Arguments of Mass Confusion

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Abstract

While public discourse has been correct to question the credibility of Operation Iraqi Freedom, it has demonstrated the extent to which international law remains exposed to a set of serious — and serial — confusions in terms of the justifications used for analysing where a given intervention stands as a matter of the jus ad bellum. *These confusions have presented international law with an important methodological challenge and, to address this challenge, the essay returns to the jurisprudence of the* Nicaragua *case (1986), where it finds that the International Court of Justice outlined discrete principles for the identification and assessment of justifications for the application of force under international law. In its judgment, the Court distinguished between legal and political justifications for action, but it also recognized that states operate in formal and informal spheres of action. The principles form part of a coherent and viable framework for use beyond the four corners of the courtroom, in simulated scrutinizations of legal justifications given for the application of force. That framework is articulated and explained, before it is considered in the context of Operation Iraqi Freedom — where it provides us with a sense of how best to organize and evaluate the arguments made in defence of that intervention: the authorized enforcement of Security Council resolutions, the right of pre-emptive self-defence, humanitarian intervention and pro-democratic intervention.*

In the aftermath of Operation Iraqi Freedom,[1] public discourse on both sides of the Atlantic has been consumed by the persistent claims of the humanitarian and political benefits derived from the change of regime in Baghdad as well as the integrity of intelligence information on 'weapons of mass destruction' that had precipitated the intervention against Iraq. Whereas the former consideration has been pressed into

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[1] President George W. Bush announced on 1 May 2003 that combat operations in Iraq had ended: see Press Release, Office of the Press Secretary of the White House: 1 May 2003 (http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501–15.html). Operation Iraqi Freedom had commenced on 20 March 2003: Spiegel, Eedle and Nicholson, 'U.S. Launches All-Out Air Assault', *Fin. Times* (New York), 22–23 March 2003, 1 and Fuller, 'U.S. and British Troops Push into Iraq', *IHT* (Paris), 21 March 2003, 1.

service by those who advocated Operation Iraqi Freedom, the latter consideration has been taken up and pursued by the critics of intervention — who have alleged that the very credibility of the intervention lies in terminal doubt by the subsequent (and ongoing) failure to retrieve weapons of mass destruction in Iraq.[2]

In these circumstances, it has proved difficult to resist the temptation to pair together these claims and establish a certain correlation or confluence between them — to construct some neat element of cause and effect between the absence of weapons of mass destruction in Iraq and the benefits of intervention as we come to mould our perceptions and understanding of the 'justifications' for Operation Iraqi Freedom under international law. 'Weapons of mass destruction' had, after all, become the forbidding clarion call for recourse to force on that occasion that now, in the immediate wake of intervention but still absent weapons of mass destruction in Iraq but also present regime change in Baghdad, what better *raison d'être* to accompany military victory than to proclaim humanity's and freedom's own decisive triumph?

Such impressions have become more and more pronounced within the realm of public discourse, but they have also begun to resonate within international law deliberations with their unceasing emphasis on a perpetual rotation of arguments in defence of intervention. As such, they have threatened to defer or frustrate substantive assessments on the lawfulness of Operation Iraqi Freedom, because the justifications for intervention have been made out to be moving or transcendental targets, enigmatic to the core and elusive to sustained examination. At other times, the justifications have been portrayed as operating in tandem with each other or, indeed, as running in to one another to the point where phenomenal uncertainty and confusion has gathered around the reference-point for calculating where Operation Iraqi Freedom stands as a matter of the *jus ad bellum*.

To these seeds of confusion — or, perhaps, it could be said that as the root source of this confusion — it has not helped that, at different times and in different places, the arguments made in anticipation of Operation Iraqi Freedom underwent something of their own telling evolution.[3] From President Bush's commitment to expanding the boundaries of pre-emptive self-defence in a terror-struck world to the utilization of an intriguing complement of Security Council resolutions stretching as far back as 1990, we became perplexed spectators to the sport of nurturing different arguments as possible candidates for the legal justification of Operation Iraqi Freedom. Precisely how this evolution transpired, what its starting and ending coordinates were, and ascertaining whether these *candidates* for justification did indeed become the *justifications* for intervention are all questions calling out for further inquiry, but, before their details can be mastered in the fullness of time, we should at least be conscious of the narrative of nuance which they contribute to our proceedings. That narrative cannot afford to be missed if the complete tale is to be told but, critically, it is

[2] See Duffy and Carney, 'A Question of Trust', *Time*, 21 July 2003, 22. Not even the foremost internet search engine has been able to oblige: readers are advised to visit http://www.google.com and enter 'weapons of mass destruction' in the search bar, before clicking the 'I'm Feeling Lucky' icon.

[3] Lowe, 'The Iraq Crisis: What Now?', 52 *ICLQ* (2003) 859, at 860–861.

also a narrative which speaks to the experiences of but *one* of the states which participated in Operation Iraqi Freedom: it is not a narrative which can or should be assumed for other intervening states, or indeed, for the coalition when taken as a totality.

As if this were not enough, Operation Iraqi Freedom occurred against an ever-shifting factual landscape in which accusations and facts seemed to change and to continue to change in real time.[4] Nowhere was this made more apparent than with the failure of intervening forces to locate or secure anything approximating 'weapons of mass destruction' in the opening chapter of their occupation of Iraq. That matter alone has forced us to confront the precise bearing which these accusations and facts have and should have on the lawfulness of Operation Iraqi Freedom: which of these factual assertions are relevant — which count and which do not — in making that determination? With what consequence those accusations redeemed and those left unredeemed? Has Operation Iraqi Freedom been trapped in a state of provisional lawfulness until the time that offending arsenals do indeed surface? Or does it lurk in the twilight zone of provisional unlawfulness until that same time? Or will discoveries of weapons of mass destruction make no difference to that determination?

To be sure, the methodological challenge posited for international law by the apparent justifications for Operation Iraqi Freedom is not unique to Operation Iraqi Freedom. However, Operation Iraqi Freedom magnified the challenge several fold because it enhanced the opportunities for confusion — for confused analysis — by its most extraordinary cocktail of historical and modern and changing and speculative circumstance. More so than before, international law appeared wholly exposed to a set of serious — and, given their recurring nature, we should contend serial — confusions in terms of the identification and assessment of justifications for the application of force under international law. To ward off these eventualities, it is incumbent on us to investigate whether international law has designed its own framework for addressing this challenge, so that the mission of this essay is to discern and provisionally work with such a framework for Operation Iraqi Freedom. We are therefore concerned with exploring the particularities of such a framework, but, in our conclusion, we shall also reflect upon the possible problems and limitations of its function in practice. Our objective is not to set about the passing of final judgement on the lawfulness of Operation Iraqi Freedom in these pages — for that would require a far more programmatic study than is ever attempted within — but, rather, to gain a better sense of how international law has sought to moderate the thinking and making of such judgements on previous occasions as part of its own methodological record.

1.

In seeking to respond to this challenge, it repays us to return to the jurisprudence of the International Court of Justice in the *Nicaragua* case in 1986, where the Court

[4] See, in particular, Miller, 'A Chronicle of Confusion in the Hunt for Hussein's Weapons', *NY Times*, 20 July 2003, A1.

concluded its assessment of the military and paramilitary activities of the United States in Nicaragua on the basis of the justifications advanced by the United States 'on the legal plane' — and not, as it said, of those pleaded at 'the political level'.[5]

Making this distinction was critical to the way the Court structured and reasoned and reached its judgment because, as far as it was concerned, '[t]o justify certain activities involving the use of force, the United States relied solely on the exercise of its right of collective self-defence'.[6] The Court did give brief contemplation to other possibilities of justification for the self-same activities in Nicaragua[7] — one of which, the Court said, might have assumed the nature of a 'general right' for states to intervene 'directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified'.[8] However, the Court was unequivocal in finding that the United States had 'not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances'.[9]

According to its schemata, the Court therefore considered it imperative in its examination of the lawfulness of intervention to proceed on the basis of the legal justification advanced by the United States, and not on the basis of political arguments framed as justifications, even though it was clear to the Court that the United States had directed such political justifications with equal mission and vigour at defending its involvement in Nicaragua.[10] The Court did recognize intermittent announcements of

[5] *Nicaragua v. United States of America*, ICJ Reports (1986) 14, at 109 (para. 208). For an excellent summarization of the historical and political background, see S. Rushdie, *The Jaguar Smile: A Nicaraguan Journey* (1987).

[6] *Nicaragua* case, *supra* note 5, at 106 (para. 201). Note, however, that the Court had elsewhere spoken of the claim of collective self-defence as 'the *principal* justification announced by the United States for its conduct', at 72–73 (para. 131) (emphasis added). See, further, at 22 (para. 24), 44–45 (para. 74) and 70 (para. 126).

[7] See, further, *infra* notes 80 and 81.

[8] *Nicaragua Case*, *supra* note 5, at 109 (para. 208). As the Court found, the United States had not converted this possibility into a reality: see *infra* notes 22 and 23.

[9] *Ibid.* at 108–109 (para. 207). See, also, 27 (para. 34), 34–35 (para. 48), 36 (para. 51), 44–45 (para. 74), 70 (para. 126) and 134 (para. 266). The Court noted at *ibid.*, at 109 (para. 208) that, notwithstanding its 'solidarity and sympathy with the opposition in various States, especially in El Salvador', Nicaragua 'too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force'. In any event, the Court was of the view that:

> no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

See *ibid.*, at 109–110 (para. 209) and 133 (para. 263).

[10] We make this distinction between legal and political justifications (see *infra* notes 19 and 20 (and accompanying text)) on the basis of a synonymous treatment of the terms 'level' or 'plane' (which the Court had put into use (*supra* note 5)) and 'justification', and in view of what the Court said elsewhere in its judgment: see, in particular, *supra* notes 17 and 22. However, the Court could have intended this division as a manifestation of its broader dichotomization of 'legal' and 'political' forms of state behaviour,

the United States to the effect that its involvement in Nicaragua had conformed to some 'right of political or ideological intervention',[11] but the Court was keen to emphasize that these actions were justified 'in this way' — that is to say, to intervene in a country in order to support a particular system of 'political and moral values'[12] — on, and only on, 'the political level'.[13] No contrary proofs had been rallied to deflect the Court from its course and, as the full portrait of its jurisprudence emerges in the *Nicaragua* case, we find that this dichotomization between the legal and political dimensions of state action instructed the Court's entire conceptualization of the realities presented before it:

> Nicaragua claims that the references made by the United States to the justification of collective self-defence are merely 'pretexts' for the activities of the United States. It has alleged that the true motive for the conduct of the United States is unrelated to the support which it accuses Nicaragua of giving to the armed opposition in El Salvador, and that the real objectives of United States policy are to impose its will upon Nicaragua and force it to comply with United States demands. In the Court's view, however, if Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of an additional motive, one perhaps even more decisive for the United States, drawn from the political orientation of the present Nicaraguan Government. The existence of an additional motive, other than that officially proclaimed by the United States, could not deprive the latter of its right to resort to collective self-defence. The conclusion to be drawn is that special caution is called for in considering the allegations of the United States concerning conduct by Nicaragua which may provide a sufficient basis for self-defence.[14]

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according to which the Court would have carved up state behaviour into 'legal' and 'political' *spheres* (rather than 'levels' or 'planes') of action. See *infra* note 14. Or it could have envisaged *both* of these conceptualizations as separate to — and, at times, coinciding with — one another (so that legal justifications could be pleaded in the political sphere of state action and political justifications could be pleaded in the legal sphere). Or its 'spheres' could have been divided between the formal and the informal: see the discussion that accompanies *infra* notes 34, 36, 78 and 88.

[11] For the sake of clarity, it is believed that the Court was prepared to view the 'right of political or ideological intervention' at both the political and legal levels, but it also observed that the 'right' had not been pleaded at both of these levels — perhaps because of its legal status at that moment in time: *supra* note 9 and *infra* note 21. This might cause some confusion, but the confusion derives from the name of the doctrine under consideration: a right of 'political' or 'ideological' intervention. Such, however, is its name: see D. J. Harris, *Cases and Materials on International Law* (5th ed., 1998), at 886 and *infra* note 23 (*per* the International Court of Justice). See, further, Reisman, 'Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice', 13 *Yale JIL* (1989) 171.

[12] As distinct from 'the process of decolonisation' which 'is not in issue in the present case'. See *Nicaragua Case*, *supra* note 5, at 108 (para. 206).

[13] *Supra* note 9. See, also, *infra* note 22.

[14] *Nicaragua Case*, *supra* note 5, at 70–71 (para. 127). See, also, 92 (para. 171). See, further, O. Schachter, *International Law in Theory and Practice* (1991), at 59 ('True, in some cases, [governments] depend on power to be persuasive. But even in these cases, governments — whatever their motivation — generally base their legal case on grounds that are logically independent of their own interests and wishes'). 'Motivation' and 'justification' are also described as 'analytically distinct'. See, further, C. M. Chinkin, *Third Parties in International Law* (1993), at 318.

