolling the zones. Thus Prime Minister Blair, in his statement following the February 2001 action, said nothing about the legal basis for the establishment of the no-fly zones; he noted that the action by British and American pilots was a limited operation with the sole purpose of defending the pilots and aircrew who patrol the no-fly zones. Saddam Hussein's attacks had become more intensive and systematic and he concluded that '[o]perations such as the one last night would not be needed if Saddam stopped attacking us.'⁶⁷ The Ministry of Defence similarly said that this mission was conducted in self-defence in response to repeated Iraqi threats to coalition aircraft carrying out

⁶⁵ S/PV.3988, 3989.

⁶⁶ 93 *AJIL* (1999) 631.

⁶⁷ <www.fc.o.gov.uk/news/newstext.asp?4702> (17 February 2001).

routine patrols of the southern no-fly zone.⁶⁸ This preference for a self-defence justification, noticeable particularly in UK parliamentary debates and answers to parliamentary questions on the no-fly zones, is revealing in that it indicates a certain lack of confidence in the justification for the zones and an unwillingness to debate this issue. The USA, similarly, in its explanation of the February 2001 actions, stressed that their actions were essentially a matter of self-defence.⁶⁹ But the claim to be acting in self-defence cannot be taken in isolation. If the establishment and patrolling of the zones was not legal then there can be no justification for the use of force by the US and UK aircraft; they have no right of self-defence if they are illegally violating Iraqi sovereignty over its airspace.

Apart from this underlying problem, the use of force in the protection of the no-fly zones again reflects a polarization among states — this time on the scope of the right of self-defence. Initially, the USA and the UK did not actually claim an extensive right to self-defence in the no-fly zones; they responded only to actual attacks on their aircraft. They interpreted ‘armed attack’ to cover the locking-on of Iraqi radar onto US and UK planes; the notion of armed attack in international law has developed in response to modern warfare. This was apparently accepted in principle by other states.

But controversy arose in 1999 when the USA and UK changed the rules of engagement after *Operation Desert Fox* and vastly increased their activity in the zones in response to increasing provocation and confrontation by Iraq. They decided that they would use force not only against actual attacks, they could also attack command and control centres inside and outside the zones.⁷⁰ Thus the USA and the UK apparently act on the basis of their usual position that the right to self-defence is a wide one which covers anticipatory self-defence, but they do not expressly invoke this right. Even after this change in the rules of engagement the USA and the UK rejected suggestions that their actions were preemptive. That is, they did not wish to enter into a debate on the scope of self-defence. The reluctance openly to rely on a doctrine of anticipatory or preemptive self-defence is normal in state practice.⁷¹

Nevertheless France, which had been a partner in patrolling the no-fly zones until *Operation Desert Fox* in December 1998, apparently regarded the new operations as going beyond self-defence. It openly criticized the US and UK actions after the February 2001 operation. The Minister for Foreign Affairs stated that France had ended its participation since the operation had changed in nature with regard to its initial objectives of surveillance; France had several times expressed its incomprehension and unease concerning the repeated air attacks by US and UK aircraft. The Minister criticized the USA and the UK on policy grounds; he also alleged that there was no basis in international law for this type of air action, in contrast to the situation when the aircraft were illuminated by hostile Iraqi radar.⁷² Thus the French criticism

⁶⁸ <www.fco.gov.uk/news/newstext.asp?4700> (17 February 2001).

⁶⁹ <www.defenselink.mil/news/Feb2001/t02162001_t216iraq.html>.

⁷⁰ *Keesings Record Of World Events* (1999) 42754, 42811.

⁷¹ See Gray, *supra* note 40, at 112–115.

⁷² <www.doc.diplomatie.gouv.fr/cgi-bin/go_doc.pl?type=bull&cible+du_jour.html> (19 February 2001); 1999 RGDIP 888–890.

is apparently based on the view that the US and UK actions no longer constituted self-defence. There has been no Security Council debate specifically on actions in the zones, but the issue has come up in debates on other matters, such as protection of civilians and sanctions against Iraq. In these debates Russia and China do not make a direct challenge on the question of the scope of self-defence; they have preferred to focus on the more fundamental question of the legality of the zones. As regards the methods of enforcement of the zones they stress the popularly appealing argument that the USA and the UK have acted illegally in that they have caused civilian casualties in violation of the laws of war.⁷³

2 *Self-defence in Response to Terrorism*

Another instance of the polarization of states over actions against Iraq can be seen in the invocation of self-defence by the USA in its 1993 actions in response to the alleged assassination attempt against former President Bush in Kuwait in April 1993. In June 1993 the USA fired missiles at the Iraqi Intelligence Headquarters in Baghdad; in its report to the Security Council it claimed to be acting under Article 51 of the Charter of the United Nations. There was widespread sympathy for the US action, but in the Security Council only the UK and Russia expressly supported the *legality* of the US action.⁷⁴ Conversely, only China actually condemned the US action. This was taken as a precedent by the USA in its action in 1998 against Afghanistan and Sudan in response to the terrorist attacks on US embassies in Kenya and Ethiopia. Again the USA claimed to be acting under Article 51.⁷⁵

But this time the consensus and willingness to be silent, which had been apparent with regard to the actions against Iraq, were weaker. The matter was not openly discussed by the Security Council. Russia was not this time willing to offer support; Arab states and Pakistan also condemned the action. Others offered support but did not expressly adopt the US doctrine of self-defence.⁷⁶ It is striking that the 'UK Materials on International Law' included in the 1998 *British Yearbook of International Law* contain nothing on the UK response to the US action. This reflects the difficulty of the UK in arriving at an agreed public position on the attacks; whereas the Prime Minister defended the legality of the US actions, the Foreign Secretary took a much more cautious line. The absence of any mention in the *Yearbook* shows the reluctance publicly to endorse the US doctrine on this issue.

Conclusion

Operation Desert Storm marked the start of a new era for the United Nations. The Security Council has continued to turn to Member States to take enforcement action, although it has subjected subsequent operations to greater control than it did for

⁷³ For example, S/PV.4084.

⁷⁴ *UN Yearbook* (1993) 431; see Kritsiotis, 'The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-defence in International Law', 45 *ICLQ* (1996) 162.

⁷⁵ S/1998/780.

⁷⁶ Gray, *supra* note 40, at 117–118.

Operation Desert Storm. States have accepted this transformation of the collective security system and a flexible interpretation of Chapter VII of the UN Charter. But the virtual unanimity over *Operation Desert Storm* and subsequent Member State operations has not extended to claims by states to implied authorization by the Security Council of the use of force against Iraq and in Kosovo. This paper has focused particularly on the growing isolation from the rest of the world of the USA and the UK as regards their actions against Iraq, but also on the differences between the UK and the USA. The UK has joined the USA in some, but not all, of a long series of actions against Iraq; other European states have become increasingly critical over the last 10 years and have called for a reappraisal of policy towards Iraq. The UK, more than any other state, has explicitly treated the actions against Iraq as a crucial precedent in the development of the law; to a much greater extent than the USA it has seemed seriously concerned to find legal justifications for its continuing use of force in Iraq and has taken trouble to elaborate the scope of a new doctrine of humanitarian necessity. But the USA seems to feel itself liberated by the end of the Cold War from any real need to justify its actions against Iraq.