From this passage, it is evident how much the Court sought to develop its methodological commitment to preserving separate identities for the legal and political aspects of state action — notice how the Court acknowledges the currency of motives and pretexts in political terms, but conducts a subtle divorce from this position when it embarks upon its legal investigation of the identical pattern of events. That observation did not complicate the work of the Court: in fact, it seemed to facilitate the Court's task by helping it dissect relevant from irrelevant considerations in its analysis as the Court began to fix its sights on what the United States had 'officially proclaimed' in defence of its involvement in Nicaragua.[15] The Court's governing ambition was to train its focus and energies on the *legal justification* provided by the United States — and not the *political justification* or, for that matter, the *motive* or *motives* of the United States — even though, from time to time and in different measure, colloquial or generic reference may be made to each or all of these elements as the *reasons* behind a given intervention.[16]

Why was it so imperative for the Court to have proceeded in this manner? According to its own reasoning, the Court was firm in its belief that it had no 'authority' to 'ascribe to States *legal* views which they do not themselves advance'.[17] From this *dictum*, we can speculate that ascriptions might take one of two possible forms: they can either emanate from the conflation or confusion of political justifications with legal justifications or, if the logic is followed, the legal justification that is 'officially proclaimed' can be mistaken or misunderstood or misinterpreted or misrepresented from that which is actually advanced in practice. The denominator common to both of these forms is that insufficient care, attention, recognition or weight is given to the *legal justification* issued in point of fact by the intervening state or states *for their own intervention* — in favour of an assumed or projected, but significantly *different*, legal justification.[18] Hence the notion of *ascription* conjured by the Court in 1986, because the justification ascribed to intervening states is not one to

[15] *Ibid.* (though, the Court conceded that 'special caution' was 'called for' by virtue of the full sum of considerations that had been drawn to its attention). See *infra* note 201.

[16] See, further, Kritsiotis, 'The Legal Travails of Kind-hearted Gunmen', 62 *Modern Law Rev.* (1999) 937, at 942–943 and 948–949; Richardson, 'U.S. Hegemony, Race and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq', 17 *Temple Int'l & Comp. LJ* (2003) 101, at 105–110 and Lowe, *supra* note 3, at 861. The Court's own wording (of 'an additional motive, *other than that officially proclaimed by the United States*' (*supra* note 14) (emphasis added)) denotes that the legal justification for action can at one and the same time serve as a 'motive' for intervention. In the event of this coincidence — and in the absence of an 'additional motive' — the Court insinuated a lesser need for 'special caution' in considering the legal case of the respondent state. See *ibid.*

[17] *Nicaragua Case*, *supra* note 5, at 108–109 (para. 207) (emphasis added). Later in its judgment, the Court did say that 'it is required to consider *on its own initiative* all rules of international law which may be relevant to the settlement of the dispute *even if these rules have not been invoked by a party*' (emphasis added). However, it immediately qualified this statement by repeating its earlier incantation — and it did so almost verbatim: '[t]he Court is *however* not entitled to ascribe to states legal views which they do not themselves formulate'. *Nicaragua Case*, *supra* note 5, at 134 (para. 266) (emphasis added).

[18] We should be clear that a *different* legal justification can be entered either as an *additional* legal justification for the United States (i.e. additional to the right of collective self-defence) or as an *alternative* legal justification (i.e. a justification used in the alternative to that advanced by the United States).

which they have submitted *in law*: it is, rather, announced for and assigned to them by others, by outside parties.

As it happened in the *Nicaragua* case, the Court was considering the (political) justification of a right of political or ideological intervention[19] alongside the (legal) justification of collective self-defence advanced by the United States,[20] and the existence of the political justification of the United States suggested that it was the first form of ascription that was testing itself (and tempting the Court) here. The Court considered that the 'right' of political or ideological intervention was nothing more than a political contrivance with no empirical foundation in international law,[21] but it also concluded that the United States had presented such arguments as 'statements of international policy, and not [as] an assertion of rules of existing international law'.[22] The Court was therefore alert to the temptation and, as we can see in these passages, worked hard to resist it.[23]

To appreciate the nature and orientation of the second form of ascription, it is necessary for us to indulge certain additional hypotheses for the *Nicaragua* case so that we can further our understanding of the thinking of the Court. To do this, we need to factor different *legal justifications* into our account of the case[24] — that is justifications different to collective self-defence but which occur with a less problematic juridical pedigree than that which afflicted the right of political or ideological intervention[25] — and consider how these, if at all, would have impacted upon the Court's reckoning. For these hypotheses, we shall suppose that different legal justifications for the involvement of the United States in Nicaragua did indeed arise during the case — either from arguments put forward by the applicant state against the United States

[19] *Ibid.*, at 109–110 (para. 209) ('not something', the Court said, which 'exists in contemporary international law'). See also *supra* note 11.

[20] The United States claimed its right of self-defence on the basis of armed attacks launched by Nicaragua against El Salvador, Honduras and Costa Rica: see *ibid.*, at 72 (para. 130). See *infra* notes 27 and 28.

[21] *Supra* notes 9 and 19.

[22] *Nicaragua Case*, *supra* note 5, at 109 (para. 207).

[23] At para. 208, *ibid.*, at 109, the Court maintained:

> [A]s regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way [i.e. a right of political or ideological intervention] on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. . . . *[T]he United States has, on the legal plane, justified its intervention expressly and solely by reference to the 'classic' rules involved, namely, collective self-defence against an armed attack*. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various states, especially in El Salvador. *But Nicaragua too has not argued that this was a legal basis for intervention, let alone an intervention involving the use of force. (Emphasis added.)*

See, further, at 134 (para. 266), where the Court said that 'one of the accusations of the United States against Nicaragua is violation of the 1965 General Assembly Declaration on Intervention . . . by its support for the armed opposition to the Government in El Salvador. *It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle* "of ideological intervention", the definition of which would be discretionary' (emphasis added).

[24] See, further, *supra* note 18.

[25] *Supra* notes 9, 19 and 21.

(Nicaragua claims, for instance, that the United States is disguising its actions as acts of collective self-defence when they are deserving of more appropriate legal designations and should be treated according to criteria for an altogether different legal justification) or from a mysterious brief that appears in the judicial chamber of the Peace Palace on the night after the United States has made its closing arguments to the Court. The brief, penned by 'friends of the United States', is a robust apology for the involvement of the United States in Nicaragua commissioned by other states and at once sets out a much more persuasive line of legal argumentation than that which had earlier befallen the ears of the Court — but nowhere does it make mention of the right of collective self-defence.[26] How would the Court have reacted then? How would it have related these claims to the position of the United States which, the Court itself had observed, 'relied solely on the exercise of its right of collective self-defence'?[27]

We can infer from the Court's earlier postulations that it would not have reconciled itself to either of these approaches — irrespective of whether these were designed to help or hinder the case of the United States — without specific consent or confirmation from the United States that it had endorsed an obvious change to its own stated legal position. We know this because of the steadfast attention and allegiance which the Court paid to the legal justification that the United States had elected and elaborated in the *Nicaragua* case as a matter of fact, namely the exercise of its right of collective self-defence on behalf of El Salvador, Honduras and Costa Rica 'against aggression by Nicaragua'.[28] From the theoretical perspective, international law could well have presented the United States with a rich host of argumentative opportunities to exploit as the legal justification for its involvement in Nicaragua, but the concern of the Court was not to entertain an endless spectacle of counter-factual thought-experiments on rival legal strategies of or for the United States, on chasing speculative leads and might-have-beens (even if, we could argue, these might have stood the United States in better stead with the Court). Out of wholehearted respect for the *opinio juris sive necessitatis* of the United States, the Court's concern was to rule upon the argumentative opportunities that the United States had actually chosen to exploit in fact, but we can also surmise that the Court conducted itself thus out of fairness to and respect for its own role and procedures: the Court did not believe that it was its business to put itself in the position of devising or inventing or revising the defence for the defence (as it were). To have done so would have implicated it in assessments of

[26] The brief brilliantly anticipates para. 210 of the *Nicaragua* judgment as the core of its argumentation: there, the Court suggested that, in the situation in which it found itself, the United States 'might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack'. See *Nicaragua Case*, *supra* note 5, at 110 (para. 210). See, however, *infra* note 29.

[27] *Ibid.*, at 106 (para. 201). See *supra* notes 6 and 20.

[28] *Nicaragua Case*, *supra* note 5, at 70 (para. 126). See, also, *ibid.* Although, with evident caution, the Court then said: '*it has been suggested that*, as a result of certain assurances given by the Nicaraguan "Junta of the Government of National Reconstruction in 1979", the Government of Nicaragua is bound by international obligations as regards matters of purely domestic policy, that it is in breach of those obligations, and that such breach might justify the action of the United States' (emphasis added).

argumentation and evidence that would have been denied the essential tests and benefits of exposition and advocacy yielded by the Court's own proceedings. And so it was,[29] we are led to conclude, that the Court persisted with its conviction that it was for the United States — and for no-one else — to articulate its legal justification before the Court and that it was on that basis — and upon that basis alone — that the Court's deliberations and its final judgment would take their ultimate cue.[30]

2.

How does Operation Iraqi Freedom fare in this respect? Given the absence of litigation on the lawfulness of the intervention — a feature so familiar in practices concerning the application of force — how are we to determine the legal justification 'officially proclaimed' for Operation Iraqi Freedom if the political process provides no procedural benchmark equivalent to that found in contentious proceedings before the International Court of Justice? Can an assessment even be made of the lawfulness of an intervention in the absence of litigation? In the absence of justifications 'officially proclaimed' in a court of law? Does the invisible frontier between the Court's legal and political justifications continue to assert itself outside the four corners of its courtroom?

On this issue, let it be recalled that, on the very day that hostilities commenced against Iraq in March 2003, both the United States and the United Kingdom filed communications with the United Nations Security Council in New York to notify the Council of the intervention — but also, it would seem, to mark out the legal basis for their action.[31] The United States considered that Operation Iraqi Freedom was 'authorised under existing [Security] Council resolutions, including its Resolutions 678 (1990) and 687 (1991)', that Iraq had decided 'not to avail itself of its final opportunity under Resolution 1441 (2002) and has clearly committed additional violations [and that] [i]n view of Iraq's material breaches, the basis for the ceasefire [in Resolution 687 (1991)] has been removed and the use of force is authorised under

[29] Or so it seems: see the discussion at *supra* notes 17 and 26. The Court mentioned that 'having regard particularly to the non-participation of the United States in the merits phase . . . it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities'. See *ibid.*, at 106 (para. 201). The Court felt it 'must' enquire 'whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack'. However, this proposition is by no means free from controversy: see Greenwood, 'The International Court of Justice and the Use of Force', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 373, at 381.

[30] *Nicaragua Case*, *supra* note 5, at 146–149 (para. 292 (1)–(16)).

[31] See Taft and Buchwald, 'Preemption, Iraq and International Law', 97 *AJIL* (2003) 557. Australia followed suit: UN Doc. S/2003/352 (20 March 2003). See, further, Campbell and Moraitis, 'Memorandum of Advice to the Commonwealth Government on the Use of Force Against Iraq', 4 *Melbourne JIL* (2003) 178 and http://www.pm.gov.au/iraq/displayNewsContent.cfm?refx=96.

Resolution 678 (1990)'.[32] In a less detailed formulation to the Council, but to equivalent effect, the United Kingdom maintained that 'Iraq has failed, in clear violation of its obligations [under Resolution 687 (1991)], to disarm and that in consequence Iraq is in material breach of the conditions for the cease-fire at the end of hostilities in 1991 laid down by the [Security] Council in its Resolution 687 (1991)'.[33]

Now, it is open for us to designate these representations of the United States and the United Kingdom as *the* legal justification provided for the intervention because, even though they were made outside the court-room and within the undisputed political context of the Security Council, they occurred as part of a formal exercise of making justifications to defend the application of force under international law. On this score, we should note that, in 1986, the concern of the Court was to dissect argumentation lodged on the legal level from that made on the political level so that it could make headway with its investigations, but it is also possible that the Court engaged an additional categorization at that time. According to this canon, the Court centred more on the making of formal or official proclamations of a legal nature,[34] and less on the legal or political venue — here, the judicial venue — where such proclamations take place.[35] The Court would have thus perceived *formal* and *informal* spheres of state action with *legal* and *political* justifications made within each of those spheres.[36] Evidence to that effect is available in the Court's jurisprudence to ground this interpretation of its position.[37] In any event, there is no reason in principle why the techniques of analysis which the Court then went on to espouse cannot be simulated beyond its walls, in order to critique a formal — but political — process which engages legal justifications for the application of force.

Granted, within international law, there can be no substitutes for the authority or processes or jurisprudence of the Court, but that consideration should point us in the direction of making *provisional* conclusions reached as part of any simulated exercise — rather than as a basis for rejecting the undertaking of this exercise altogether.

[32] UN Doc. S/2003/351 (21 March 2003) 1.

[33] UN Doc. S/2003/350 (21 March 2003). For more detailed transcriptions, see Attorney-General Clarifies Legal Basis for the Use of Force against Iraq (http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1047661460790) (18 March 2003) and Foreign and Commonwealth Office, *Iraq: Legal Basis for the Use of Force* (17 March 2003) (copy on file with the author). Both of these documents have been helpfully reproduced by Warbrick, 'The Use of Force against Iraq', 52 *ICLQ* (2003) 811.

[34] *Nicaragua Case*, *supra* note 5, at 70–71 (para. 127). In this respect, see, also, its treatment of the significance of General Assembly resolutions: Morrison, 'Legal Issues in the *Nicaragua* Opinion', 81 *AJIL* (1987) 160, at 160–162.

[35] In an apparent de-emphasis of the idea of 'legal and political spheres' of action: see *supra* note 10, *ibid.*, and *infra* note 88 (emphasis on the formal conduct of the United States before the Security Council).

[36] This would furnish us with the following configurations: (1) political justifications made in the informal sphere; (2) political justifications made in the formal sphere; (3) legal justifications made in the informal sphere and (4) legal justifications made in the formal sphere. Although, see the discussion at *supra* note 10.

[37] See the analysis accompanying *supra* notes 14 and 34 and *infra* note 88. Note, specifically in this context, the range of examples supplied by Damrosch and Oxman on the first page of their 'Editors' Introduction', 97 *AJIL* (2003) 553.

Indeed, one could argue that such is the existing thrust and parry of modern scholarship in the field,[38] and, furthermore, that such is the urgent function of this scholarship given the paucity of litigation and jurisprudence occasioned by the jurisdictional fortress that surrounds access to the International Court of Justice.[39] At the same time, it should be cautioned that any simulated exercise should treat with great care the legal justifications offered in the formal sphere. This proviso applies even for proceedings before the Court, because, to be sure, justifications offered in one phase of proceedings might evolve or mutate or differ from those offered by the same state at a later or different phase of the same proceedings,[40] or, as recent events have come to suggest, they might hinge on and be defined by the peculiarities of the basis *for* jurisdiction.[41] That said,

[38] As the market leaders of the field indicate: see I. Brownlie, *International Law and the Use of Force by States* (1963); C. Gray, *International Law and the Use of Force By States* (2000); Y. Dinstein, *War, Aggression and Self-Defence* (3rd ed., 2001) and T. M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002). See, also, Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern Univ. Law Rev.* (1977) 217.

[39] In terms of the consent required from contesting states for contentious proceedings. Note, however, the statistical appraisal and critique of Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After *Nicaragua*', 14 *EJIL* (2003) 867. Jurisdictional difficulties do exhibit themselves on additional fronts: in the *Nicaragua* case, for example, the Court found that it had 'no jurisdiction to rule upon the conformity with international law of any conduct of states not parties to the present dispute, or of conduct of the parties unconnected with the dispute': *Nicaragua*, *supra* note 5, at 108–109 (para. 207). The position has been criticized on the grounds that it 'is not a satisfactory rationale for failure to examine the behaviour of states which were not parties to the dispute before the Court. Absence of jurisdiction over particular state action does not preclude its assessment as state practice for the purposes of a general rule of customary international law': Charlesworth, 'Customary International Law and the *Nicaragua* Case', 11 *Australian YbIL* (1988) 1, at 20. See, further, *infra* notes 41, 43 and 222.

[40] See the provisional measures suit filed by the Federal Republic of Yugoslavia before the International Court of Justice against the United States of America, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, Canada, Portugal and Spain: ICJ Press Communiqué 99/17 (29 Apr. 1999). See, further, Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia', 49 *ICLQ* (2000) 330, at 343.

[41] In the *Oil Platforms Case*: *Islamic Republic of Iran v United States of America* (ICJ Press Release 2003/38 (6 Nov. 2003)), Judge Higgins took issue with the International Court of Justice for using 'as the basis of its analysis' the '*jus ad bellum* on armed attack and self-defence' (para. 40, Separate Opinion) (http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106–higgins.PDF) when, she argued, the basis of jurisdiction — the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran — required the Court to focus on Article XX(1)(d) of that treaty as the foundation of its reasoning and applicable law. Article XX(1)(d) provided that the treaty 'shall not preclude the application of measures . . . necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'. For Judge Higgins, the Court 'never looks' at the 'major submission' of the United States which is framed in terms of 'a justification of the use of force by reference to the criteria specified in Article XX, para. 1(d)' (para. 50, Separate Opinion). The United States had, she maintained, invoked the right of self-defence in its argumentation, but this had not formed its 'main argument'; '[i]t invoked that argument as a final submission in the alternative, arising only should the Court find that its other arguments do not avail' (para. 50, Separate Opinion):

> The Court has . . . not interpreted Article XX, para. 1(d), by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law. It has replaced the terms of Article XX, para. 1(d), with those of international law on the use of force and all sight of the text of Article XX, para. 1(d), is lost. Emphasising that 'originally' and 'in front of the Security Council' . . . the United States had stated that it had acted in self-defence,

the virtue of simulation is that it affords us considerable latitude for responsible investigation of the validity of legal justifications pleaded in the formal sphere — justifications that might not otherwise have the opportunity of judicial scrutinization. Simulation would therefore allow for provisional scrutinizations of these justifications to occur,[42] and their validity could be tested against the framework and laws of the *jus ad bellum* without fear of the procedural complications that sometimes fasten to proceedings before the International Court of Justice.[43]

To set us on our path, and to guard against the cardinal sin of ascription, the communications to the Security Council in March 2003 stand as formal representations of the states concerned — but, significantly for present purposes, they also constitute representations of a *legal* character.[44] We know this because they appeal to the general framework and assumptions of the laws regulating force in the United Nations Charter; namely, the interdiction placed upon the threat or use of force in international relations (Article 2(4)) save in the exceptional circumstances of self-defence (Article 51) or cases of authorization by the Security Council (under Chapter VII).[45] Their shared premise also relies on an intricate contextual reading, or interpretation,[46] of Security Council Resolutions 678 (1990), 687 (1991) and 1441 (2002); on the use of legal concepts and terminologies such as 'authorization'[47] and 'material breach'[48] and 'ceasefire'[49] — and upon the notion of precedent. Thus, in its communication to the Security Council, the United States contended that '[t]his [argumentation] has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by [Secretary-General Boutros-

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the Court essentially finds that 'the real case' is about the law of armed attack and self-defence. This is said to be the law by reference to which Article XX, para. (1)(d), is to be interpreted, and the actual provisions of Article XX, para. (1)(d), are put to one side and not in fact interpreted at all (para. 49, Separate Opinion).

42 *Supra* note 41 and *infra* note 222.

43 We are left with the poignant question of Judge Higgins in the *Oil Platforms Case* (2003): '[i]f the use of force on armed attack and self-defence is to be judicially examined, is the appropriate way to do so through the eye of the needle that is the freedom of commerce clause of a 1955 Freedom of Commerce and Navigation Treaty?' See Separate Opinion, para. 26: *supra* note 41.

44 See, further, Johnstone, 'Security Council Deliberations: The Power of the Better Argument', 14 *EJIL* (2003) 437, at 452–464 and 466–477.

45 A third — and often forgotten — exception was also originally envisaged, concerning measures taken against 'any state which during the Second World War has been an enemy of any signatory to the present Charter' (Article 107). See Randelzhofer, 'Article 2(4)', in B. Simma *et. al.* (eds), *The Charter of the United Nations: A Commentary* Vol. I (2nd. ed, 2002) 112, at 125–128.

46 On such practices in general, see Wood, 'The Interpretation of Security Council Resolutions', 2 *Max Planck Yrbk. UN Law* (1998) 73.

47 Freudenschuß, 'Between Unilateralism and Collective Security: Authorisations of the Use of Force by the UN Security Council', 5 *EJIL* (1994) 492.

48 See 1969 Vienna Convention on the Law of Treaties, Art. 60: 1155 UNTS 331 and reprinted in 8 ILM (1969) 679. See, further, A. Aust, *Modern Treaty Law and Practice* (2000) 238 and Chinkin, 'Nonperformance of International Agreements', 17 *Texas ILJ* (1982) 387, at 430.

49 Gray, 'After the Cease-fire: Iraq, the Security Council and the Use of Force', 65 *BYbIL* (1994) 135 and Morriss, 'From War to Peace: A Study of Cease-fire Agreements and the Evolving Role of the United Nations', 36 *Virginia JIL* (1996) 801.

Ghali'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)'.[50] Neither communication, it must be said, recalled by name the leading comparator of Operation Desert Fox — the four-day operation that the United States[51] and the United Kingdom[52] had undertaken against Iraq in December 1998[53] and which had been justified according to legal argument used in January 1993 and then again in March 2003[54] — but this did make an appearance elsewhere in the citations of the United Kingdom.[55]

[50] *Supra* note 32, at 1. On 13 Jan. 1993, fighter aircraft from France, the United States and the United Kingdom targeted missile site and air defence facilities in southern Iraq: see *Keesing's Record of World Events* (Jan. 1993) 39391. The United States initiated a further round of strikes against Iraq on 17 and 18 Jan. of that year and was later joined by France and the United Kingdom: see *Keesing's Record of World Events* (Jan. 1993) 39391. For the British justification for action, see 64 *BYbIL* (1993) 737. For the position of the United Nations Secretary-General at that time, see UN Doc. S/25091 (14 Jan. 1993) and *Keesing's Record of World Events* (Jan. 1993) 39392. See, further, Boutros-Ghali, 'Introduction', in United Nations Department of Public Information, *The United Nations and the Iraq–Kuwait Conflict 1990–1996* (1996) 1, at 29 and M. Weller (ed.), *Iraq and Kuwait: The Hostilities and Their Aftermath* (1993), at 741–742.

[51] UN Doc. S/1998/1181 (16 Dec. 1998) 1 (and, at 2: 'Following Iraq's repeated, flagrant and material breaches of its obligations under Security Council resolutions ... the coalition today exercised the authority given by the Security Council in its resolution 678 (1990) of 29 November 1990 for Member States to employ all necessary means to secure Iraqi compliance with the Council's resolutions and to restore international peace and security in the area'). See, further, Matheson, 'Legal Authority for the Possible Use of Force Against Iraq', 92 *Proceedings ASIL* (1998) 137.

[52] In a letter to the Security Council on the day hostilities commenced for Operation Desert Fox, the United Kingdom said that it had acted together with the United States 'on the basis of the relevant resolutions of the Security Council [and that] our objective is compliance by the Iraqi leadership with the obligations laid down by the Council'. See UN Doc. S/1998/1182 (16 Dec. 1998). See, further, UN Doc. S/PV. 3955 (16 Dec. 1998) 6 ('Resolution 1205 (1998) established that Iraq's decision ... to cease co-operation with the Special Commission was a flagrant violation of Resolution 687 (1991), which laid down the conditions for the 1991 cease-fire. By that resolution, therefore, the Council implicitly revived the authorisation to use force given in Resolution 678 (1990)').

[53] For further background, see Dinstein, *supra* note 38, at 52; Wedgwood, 'The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction', 92 *AJIL* (1998) 724; Condron, 'Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox', 161 *Military Law Rev.* (1999) 115 and Lobel and Ratner, 'Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-fires and the Iraqi Inspection Regime', 93 *AJIL* (1999) 124.

[54] On this front, the United States confined itself to making generalities: it said that '[t]his [justification] has been the basis for coalition use of force in the past', but did not go on to specify details: see *supra* note 32.

[55] As a further example of 'military action under the revived authority of [Security Council Resolution] 678 [(1990)] to deal with the threat to international peace and security posed by those violations': see Foreign and Commonwealth Office, *Iraq: Legal Basis for the Use of Force* (17 March 2003), para. 5. See Warbrick, *supra* note 33, at 813. However, by way of counterpoint, it should be said that this reasoning had not underpinned the position of the United Kingdom in respect of Operation Provide Comfort in northern Iraq (Apr. 1991) and southern Iraq (Aug. 1992): United Kingdom Materials on International Law, 63 *BYbIL* (1992) 824. See, further, Gray, *supra* note 38, at 192; D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the U.N. Security Council of Its Chapter VII Powers* (1999), at 226–229; S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), at 201–203 (on the 'continuing operation' of Security Council Resolution 678 (1990)) and Harrington, 'Operation Provide Comfort: A Perspective in International Law', 8 *Connecticut JIL* (1993) 635.

3.

With such comprehensive argumentation of the legal basis for Operation Iraqi Freedom, what had become of the right of pre-emptive self-defence which the Bush Administration had set out — to, it must be said, considerable consternation — in its National Security Strategy of September 2002?[56] Had the United States not claimed there that, 'as a matter of common sense and self-defence, America will act against . . . emerging threats before they are fully formed'?[57] Was Operation Iraqi Freedom not therefore a choice demonstration of this controversial right in action?

Prima facie indicators suggest that this was indeed the case, that Operation Iraqi Freedom provided the test-drive for the version of pre-emptive self-defence which President Bush had hinted at as far back as his 2002 State of the Union Address,[58] or during his visit to the German Reichstag in May 2002,[59] or in his commencement speech at the West Point Military Academy in June 2002.[60] And, as late as the eve of conflict against Iraq in March 2003, President Bush had continued to claim that '[t]errorists and terror states do not reveal these threats with fair notice, in formal declarations — and responding to such enemies only after they have struck first is not self-defence, it is suicide'.[61] The theme was recaptured from his 2003 State of the Union Address, consonant with his Administration's National Security Strategy, in which he had argued:

> [s]ome have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this

[56] *The National Security Strategy of the United States of America* (17 Sept. 2002) (http://www.whitehouse.gov/nsc/nss.pdf): reprinted in 41 ILM (2002) 1478. See Gray, 'The US National Security Strategy and the New "Bush Doctrine" on Pre-emptive Self-Defence', 1 *Chinese JIL* (2002) 437 and Murphy, 'Contemporary Practice of the United States Relating to International Law', 97 *AJIL* (2003) 179, at 203–205. See, further, Harding, Wolffe and Blitz, 'Bush Unveils First-Strike U.S. Security Strategy', *Fin. Times* (London), 21–22 Sept. 2002, 1; and Allen and Gellman, 'Pre-emptive Strikes Part of U.S. Strategic Doctrine', *Wash. Post*, 11 Dec. 2002, A1.

[57] *National Security Strategy*, *supra* note 56.

[58] 38 Wkly. Comp. Pres. Doc. 133 (1 Feb. 2002). Reproduced at 'President Bush's State of the Union Address to Congress and the Nation', *NY Times*, 30 Jan. 2002, A22 ('By seeking weapons of mass destruction, these regimes [of the axis of evil] pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic').

[59] 'In Bush's Words: A New Call to Mutual Defence', *NY Times*, 24 May 2002, A12 ('If these regimes and their terrorist allies were to perfect these capabilities, no inner voice of reason, no hint of conscience would prevent their use. Wishful thinking might bring comfort, but not security. Call this a strategic challenge; call it, as I do, the axis of evil; call it by any name you choose, but let us speak the truth: if we ignore this threat, we invite certain blackmail and place millions of our citizens in danger').

[60] Bumiller, 'U.S. Must Act First to Battle Terror, Bush Tells Cadets', *NY Times*, 2 June 2002, A1. For the full text of the speech given at West Point on 1 June 2002, see http://www.whitehouse.gov/news/releases/2002/06/20020601–3.html ('[i]f we wait for threats to fully materialize, we will have waited too long'). See, further, Allen and DeYoung, 'Bush: U.S. Will Strike First at Enemies: In West Point Speech, President Lays Out Broader U.S. Policy', *Wall St. J.*, 2 June 2002, A1.

[61] President Says Saddam Hussein Must Leave Iraq Within 48 Hours (17 March 2003) (http://www.whitehouse.gov/news/releases/2003/03/20030317–7.html). See, further, Sanger, 'A New Doctrine for War: In Age of Unseen Enemies, President Says Waiting for Opponent to Attack "Is Suicide"', *NY Times*, 18 March 2003, A1.

> threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late. Trusting in the sanity and restraint of Saddam Hussein is not a strategy, and it is not an option.[62]

Operation Iraqi Freedom, furthermore, had possessed the right factual matrices associated with claims of pre-emptive self-defence: no 'armed attack' had been launched by Iraq against the United States; Iraq had fired no shot against the United States before Operation Iraqi Freedom; none of the territories of the United States had been seized and none of its targets hit. So, when Operation Iraqi Freedom finally materialized in March 2003, it seemed to make good the welter of confident forecasts that had anticipated the intervention: that the United States would not only take armed action against Iraq, but that it would do so on the back of its self-proclaimed and enhanced right of pre-emptive self-defence.[63] There are those whose subsequent appreciations have not disappointed this projection of events.[64]

However, *pace* the methodological disposition of the International Court of Justice in 1986, we should be cautious of combining these ingredients together to give us the 'officially proclaimed' legal justification of the United States for Operation Iraqi Freedom: rhetoric and speculation, presumption or perception — no matter how intense or ubiquitous they be — do not an actual justification make. True, upon the unanimous adoption of Security Council Resolution 1441 (2002) in November 2002, the United States had made clear to the Security Council that Resolution 1441 (2002) 'does not constrain any member state *from acting to defend itself against the threat posed by Iraq* or to enforce relevant United Nations resolutions and protect world peace and

[62] President Delivers State of the Union (28 Jan. 2003) (http://www.whitehouse.gov/news/releases/2003/01/20030128–19.html).

[63] Byers, 'Jumping the Gun', *London Rev. Bks.*, Vol. 24. No. 14 (25 July 2002), 3; Glennon, 'Pre-empting Terrorism: The Case for Anticipatory Self-Defence', *Weekly Standard*, 28 Jan. 2002, 24; Koh, 'The Law under Stress after September 11', 49 *Yale Law Report* (2002) 12, at 14 ('At this moment, the Bush Administration seems increasingly attracted to arguments based on pre-emptive self-defence: putting troops in the Philippines, gearing up for a military campaign against Iraq, and even studying proposals for an "offensive deterrence" policy'); O'Connell, 'The Myth of Pre-emptive Self-Defence', ASIL Task Force on Terrorism (http://www.asil.org/taskforce/oconnell.pdf) (Aug. 2002), 1, at 19; Ackerman, 'But What's the Legal Case for Pre-emption?', *Wash. Post*, 18 Aug. 2002, B2 and 'Howard Must Not Involve Us in An Illegal War', *The Age* (Melbourne), 26 Feb. 2003 (http://www.theage.com.au/articles/2003/02/25/1046064031296.html) (representations of Australian academic international lawyers which, as late as Feb. 2003, continued to represent the legal position of the Bush Administration as part of its 'doctrine of "pre-emptive self-defence" that would allow a country to use force against another country it suspects may attack it at some stage': '[t]he weak and ambiguous evidence thus far presented to the international community by [United States] Secretary of State Colin Powell to justify a pre-emptive strike underlines the practical danger of a doctrine of pre-emption').

[64] See Danner and Fisher, 'U.S. Apes Nazi Rationale', *San Fran. Chronicle*, 16 March 2003, D1. See, also, the statement of Professor Stanley Hoffman of Harvard University just before the commencement of hostilities, that: 'To [France and Germany], it will show that this whole [United Nations] detour was an exercise in futility — that this is what the President planned to do all along' and that '[t]here is no room in the [United Nations] Charter for the President's doctrine of pre-emption, for anticipatory self-defence'. Quoted in Sanger, *supra* note 61. Although note how some have entered a qualification to this position: see Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defence', 97 *AJIL* (2003) 599 ('the concept [of preventive war] provided the main *political* justification for [the Bush Administration's] decision to resort to force') (emphasis added).

security'.[65] This point was later echoed by William H. Taft IV, the Legal Adviser of the State Department, who, upon the outbreak of hostilities in March 2003, informed the National Association of Attorneys-General of the United States that '[t]he basis in international law for the use of force in Iraq today is clear ... [t]here is clear authorisation from the Security Council to use force to disarm Iraq'. But, he also added that the President may 'of course, always use force under international law in self-defence'.[66]

Upon closer examination, the import of these statements is that they do not actually reveal the hand — the 'officially proclaimed' hand, to place it within the parlance of the International Court of Justice[67] — of the United States: what they do is reserve the right of the United States to exercise its right of self-defence in these circumstances; they say that whatever developments might take place within the United Nations with respect to the dismantling of weapons of mass destruction within Iraq, *take place without prejudice to the right of self-defence of the United States* (as it would, we can presume, for any other state facing an identical security predicament). To say that the right existed and that it *could* be invoked in these circumstances is not, however, the same as to say that the right *was* invoked in these circumstances — no more than it would be true to claim that an invocation of the right automatically assures its acceptance.[68] The possession of the right, which is what appears to have been expressed in these statements, should therefore not be mistaken for, or confused with, its activation.

We are left with what was said on self-defence — on pre-emptive self-defence to be more precise — in the communication sent by the United States to the Security Council in March 2003. After an elaborate construction of how the 'authorization' of the Council came to be for Operation Iraqi Freedom, a fleeting mention was made of the 'necessary steps' that had been taken 'to defend the United States and the international community from the threat posed by Iraq *and* to restore international peace and security in the area'.[69] To be sure, this is the sole reference to self-defence, to pre-emptive self-defence — if such it be — in the entire 44 lines of reasoning and legal justification provided by the United States in March 2003. It bears a most striking contrast to the great expectations once held for the career prospects of the version of pre-emptive self-defence set out in the National Security Strategy of September 2002.[70]

By this lone reference, was the right of pre-emptive self-defence officially proclaimed

[65] UN Doc. S/PV. 4644 (8 Nov. 2002) 3.

[66] Slevin, 'U.S. Says War Has Legal Basis: Reliance on Gulf War Resolutions Is Questioned by Others', *Wash. Post*, 21 March 2003, A14.

[67] *Supra* note 14.

[68] L. Oppenheim, *International Law* (vol. II: Disputes, War and Neutrality, edited by H. Lauterpacht) (7th ed., 1952), at 187–188 ('elementary principles of interpretation preclude a construction which gives to a state resorting to an alleged war in self-defence the right of ultimate determination, with a legally conclusive effect, of the legality of such action'). See, also, Schachter, *supra* note 38 and *supra* note 44.

[69] *Supra* note 32, at 2 (emphasis added).

[70] *Supra* note 63.

and invoked by the United States for Operation Iraqi Freedom in March 2003, or was its mention mere rhetorical flourish on the part of the Bush Administration? Our conceptualization of legal justifications for action has thus far occurred on the basis of a bipolar routine — that is to say that it is either one justification or the other that stands to be considered for claims made under the *jus ad bellum* — but it is also conceivable that the United States had here advanced pre-emptive self-defence as *part* of its legal justification for Operation Iraqi Freedom. This approach has been described as the 'fact-based factors' or 'elements' approach, in which 'no single argument quite carries the day, even while the ensemble seems sufficient'.[71] Avid observers of these events will want to reach for Operation Just Cause in Panama (December 1989)[72] or, perhaps, for Operation Allied Force against the Federal Republic of Yugoslavia (March 1999)[73] from the historical stockpile to furnish examples of this phenomenon in action. After all, in the resolution which President Bush had submitted for congressional approval in September 2002,[74] he had sought authorization for action on more than one ground. This was duly obtained in October 2002, when the United States Congress authorized President Bush to commit 'the armed forces of the United States' in order to '(1) defend the national security of the United States against the continuing threat posed by Iraq and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq'.[75]

This formulation in *this* resolution can be read as aligning with the 'fact-based factors' or 'elements' approach, since it develops a twin-based justification for action against Iraq in which 'no single argument quite carries the day, even while the ensemble seems sufficient',[76] but it is also possible that Congress adopted the resolution on the basis that '[i]ndependent of the support provided by [United Nations] Security Council resolutions, authority for the armed intervention in Iraq stemmed from the national right of self-defence'.[77] Whichever of these possibilities it be, the question uppermost in our minds should be whether, taken in this form, the resolution can be regarded as the legal justification which the United States 'officially

[71] Wedgwood, 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1999) 828, at 829.

[72] See 'President Bush's Address to the Nation Announcing United States Military Action in Panama (20 Dec. 1989)', in *Public Papers of the Presidents of the United States: George Bush 1989* (Vol. II) (1990) 1722 and Nanda, 'The Validity of United States Intervention in Panama under International Law', 84 *AJIL* (1990) 494, at 496–502.

[73] See Kritsiotis, *supra* note 40, at 343.

[74] President Bush announced on 4 Sept. 2002 that he would seek Congressional approval before any action against Iraq was taken: see Bumiller, 'President to Seek Congress's Assent over Iraq Action', *NY Times*, 5 Sept. 2002, A1. See, further, Lewis and Sanger, 'Bush May Request Congress's Backing on Iraq, Aides Say', *NY Times*, 29 Aug. 2002, A1.

[75] H.R.J. Res. 114, 107th Cong. (2002) and 116 Stat. 1498 (2002) (7 Oct. 2002) (http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=hj114rh.pdf&directory=/disk2/wais/data/107_cong_bills).

[76] *Supra* note 71. See Report of the Committee on International Security Affairs of the Association of the Bar of the City of New York, 'The Legality and Constitutionality of the President's Authority to Initiate an Invasion of Iraq', 41 *Columbia JTL* (2002) 15.

[77] Yoo, 'International Law and the War in Iraq', 97 *AJIL* (2003) 563, at 571.

proclaimed' for Operation Iraqi Freedom *at the international level*.[78] The different context in which it was adopted — within the constitutional apparatus of the United States — together with the fact that it was destined for an audience altogether different from the United Nations combine to suggest that the resolution cannot be taken to supply the formal position of the United States from the perspective of international law. In the *Nicaragua* case in 1986, the International Court of Justice gave guarded treatment to a congressional resolution of July 1985, which 'recorded the expectation of the Congress from the Government of Nicaragua of "the end to Sandinista support for insurgencies in other countries in the region, including the cessation of military supplies to the rebel forces fighting the democratically elected government in El Salvador"'.[79] The treatment was guarded because, as we have seen, while the Court was prepared to entertain the possible assertion of such justifications in practice,[80] its treatment of them remained of a theoretical kind; it remarked that 'these justifications' had been advanced 'solely in a political context which it is naturally not for the Court to appraise [since they] were not advanced as legal arguments'.[81] What mattered above all to the Court was 'the legal strategy of the respondent State'[82] — in that case, the legal strategy of the United States.

What part, then, for pre-emptive self-defence in the legal strategy of the United States for Operation Iraqi Freedom, especially given that, on this occasion, both arguments presented by the United States Congress *were* arguments of a *legal* kind?[83] In reply, it could be contended that, by March 2003, the Congressional position had become the official position of the United States — that it was mirrored in the communication which the United States dispatched to the Security Council, which justified Operation Iraqi Freedom according to an authorization from the Security Council *as well as* the right of pre-emptive self-defence. However, if this is indeed what had happened or what was intended by the Bush Administration,[84] the shallowness of

[78] *Supra* note 14 and *infra* note 88.

[79] *Nicaragua Case*, *supra* note 5, at 76–77 (para. 137).

[80] *Ibid.*, at 134 (para. 267) and *supra* notes 7 to 9 (and accompanying text). At 134–135 (para. 268), the Court concluded: 'the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States'.

[81] *Ibid.* (para. 266). The reference to 'these justifications' — in the plural — is because the Court had also considered in this context the finding of the United States Congress, that the Nicaraguan Government had taken 'significant steps towards establishing a totalitarian Communist dictatorship' (at 133) (para. 263). The Court nevertheless concluded that, notwithstanding this finding, '[t]he respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", which', the Court said, 'would have been a striking innovation' (para. 266).

[82] *Ibid.*, at 134–135 (para. 268).

[83] Cf. *supra* notes 19 and 20 (and accompanying text).

[84] Taft and Buchwald argue that 'preemption of Iraq's possession and use of weapons of mass destruction was a *principal objective* of the coalition forces': *supra* note 31, at 563 (emphasis added).

the reference to self-defence in the communication made to the Security Council on 20 March 2003 — offered almost by way of a casual afterthought in the closing sentences of a document otherwise given to an impressive display of legal detail — stands at real odds with the previous practice developed by the United States in situations in which it *has* invoked the right of self-defence as its legal justification at the international level. On these occasions, an elaborate transcription of legal argument concerning the activation of the right has been undertaken before the Security Council: revisit the action of the United States against Iraq (June 1993),[85] or Operation Infinite Reach against Afghanistan and the Sudan (August 1998)[86] or Operation Enduring Freedom against Afghanistan (October 2001).[87]

This departure from previous practice is, it is submitted, instructive,[88] but it should not be regarded as surprising in view of the turn of developments unleashed by the so-called 'eureka moment' within the Bush Administration sometime in August 2002.[89] According to accounts of this moment, the Bush Administration had begun to reassess its (political? legal? political and legal?) strategy on Iraq in the summer of

[85] UN Doc. S/26003 (26 June 1993). See, further, Kritsiotis, 'The Legality of the 1993 U.S. Missile Strike on Iraq and the Right of Self-Defence in International Law', 45 *ICLQ* (1996) 162, and Reisman, 'The Raid on Baghdad: Some Reflections on its Lawfulness and Implications', 5 *EJIL* (1994) 120.

[86] UN Doc. S/1998/780 (20 Aug. 1998). See Murphy, 'Contemporary Practice of the United States Relating to International Law', 93 *AJIL* (1999) 161 and, further, Campbell, 'Defending against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan', 74 *Tulane Law Rev.* (2000) 1067 and Wedgwood, 'Responding to Terrorism: The Strikes against bin Laden', 24 *Yale JIL* (1999) 559.

[87] UN Doc. S/2001/946 (7 Oct. 2001). See, further, Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter', 43 *Harvard ILJ* (2002) 41; Myjer and White, 'The Twin Towers Attack: An Unlimited Right of Self-Defence?', 7 *J. Conf. & Sec. Law* (2002) 5 and Schrijver, 'Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"', XLVIII *Netherlands ILR* (2001) 271.

[88] However, could it possibly be that all of these cases are examples of an Article 51-type right of self-defence — which, in addition to the requirement of an armed attack places a reporting requirement on states — and that Operation Iraqi Freedom was a manifestation of the customary right of (pre-emptive) self-defence, in which no armed attack or report is required? On this, see, further, the *Nicaragua Case*, *supra* note 5, at 121–122 (para. 235):

> The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as the breach of an undertaking forming part of the customary international law applicable to the present dispute. But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter. This fact is all the more noteworthy because, in the Security Council, the United States has itself taken the view that failure to observe the requirement to make a report contradicted a State's claim to be acting on the basis of collective self-defence (S/PV. 2187).

See, further, *infra* note 133.

[89] The 'eureka moment' occurred in Crawford, Texas, in mid-August 2002, when President Bush 'seized on an idea proposed by Secretary of State Colin Powell' to cast President Saddam Hussein 'as the unilateralist who is defying the international community — by spurning 11 years of [United Nations'] resolutions calling on him to disarm — and the United States as the multilateralist that is defending the United Nations' honour': see Lipper, Brant and Hirsh, 'Selling the World on War', *Newsweek*, 23 Sept. 2002, 27, at 27–28.

2002, when it decided to seize upon Iraq's woeful record of compliance with the disarmament obligations of Resolution 687 (1991) as the mainstay of its public case for war. Whether this occurred because of a sudden political or intellectual appeal of this argument to the Administration when compared to that of pre-emptive self-defence, or whether it resulted from the private interventions of the British Prime Minister,[90] is, of course impossible to say and, truth be told, we may never know; what can be said with certainty is that it was that moment which transformed the course of subsequent events both inside and outside the United Nations — from President Bush's dramatic speech to the United Nations General Assembly in New York in September 2002,[91] to the release of the British Government's dossier on *Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (2002) (September 2002),[92] and the unanimous adoption of Security Council Resolution 1441 (2002) (November 2002) — all of which culminated in the communication by the United States to the Security Council on 20 March 2003. We therefore seem to be on solid ground in according with the observation that:

> [a]lthough some American officials have suggested pre-emptive self-defence as an additional legal basis for the war, the core U.S. claim rests not on that murky ground, but on the much narrower claim that Iraq was in material breach of [United Nations] Security Council resolutions . . . Similarly, the contested British legal opinion justifying the war relies at bottom not on broad customary law arguments about pre-emptive self-defence or humanitarian intervention, but on two narrow resolution-based arguments.[93]

[90] During Prime Minister Blair's visit with President Bush at Camp David on 7 Sept. 2002 — less than a week before President Bush delivered his address to the General Assembly — he announced that the United States and the United Kingdom shared the strategy of 'mobilis[ing] the maximum support, but [that this was done] on the basis of removing a threat that the United Nations itself has determined is a threat to the whole of the world': see Sanger, 'Blair, Meeting With Bush, Fully Endorses U.S. Plans for Ending Iraqi Threat', *NY Times*, 8 Sept. 2002, A13. See, also, *infra* note 97.

[91] See President's Remarks at the United Nations General Assembly: 12 Sept. 2002 (http://www.whitehouse.gov/news/releases/2002/09/20020912–1.html).

[92] Foreign and Commonwealth Office (United Kingdom), *Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (2002) (http://www.fco.gov.uk/Files/kfile/iraqdossier.pdf). See Watt and Wintour, 'Blair Makes His Case as U.S. Puts Squeeze on Iraq', *The Guardian* (London), 25 Sept. 2002, 1. Iraq challenged the assumptions and findings of the dossier: see BBC News Online, 'Iraq's Response to Blair's Dossier: Full Text' (4 Oct. 2002) (http://news.bbc.co.uk/1/hi/world/middle_east/2296223.stm). A subsequent dossier was released in Feb. 2003. Doubts were raised about the authenticity of this dossier's findings and their similarity to al-Marashi, 'Iraq's Intelligence and Security Network: A Guide and Analysis', 6 *Middle East Rev. Int'l Aff.* (2002) (http://meria.idc.ac.il/journal/2002/issue3/jv6n3a1.html). See, also, BBC News Online, 'A Piece of Plagiarism?' (http://news.bbc.co.uk/1/hi/uk_politics/2736149.stm) and Lyall, 'Britain Admits That Much of Its Report on Iraq Came From Magazines', *NY Times*, 8 Feb. 2003, A8. See the rebuttal of the government of the United Kingdom: BBC News Online, 'Iraq Dossier "Solid" — Downing Street' (http://news.bbc.co.uk/2/hi/uk_news/politics/2735031.stm).

[93] See Koh, 'On American Exceptionalism', 55 *Stanford Law Rev.* (2003) 1479, at 1521–1522. This communication has also been described (at 1521) as the 'most complete legal justification for the Iraqi war' provided by the United States, but that 'the U.S. government has yet to issue its own definitive legal justification for the war'. See, further, Damrosch and Oxman, *supra* note 37, at 554 ('Analytically, . . . there are alternative and narrower bases [than the doctrine of preemptive use of force] on which a legal

In any event, after all is said and done, even if we were to have concluded the opposite — that the United States had indeed invoked its 'right of pre-emptive self-defence' as part of its legal justification for Operation Iraqi Freedom in the formal sphere — there is no question that this would not have helped its legal case by edging the intervention across the wire, into the desired heartland of lawfulness as it were. In the end, it could not contribute much to the 'ensemble' and, in all truth, its impact would have done little — if that — to make the ensemble seem 'sufficient'.[94] We say this because, aside from the formidable criticism levelled at the Bush Administration when it sought to develop this justification in anticipation of intervention,[95] its closest advocate on the need for coercive action against Iraq — the United Kingdom — had refrained from appealing to any right of pre-emptive self-defence in the formal sphere, and, if one were to read between the lines, had distanced itself in fundamental terms from this aspect of the Bush Administration's argumentation. Not a single word had been devoted to this matter in the communication of the United Kingdom to the Security Council in March 2003[96] and, in January 2003, the Prime Minister had set out the thinking of his government on this matter in unambiguous terms before the Liaison Committee of the House of Commons:

> I think it is right that we deal with this [situation concerning Iraq] but [the United Kingdom] chose a particular way of dealing with it which is the United Nations and we did that *precisely because we recognise [that] this was not a situation where we could say there is an immediate threat to Britain of a nuclear strike from Iraq. I have never made that case, I have never said that is the case.* What I have said is [that] there is an issue about weapons of mass destruction, the Iraqis have to disarm, and the best way of doing that is through the United Nations process, and we have given that process the time to work.[97]

4.

The legal case for Operation Iraqi Freedom must therefore either stand or fall on its reliance on Security Resolutions 678 (1990), 687 (1991) and 1441 (2002) — and the strategy of bringing back to life the authorization for force which the Security Council had provided in November 1990, which, it was claimed, the Council had 'suspended but did not terminate' in April 1991 and which had then been 'revived' by

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argument supporting the war *could* rest, deriving from the unfinished business of the invasion of Kuwait in 1990 and Iraq's flouting of numerous compulsory resolutions . . . between 1991 and 2003') (emphasis added) and Murphy, 'Contemporary Practice of the United States Relating to International Law', 97 *AJIL* (2003) 419, at 427.

94 *Supra* note 71. See Greenwood, 'International Law and Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq', 4 *San Diego ILJ* (2003) 7, at 15 ('In so far as talk of a doctrine of "pre-emption" is intended to refer to a broader right of self-defence to respond to threats that might materialize at some time in the future, such a doctrine has no basis in law'). See, also, Lowe, *supra* note 3, at 865.

95 See MacFarquhar, 'Pact over Kuwait: By Embracing Baghdad, League Deals Rebuff to Bush's Efforts', *NY Times*, 29 March 2002, A1.

96 *Supra* note 33.

97 United Kingdom Parliament: Liaison Committee of the House of Commons, 21 Jan. 2003 (http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmliaisn/uc334-i/uc33402.htm) (emphasis added).

Iraq's material breach of the obligations set down in Resolution 687 (1991).[98] Such is the reasoning intrinsic to the legal positions supplied by both the United States and the United Kingdom, and to the structure of argumentation and precedents given in formal defence of Operation Iraqi Freedom, before the Security Council in March 2003.[99]

Let us assume for the time being that this argument is indeed valid — that it is both good on its merits and that other states were sensitive to (and ultimately taken in by) its elliptical persuasions.[100] How would it matter, if at all, that factual assertions once made regarding weapons of mass destruction in Iraq have still not been verified; that, even after the conclusion of hostilities, allegations continue to remain allegations and that, at its worst, the entire episode of Operation Iraqi Freedom can be constructed at the mercy of artificial intelligence, so to speak?[101] For Professor Linda Colley, there is no temporal qualification to the judgements we can or should make in this regard, since the matter of defining importance is the actual finding of weapons of mass destruction. Such discoveries strike at the heart of the justification made by the United States and the United Kingdom for Operation Iraqi Freedom and, however long they take, will serve to either vindicate or vitiate that justification:

> If major stocks of weapons of mass destruction are uncovered in Baghdad or elsewhere in Iraq, and such finds are confirmed by neutral observers; and if it can be shown that these weapons were intended for aggression and not for self-defence — which is the right of all nations — then [President] Bush and [Prime Minister] Blair will be fully vindicated. But until and unless this happens, questioning and probing this war, on both sides of the Atlantic, and inside as well as outside Parliament, should not be viewed as irresponsible, still less patriotic. Doing so is essential and above all prudent.[102]

Notwithstanding the popular appeal of this mode of thinking for the political fallout from the use of this justification,[103] our foregoing framework requires us to consider the relevance which this approach holds for international legal analysis, and for

[98] Adopted from the clarification of the Attorney-General, *supra* note 33.

[99] *Supra* notes 32 to 33 and 50 to 55.

[100] The Bush Administration listed 49 states as members of its 'coalition': see *Iraq: Special Report* (http://www.whitehouse.gov/infocus/iraq/news/20030327–10.html) (to be contrasted with the support it received for its version of pre-emptive self-defence: see *supra* notes 95 and 97). However, see Lichfield, 'France May Allow "First Strikes" on Rogue States in Policy Shift', *The Independent* (London), 28 Oct. 2003, 1.

[101] See, in particular, *supra* note 4, and, further, Pincus and Milbank, 'Arms Hunt in Iraq to Get New Focus', *Wash. Post*, 24 Jan. 2004, A1.

[102] *The Guardian* (London), 7 Apr. 2003.

[103] *Supra* note 10. See, further, Robbins, Fialka and Morse, 'U.S. Has 2 Chemical-Arms Issues: Finding Them, Convincing World', *Wall St. J.*, 8 Apr. 2003, A1 (claiming that the 'search' is a 'critical one for the Bush Administration' because '[i]f the U.S. doesn't make any undisputed discoveries of forbidden weapons, the failure will feed already widespread skepticism abroad about its motives for going to war'); Miller, 'Smoking Gun Still Proves to Be Elusive for Searches', *NY Times*, 2 Apr. 2003, B7 and Miller and Jehl, 'U.S. Forces Have Searched Few Iraqi Weapons Sites', *NY Times*, 5 Apr. 2003, B1. See, also, Sturrock, 'Short Cuts', *London Rev. Bks*, Vol. 25, No. 12, 19 June 2003, 20 and Ackerman and Judis, 'The First Casualty', *The New Republic*, Vol. 228, Issue 4,615, 30 June 2003, 14.

measuring the lawfulness of Operation Iraqi Freedom on the basis of the legal justification tendered before the Security Council in March 2003.

Before we go much further, we should at least have some sense of what factual assertions accompanied that legal justification. According to the British Government in its dossier entitled *Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (2002),[104] Iraq could launch chemical or biological warheads with one of its Al Hussein missiles (whose range was 650 kilometres)[105] and, if unchecked, would possess a nuclear weapons system within five years as it had sought to acquire uranium from Africa to redeem its ambitions on this front.[106] In fact, Prime Minister Blair had used the introduction of that dossier to highlight one of its principal disclosures, that President Saddam Hussein's 'military planning' allowed for some of the weapons of mass destruction 'to be ready within 45 minutes of an order to use them'.[107] The Prime Minister was 'quite clear' that President Hussein 'will go to extreme lengths, indeed has already done so, to hide these weapons and avoid giving them up'.[108]

When United States Secretary of State, Colin L. Powell, appeared before the Security Council in February 2003, his 80-minute presentation sought to reinforce and elaborate these essential charges. His evidence was organized according to related trajectories: *first*, that declassified intelligence revealed deliberate obfuscations by Iraqi officials to evacuate or conceal traces of weapons of mass destruction,[109] and, *second*, he argued of a 'potentially ... sinister nexus between Iraq and the al-Qaeda terrorist network, a nexus that combines classic terrorist organisations and modern methods of murder'.[110]

With respect to weapons of mass destruction, Secretary Powell announced that Iraq continued to engage in a 'disturbing pattern' of deceiving United Nations weapons inspectors and the inspections' process: '[t]he pattern is not just one of reluctant

[104] *Supra* note 92.

[105] Hoge, 'Blair Says Iraqis Could Launch Chemical Warheads in Minutes', *NY Times*, 25 Sept. 2002, A1 and Fidler and White, 'Intelligence Report Says Baghdad is Ready to Use Chemical and Biological Weapons', *Fin. Times* (London), 25 Sept. 2002, 2.

[106] Lamont, Innocenti and Huband, 'African Countries May Be Source of Uranium', *NY Times*, 25 Sept. 2002, A3. This factor had originally been included in a speech which President Bush delivered in Ohio on 7 Oct. 2002, but was subsequently withdrawn: see Remarks by the President on Iraq Cincinnati Museum Centre, Cincinnati Union Terminal, Cincinnati, Ohio: 7 Oct. 2002 (http://www.whitehouse.gov/news/releases/2002/10/20021007–8.html). The reference did, however, appear in the State of the Union Address in Jan. 2003: President Delivers State of the Union (28 Jan. 2003) (http://www.whitehouse.gov/news/releases/2003/01/20030128–19.html) ('The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa. Our intelligence sources tell us that he has attempted to purchase high-strength aluminium tubes suitable for nuclear weapons production'). See, further, Beaumont and Helmore, 'The Niger Connection', *The Observer* (London), 13 July 2003, 3; Risen, 'Bush Aides Now Say Claim on Uranium Was Accurate', *NY Times*, 14 July 2003, A7, and Stevenson, 'White House Tells How Bush Came to Talk of Iraq Uranium', *NY Times*, 19 July 2003, A6.

[107] *Supra* note 92.

[108] *Ibid.*

[109] 'Powell's Address, Presenting "Deeply Troubling" Evidence on Iraq', *NY Times*, 6 Feb. 2003, A14.

[110] *Ibid.*, at A16.

co-operation, nor is it merely a lack of co-operation ... [w]hat we see is a deliberate campaign to prevent any meaningful inspection work'.[111] Iraq, he said, had evacuated material from at last 30 chemical weapons and other munitions sites and possessed at least seven mobile biological weapons laboratories; it had attempted to rebuild part of its chemical weapons establishment under the guise of civilian programs; biological agents were unaccounted for and Iraq had developed dispersal techniques for release of prohibited substances; it had sought to develop ballistic as well as short-range missile systems and acquire special aluminium tubes from 11 countries; it was 'relentlessly attempting to tap' the communications of weapons inspectors and to intimidate its own scientists with knowledge of its weapon capacities and had refused permission for any U-2 recognisance flights; intercepted conversations by officers of the Republican Guard revealed orders to conceal items or to stop mentioning 'nerve agents'.[112]

Once Secretary Powell had relayed details to the Council about 'these terrible weapons and about Iraq's continued flouting of its obligations under Security Council Resolution 1441', he turned his attention to 'the way that these illicit weapons can be connected to terrorists and terrorist organisations that have no compunction about using such devices against innocent people around the world'.[113] He revisited Iraq's associations with the Palestine Liberation Front and the Arab Liberation Front, Hamas and Palestine Islamic Jihad, as the background for his claim that Iraq 'today harbours a deadly terrorist network, headed by Abu Musaab al-Zarqawi, an associate and collaborator of Osama bin Laden and his al Qaeda lieutenants'.[114] His argument attempted to bolster the connection between the rogue state and the terrorist organization:

> Some believe — some claim [that] these contacts do not amount to much. They say Saddam Hussein's secular tyranny and al Qaeda's religious tyranny do not mix. I am not comforted by this thought. Ambition and hatred are enough to bring Iraq and al Qaeda together, enough so al Qaeda could learn how to build more sophisticated bombs and learn how to forge documents; and enough so that al Qaeda could turn to Iraq for help in acquiring expertise on weapons of mass destruction.[115]

This part of the presentation carries obvious reminiscences to the legal case which the United States had made when it invoked its right of self-defence against Afghanistan for Operation Enduring Freedom in October 2001: before the Security

[111] *Supra* note 109 and *ibid.* See, also, Spiegel, 'Powell Reveals "Disturbing Pattern" of Deception', *Fin. Times* (New York), 6 Feb. 2003, 3.

[112] *Ibid.* See, further, Khalaf, 'Mass of Detail Gives Believers and Sceptics Plenty of Food for Thought', *Fin. Times* (New York), 6 Feb. 2003, 3 and 'Powell Speech at U.N. Compared with Data From Prior Intelligence', *NY Times*, 7 Feb. 2003, A11.

[113] *Supra* note 109, at A16.

[114] *Ibid.*

[115] *Ibid.* See, also, Tyler, 'Intelligence Break Led U.S. to Tie Envoy Killing to Iraq Qaeda Cell', *NY Times*, 6 Feb. 2003, A1. Ansar al-Islam, the Islamic militant group, had been singled out by Secretary Powell as the link between Iraq and al-Qaeda. Their bases were targeted during Operation Iraqi Freedom: see Chivers, 'With Militant Group Routed, American and Kurdish Forces Hunt for Clues About Al Qaeda', *NY Times*, 31 March 2003, B3.

Council on that occasion, the United States had laid bare evidence of the relationship between the Taliban government in Kabul and al Qaeda and argued that the activities of al Qaeda had 'been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organisation as a base of operation'.[116] The United States informed the Council that it had 'clear and compelling information that the al Qaeda organisation … had a central role in the attacks' committed on its soil on 11 September 2001.[117] For its part in Operation Enduring Freedom, the United Kingdom noted that its military response 'has been carefully planned and is directed at Usama bin Laden's al Qaeda terrorist organisation and the Taliban regime that is supporting it'.[118] Indeed, the British Government had earlier produced its own detailed account of the relationship between al Qaeda and the Taliban, in which it cited a former Afghan government official's observation that the Taliban and Usama bin Laden were 'two sides of the same coin'.[119] The publication laid the basic groundwork for the United Kingdom's subsequent appeal to the right of self-defence in October 2001, so that, from these recollections, we are able to discern that when Operation Iraqi Freedom came to pass, it was justified according to legal argumentation altogether different from that which had been crafted for Operation Enduring Freedom before the Security Council.[120] Crucial to that difference was the fact that the relationship between state and non-state actors was deemed pivotal to the legal justification made for Operation Enduring Freedom:

> [w]here a state allows terrorist organisations to mount concerted operations against other states from its territory, and refuses to take the actions required by international law to put a stop to such operations, the victims of those operations are entitled to take action against those terrorists [and] [b]ecause the Taliban regime made it clear throughout that it would vigorously oppose any foreign forces entering its territory to root out al Qaeda bases, it exposed its own forces to lawful attack in exercise of the right of self-defence.[121]

Why, then, in his presentation to the Security Council in February 2003, had Secretary Powell returned attentions to this vexed question of the relationship between *Iraq* and *al Qaeda* — a topic that had long since agitated divisions *within* the

[116] UN Doc. S/2001/946 (2001) (7 Oct. 2001).

[117] *Ibid.*

[118] UN Doc. S/2001/947 (2001) (7 Oct. 2001).

[119] British Government, *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001* (2001) (http://www.number-10.gov.uk/output/Page3682.asp) (4 Oct. 2001) (para. 19).

[120] *Supra* notes 32 and 33. See, also, SC Res. 1368 (12 Sept. 2001) and SC Res. 1373 (28 Sept. 2001). As Greenwood has noted, 'the United States and its allies consistently based their justification for military action in Afghanistan, and against al Qaida more generally, on the right of self-defence and not on any collective security mandate from the Security Council'. See Greenwood, *supra* note 94, at 21. See, further, Delbrück, 'The Fight against Global Terrorism: Self-Defence or Collective Security as International Police Action? Some Comments on the International Legal Implications of the "War against Terrorism"', 44 *German YbIL* (2001) 9.

[121] Greenwood, *supra* note 94, at 25. See, further, Ratner, '*Jus ad bellum* and *Jus in bello* after September 11', 96 *AJIL* (2002) 905, at 908.

Bush Administration?[122] Given the Administration's stance of 'authorisation' from the Security Council for its action against Iraq, was there any legal need to take on *this* strand of argument as part of its case for Operation Iraqi Freedom — and to then have to adduce the requisite corroborations of the order undertaken for the action of 'self-defence' against Afghanistan in October 2001? Or had Secretary Powell diverted course during his presentation to push for and implicate a right of self-defence — a right of pre-emptive self-defence — as an additional legal basis for action against Iraq? Or did this part of the presentation represent an overhang of arguments once summoned as part of an elaborate plan for the right of pre-emptive self-defence but since marginalized or discarded by the Administration?

That interpretation is certainly open for us to follow, especially when it is coupled with the common perception made of Secretary Powell's presentation — that it was 'aimed at proving that Saddam Hussein poses an imminent danger to the world'.[123] Where else does this language and reasoning situate us, other than within the parameters of the idiom of pre-emptive self-defence? However, this interpretation is hard to sustain, since Secretary Powell had opened his portfolio of evidence to the Council with the over-arching theme that 'Resolution 1441 was not dealing with an innocent party, but a regime [which] this Council has repeatedly convicted over the years [and the resolution] gave Iraq one last chance, one last chance, to come into compliance or to face serious consequences'.[124] That premise also served as the drawbridge for his entire presentation:

> [W]e have an obligation to our citizens, we have an obligation to this body, to see that our resolutions are complied with. We wrote [Resolution] 1441 not in order to go to war; we wrote [Resolution] 1441 to try to preserve the peace. We wrote [Resolution] 1441 to give Iraq one last chance. Iraq is not, so far, taking that one last chance. We must not shrink from whatever is ahead of us. We must not fail in our duty and our responsibility for the citizens of the countries that are represented in this body.[125]

It is on account of this structure of the speech — as well as the legal justification which the United States went on to proclaim in official terms in March 2003[126] — that we should proceed to treat the elements contained in Secretary Powell's presentation in February 2003 and, with its accentuation on legal and political justifications

[122] The Central Intelligence Agency had earlier found 'no evidence' that 'Iraq had engaged in terrorist operations against the United States in nearly a decade, and the agency is also convinced that President Saddam Hussein has not provided chemical or biological weapons to al Qaeda or related terrorist groups'. See Risen, 'Terror Acts by Baghdad Have Waned, U.S. Aides Say', *NY Times*, 6 Feb. 2002, A10. Speaking subsequent to the intervention, Powell admitted that he had not seen 'smoking-gun, concrete evidence about the connection' but said that 'the *possibility* of such connections did exist, and it was prudent to consider them at the time we did': see Marquis, 'Powell Admits No Hard Proof in Linking Iraq to Al Qaeda', *NY Times*, 9 Jan. 2004, A8 (emphasis added).

[123] Weisman, 'Powell, in U.N. Speech, Presents Case to Show Iraq Has Not Disarmed', *NY Times*, 6 Feb. 2003, A1.

[124] *Supra* note 109.

[125] *Supra* note 109, at A16.

[126] *Supra* note 32.

within formal and informal spheres of state action, the *Nicaragua* case gives us further pause for thought.

We have established that the presence of an 'authorisation' from the Security Council for Operation Iraqi Freedom meant that a different argumentative dynamic was now at work from that which had underpinned the legal justification for Operation Enduring Freedom in October 2001.[127] By virtue of this dynamic, the elements of argumentation and evidence used for Operation Enduring Freedom no longer held the same legal provenance, because, according to the finer points of the 'legal strategy' adopted by the United States and the United Kingdom in March 2003,[128] the enforcement of Iraq's disarmament obligations occurred *with the authorization of the Security Council* and not as part of a claim of self-defence. Crucially, if it existed, that authorization had not been made contingent upon Iraq's relationship with terrorist organizations any more than it stood to be rated according to degrees of imminent threat or attack.[129] Furthermore, a summary appreciation of the 'precedents' prayed in aid of Operation Iraqi Freedom by both the United States and the United Kingdom affirms the central truth of this changed dynamic — for Operation Enduring Freedom was *not* among them.[130] So, as a matter of law and legal justification, the tenuous nature of proof rendered on the relationship between Iraq and al Qaeda[131] should not serve as a counter-point to the validity of the justification advanced for Operation Iraqi Freedom. The preferred impression of these considerations is that they were marshalled by Secretary Powell before the Security Council in February 2003 in order to build the political imperative for urgent action, to seize the moment sooner rather than later and to make use of an authorization for the application of force from the Council already provided.

This quantification of the legal relevance of *evidence* concerning the relationship between Iraq and al Qaeda would differ if the right of self-defence — including the right of pre-emptive self-defence — had been invoked for Operation Iraqi Freedom because, as we have borne witness,[132] the legal justification of self-defence defines and directs its own particularities of argument and evidence and this, in turn, has cultivated a general expectation among states that intervening states will attend to

[127] *Supra* note 120. See, also, *supra* notes 116 and 118 and, further, O'Connell, 'Re-leashing the Dogs of War', 97 *AJIL* (2003) 446, at 450–452.

[128] *Supra* notes 32 and 33.

[129] Applicable to situations in which the right of pre-emptive self-defence is invoked: see P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997), at 313 and Harris, *supra* note 11, at 898. By way of example, the attitude of some of the states critical of Operation Opera, the action taken against the nuclear reactor at Osriaq in June 1981, was grounded in the inadequacies of evidence to demonstrate the existence of an 'imminent' attack. See UN Doc. S/PV. 2282 (15 June 1981), at 6 (Uganda); UN Doc. S/PV. 2283 (15 June 1981), at 56 (Sierra Leone); UN Doc. S/PV. 2288 (19 June 1981), at 16 (United States); UN Doc. S/PV. 2288 (19 June 1981), at 42 (United Kingdom). See, further, Schachter, 'The Right of States to Use Armed Force', 82 *Michigan Law Rev.* (1984) 1620, at 1634. However, see Bothe, 'Terrorism and the Legality of Pre-emptive Force', 14 *EJIL* (2003) 227.

[130] *Supra* notes 50 and 55. Even though, of course, it formed the next instalment of the United States' allegorical 'war on terror'.

[131] By Powell's own admission: see Marquis, *supra* note 122.

[132] See Greenwood, *supra* note 94, at 24.

these elements if the burden of persuasion is to stand any chance of being discharged. It is true, though, that states who choose to plead their right of self-defence in these circumstances are not required to enter any detailed synopses of argument in the formal sphere any more or less than if the right had been pleaded in other circumstances — Article 51 of the Charter confines itself to the *obligation* that '[m]easures taken by members in the exercise of this right of self-defence shall be *immediately reported* to the Security Council'[133] — but we do find that, almost as a matter of course, states who conduct counter-terrorist operations in 'self-defence' typically engage repeat styles of argument that go towards establishing some connection between the target state and the relevant terrorist organization.[134] We can assume that states do this — they participate in this phenomenon — in order to offset the case for a *necessity* of self-defence and to succeed in pleading their case for self-defence in the formal sphere,[135] as the United States and United Kingdom did for Operation Enduring Freedom of October 2001,[136] and the United States did for Operation Infinite Reach — the action taken against Afghanistan and the Sudan in August 1998 in response to terrorist attacks on its embassies in Dar es Salaam (Tanzania) and Nairobi (Kenya) earlier that same month.[137]

Operation Infinite Reach is useful to consider from a further perspective because, there, a crucial factual premise pertaining to one aspect of the operation — the coercive action taken against the Sudan — was challenged after that operation had occurred.[138] Although the United States considered that both aspects of the operation were justified under the same legal justification of self-defence, separate *factual* allegations were entered against Afghanistan and the Sudan:[139] whereas Afghanistan

[133] Emphasis added. In the *Nicaragua* case, the International Court of Justice found that 'in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure [such as the reporting requirement] so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected': see *supra* note 5, at 105 (para. 200). See, also, *supra* note 88.

[134] See *supra* notes 115 to 121 (even though we might dispute what the exact standard of this relationship is or ought to be). We might return as far back as the rescue operation launched in 'self-defence' at Entebbe in July 1976 to trace this trend: see 15 ILM (1976) 1224; Harris, *supra* note 11, at 909–911 and Dinstein, *supra* note 38, at 205–206.

[135] See, in particular, Stromseth, 'Law and Force after Iraq: A Transitional Moment', 97 *AJIL* (2003) 628, at 632.

[136] *Supra* notes 116 and 118.

[137] See Gray, *supra* note 38, at 118 and *supra* note 86.

[138] See Myers and Weiner, 'Possible Benign Use is Seen for Chemical at Factory in Sudan', *NY Times*, 27 Aug. 1998, A1; Weiner and Myers, 'Flaws in U.S. Account Raise Questions on Strike in Sudan', *NY Times*, 29 Aug. 1998, A1; Risen and Johnston, 'Experts Find No Armed Chemicals at Bombed Sudan Plant', *NY Times*, 9 Feb. 1999, A3 and Risen, 'To Bomb Sudan Plant, Or Not: A Year Later, Debates Rankle', *NY Times*, 27 Oct. 1999, A1.

[139] 'Clinton's Words: "There Will be No Sanctuary for Terrorists"', *NY Times*, 21 Aug. 1998, A12 ('terrorist facilities and infrastructure' (Afghanistan); 'factory ... involved in the production of materials for chemical weapons' (the Sudan)). Although there was some degree of overlap in part of the factual accusations made; see the communication of the United States to the Security Council:

was regarded as a 'sanctuary for terrorists',[140] the Sudan had been targeted because of a suspected chemical weapons site in its capital of Khartoum.[141] The former of these predicates proved to be correct; the latter, however, was impugned when no trace of the suspected compounds was found at the El-Shifa pharmaceutical plant following its destruction.[142] How did this factor impact upon — how should it have impacted upon — the legal case of the United States?

For the Sudan, the existence of an incorrect factual premise, rather than any fundamental disagreement with the reasoning or argument posited by the United States, appeared to be the platform from which it condemned the lawfulness of Operation Infinite Reach.[143] If, however, we are to be more precise in our formulations, we would say that the Sudan made its counter-claim against the United States — outside the International Court of Justice, but still within the formal sphere of state action — with specific reference to that part of the operation affected by the incorrect factual premise and not against Operation Infinite Reach *in toto*. Its counter-claim would have therefore been made without prejudice to its stance on the lawfulness of the action taken against Afghanistan (for all we know, the Sudan could have concluded that that action was permissible in law and taken on the basis of proven allegations). Let us assume that the Sudan was correct in the first half of its counter-claim — that no chemical weapons site existed at the Khartoum pharmaceutical plant or, for that matter, anywhere else in the Sudan.[144] Would this automatically lock us into the second half of the Sudan's counter-claim that, in direct consequence of the incorrect factual premise, the action of the United States against the Sudan was unlawful? Or would we side with the case put before the Security

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> United States armed forces today struck at a series of camps and installations used by the bin Laden organisation to support terrorist actions against the United States and other countries. . . . These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taleban regime in Afghanistan to shut these terrorist activities down and to cease their co-operation with the bin Laden organisation. That organisation has issued a series of blatant warnings that 'strikes will continue from everywhere' against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing.
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> See UN Doc. S/1998/780 (20 Aug. 1998), 1.

[140] President Clinton claimed that '[c]ountries that persistently host terrorists have no right to be safe havens': see Bennet, 'U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied To Terrorist Network', *NY Times*, 21 Aug. 1998, A1. See, further, Security Council Resolution 1267 (1999) (15 Oct. 1999).

[141] For analytical purposes, however, we shall treat this as the length and breadth of the legal case of the United States against the Sudan notwithstanding the existence of an 'overlap' (*supra* note 139). See, further, Watson and Barry, '"Our Target Was Terror"', *Newsweek*, 31 Aug. 1998, 24; Broad, Crossette, Miller and Myers, 'U.S. Says Iraq Aided Production of Chemical Weapons in Sudan', *NY Times*, 25 Aug. 1998, A1. However, see, also, Marshall, 'U.S. Evidence of Terror Links to Blitzed Medicine Factory was "Totally Wrong"', *The Independent* (London), 15 Feb. 1999, 12.

[142] *Supra* note 138.

[143] See UN Doc. GA/9457 (29 Sept. 1998) (Mustafa Osman Ismail, the Minister for External Relations of the Sudan, informed the General Assembly that the United States had opposed the dispatch of a fact-finding mission by the Security Council, called for by the League of Arab States). See, further, Pearl, 'In Sudan Bombing, "Evidence" Depends on Who Is Viewing It', *Wall St. J.*, 28 Oct. 1998, A1.

[144] See Loeb, 'Year Later, U.S. Wavers on Sudan Plant It Razed', *IHT* (Paris), 23 Aug. 1999, 1.

Council by the United States in August 1998, that it had acted against the Sudan out of a 'necessity' for self-defence, that necessity being 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'?[145]

At this point, we would do well to remind ourselves that this case was not taken before criminal proceedings, so that it would be inappropriate to conscript an unadulterated 'defence of mistake of fact' into these deliberations. However, technicalities of this defence aside,[146] it is possible that this defence can shed some light on the *structure* of the relevant exchanges between states regarding legal justifications for force within the formal sphere. From the exchanges we have before us, that structure can be presented as follows: we are faced first of all with a claim from the United States — that it took lawful action against the Sudan in August 1998 — but we are ill-at-ease with regarding this claim as conclusive now that we discover the existence of an incorrect factual premise (if we have already decided in favour of the lawfulness of action, we are moved to rethink our position on account of the facts that *have* come to light). Come to light they have, *via* the first half of the Sudan's counter-claim, but we are then concerned with the second half of that counter-claim: that, in direct consequence of this development, we should decide that the United States acted in an unlawful manner when it used force against the Sudan. We are concerned with this outcome because to so decide would mean that we would have no regard for the circumstances in which that false predicate came to pass. (The United States might wish to argue that, even within international relations, incorrect factual premises occur for a whole range of different reasons: it accepts that it acted on an incorrect prospectus,[147] but it argues that it did so out of legitimate and *bona fide* belief,[148] and not through negligent human error or deliberate omission or manipulation).

That much is good, but where does this leave the lawfulness of Operation Infinite

[145] Drawn, of course, from the diplomatic correspondence of the *Caroline* episode: 21 BFSP 1137, 30 BFSP 195. See, further, Jennings, 'The Caroline and McLeod Cases', 32 *AJIL* (1938) 82 and Rogoff and Collins 'The Caroline Incident and the Development of International Law', 16 *Brooklyn JIL* (1990) 493.

[146] A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed., 2003), 548–555. See, also, Dinstein, *supra* note 38, at 126 (discussion in the context of individual criminal responsibility).

[147] *Supra* note 144.

[148] See, for example, Weiner and Risen, 'Decision to Strike Factory in Sudan Based Partly on Surmise', *NY Times*, 21 Sept. 1998, A1. In July 1988, the U.S.S. *Vincennes* mistook the Iranian civilian airliner of Iran Air 655 for a 'hostile Iranian military aircraft', and the United States claimed that it had 'acted in self-defence' and that 'this tragic accident occurred against a backdrop of repeated, unjustified, unprovoked and unlawful Iranian attacks against United States merchant shipping and armed forces [and] occurred in the midst of a naval attack initiated by Iranian vessels against a neutral vessel and subsequently against the *Vincennes* when she came to the aid of the innocent ship in distress'. See UN Doc. S/PV. 2818 (14 July 1988). See, further, R.Y. Jennings and A.D. Watts, *Oppenheim's International Law* (Vol. I: Peace) (9th ed., 1992) 426. The United States subsequently offered compensation — but it only did so on an *ex gratia* and humanitarian basis: see Leich, 'Denial of Liability: *Ex Gratia* Compensation on A Humanitarian Basis', 83 *AJIL* (1989) 319. Although it occurred as part of Operation Allied Force, and in the context of individual criminal responsibility, it might also be helpful to consider in this context the United States targeting of the Chinese embassy in Belgrade on 7 May 1999. According to Under-Secretary of State Thomas Pickering:

Reach *as against the Sudan?* Could we argue that it remains good in law notwithstanding the existence of the incorrect factual premise? That option does not inspire us, because it would mean that the incorrect factual premise would have no legal impact on the outcome of our investigations at one and the same time that it would have prompted us to conclude that the United States had not made out its case for the *necessity* of self-defence as either a matter of fact or law. However, neither does our other option — to regard the action as unlawful by reason of the incorrect factual premise — appeal, because it allows no framework for consideration of the different *typologies* of incorrect factual premise which were mentioned earlier. Suppose, for instance, that we think that the United States responded to the information it had in a reasonable manner, or that other states begin to concede in public forums that they would have acted no differently if they had been in the position of the United States. What then? Our remaining option — to regard the action as unlawful on account of the Sudan's position, but to allow the action to be excused in some way[149] — has the benefit of recognising the merits of the positions of both parties, but this option would mean that the action of the United States would be deemed *unlawful* as a formal point of law.

Now, for the sake of developing our argument, let us further suppose that the same action occurs between the United States and the Sudan and that it occurs in identical circumstances — but that, this time, before it uses force, the United States approaches the Security Council to request that the Council use its Charter powers to authorize action against the chemical weapons site in Sudan in order 'to maintain or restore international peace and security'. With considerable diplomatic ingenuity, the United States approaches all of its fellow Council members and, after a short debate, the Council provides the United States with the authorization it seeks.

How would this development affect the lawfulness of the subsequent action if it later transpired that the authorization had been provided subject to an incorrect factual

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> The bombing resulted from three basic failures. First, the technique used to locate the intended target — the headquarters of the Yugoslav Federal Directorate for Supply and Procurement (FDSP) — was severely flawed. Second, none of the military or intelligence databases used to verify target information contained the correct location of the Chinese Embassy. Third, nowhere in the target review process was either of the first two mistakes detected. No one who might have known that the targeted building was not the FDSP headquarters — but was in fact the Chinese Embassy — was ever consulted.
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> See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (May 2000) (para. 81) (http://www.un.org/icty/pressreal/nato061300.htm#IVB4). The report concluded (at para. 85) that 'the aircrew involved in the attack should not be assigned any responsibility for the fact they were given the wrong target and that it is inappropriate to attempt to assign criminal responsibility for the incident to senior leaders because they were provided with wrong information by officials of another agency. Based on the information available to it, the committee is of the opinion that the OTP should not undertake an investigation concerning the bombing of the Chinese Embassy'.

[149] It has already been observed that this case occurred outside the remit of criminal proceedings, but criminal analogies in cases of recourse to force are not themselves new. For an invocation of the idea of 'mitigation', see Franck and Rodley, 'After Bangladesh: the Law of Humanitarian Intervention By Military Force', 67 *AJIL* (1973) 275, at 290.

premise — that, as in the case of Operation Infinite Reach, none of the offending chemical compounds existed in the Sudan? In contrast to the conclusion which we mooted earlier for the right of self-defence, it is arguable that the outcome of this fictitious scenario would *differ* in material terms, in that the action of the United States would remain lawful notwithstanding the existence of the same incorrect factual premise that prevailed for Operation Infinite Reach. We think this because of the constitutional orthodoxies of the moment, which spurn invalidations of Security Council resolutions (save, it would seem, in the most exceptional of exceptional situations).[150] To be clear, in the immediate wake of our fictitious scenario, we would feel compelled to ask how it was ever possible that the Council could have come by the passing of such a resolution. We would feel driven and duty-bound to take whatever steps we could — whatever steps were necessary — to avoid any recurrence of this sort in future years. However, we would also be conscious of the limited opportunities open to us for mounting a successful challenge against the relevant resolution and of upsetting the lawfulness of the action of the United States. In all likelihood, it would therefore remain good in law.

The attraction of working this reasoning into our assessment of Operation Iraqi Freedom — undertaken with the apparent authorization of the Security Council but still *sans* weapons of mass destruction — should be plain enough to see, if it has not, by now, begun to take hold of governmental wisdom.[151] Consider the short shrift given to the 'essential' and the 'prudent'[152] by the British Foreign Secretary in May 2003 when he declared that the finding of weapons of mass destruction in Iraq was 'not crucially important'.[153] President Bush shared a similar sentiment in remarks he made in December 2003.[154] However, we need to be clear that Operation Iraqi Freedom did not occur pursuant to an authorization of the Security Council straight and simple. It occurred pursuant to an intricate legal justification that did have as its *base* an authorization from the Council, but which incorporated further legal minutiae — and unless we familiarize ourselves with the details of these minutiae, it will prove difficult

[150] Though, we admit, we would be much closer to invalidation if the authorization sought and obtained was done so *in the knowledge that information used to secure the resolution was false* and the Council's authorization was obtained by deception. See, further, the discussion of Dinstein, *supra* note 38, at 279–282 (in the context of the International Court of Justice).

[151] See, for instance, 'The Case For War — Revisited', *The Economist*, 19 July 2003, 9.

[152] See *supra* note 102.

[153] Watt, 'Straw Retreats on Finding Banned Weapons', *The Guardian* (London), 15 May 2003, 4.

[154] Stevenson, 'Remember "Weapons of Mass Destruction"? For Bush, They Are A Nonissue', *NY Times*, 18 Dec. 2003, A14. To be sure, the reasoning here seemed to focus more on the overall benefit of Operation Iraqi Freedom, rather than on the provision of authorization from the Security Council (President Bush: 'the fact that [Saddam Hussein] is not there ... means America's a more secure country'). See, also, Stevenson, 'President Denies He Oversold Case for War With Iraq', *NY Times*, 31 July 2003, A1. At a press conference given by President Bush in Washington D.C. on 30 July 2003, he stated that 'intelligence was good, sound intelligence on which I made a decision' and that 'in order to placate the critics and the cynics about the intentions of the United States, *we need to produce evidence*'. See, further, Gellman, 'Iraq's Arsenal Was Only on Paper', *Wash. Post*, 7 Jan. 2004, A1.

to configure the legal significance which the factual accusations concerning weapons of mass destruction have upon the lawfulness of Operation Iraqi Freedom.[155]

It is only as a result of this familiarization that we actually become aware of the full argumentative dynamic at work for Operation Iraqi Freedom: as a matter of law, both the United States and the United Kingdom argued that the authorization set down by the Security Council in Resolution 678 (1990) was suspended and not terminated in Resolution 687 (1991), only to be revived by the occurrence of Iraq's 'material breach' of its obligations. This much we already know.[156] However, in November 2002, the Security Council declared in Resolution 1441 (2002) that Iraq 'has been *and remains* in material breach of its obligations under relevant resolutions, including Resolution 687 (1991)'.[157] But, crucially on that occasion, the Council also afforded Iraq 'a final opportunity to comply with its disarmament obligations'[158] before it was threatened with 'serious consequences as a result of its continued violations of its obligations'.[159] For the United States, that 'material breach' occurred in December 2002, when Iraq submitted a 12,000-page itinerary of its weapons programmes and possessions required by Resolution 1441 (2002),[160] but defaced by omissions. This, the United States claimed, constituted a material breach of Resolution 1441 (2002),[161] because Iraq had failed to mention an anthrax stockpile of 27,500 quarts that it *could* have produced in intervening years, or the 20,000 quarts of botulium toxen which it had previously admitted that it had, or stockpiles of precursors of poison gas.[162] According to the United States, Iraq had also failed to disclose mobile biological weapons productions units and aluminium tubes for the enrichment of

[155] In this respect, we should note the change of emphasis in language used *since* Operation Iraqi Freedom: See 'In Bush's Words: "Taking the Fight to the Enemy" in Iraq', *NY Times*, 31 July 2003, A10 (President Bush: 'I'm confident that our search will yield that which I strongly believe: that Saddam [Hussein] had a *weapons program*') (emphasis added). President Bush used a similar formulation in Dec. 2003, when he referred to the discovery in Iraq of '*weapons programs* that would have put [Hussein] in material breach': see Sanger, 'With "Good Riddance" to Hussein, Bush Vows Resolve', *NY Times*, 16 Dec. 2003, A1 at A20 (emphasis added). In his 2004 State of the Union Address, President Bush referred to the identification of 'dozens of *weapons of mass destruction-related program activities* and significant amounts of equipment that Iraq concealed from the United Nations' (emphasis added). See State of the Union Address (21 Jan. 2004) (http://www.whitehouse.gov/news/releases/2004/01/20040120–7.html).

[156] *Supra* notes 32 and 33.

[157] SC Res. 1441 (2002) (8 Nov. 2002), first operative para. (emphasis added).

[158] SC Res. 1441 (2002) (8 Nov. 2002), second operative para.

[159] SC Res. 1441 (2002) (8 Nov. 2002), thirteenth operative para.

[160] SC Res. 1441 (2002) (8 Nov. 2002), third operative para. See Beaumont, Rose, Vulliamy and McCarthy, 'U.S. Seeks One Excuse for War in 12,000 Pages of Denial', *The Observer* (London), 8 Dec. 2002, 20 and Chandrasekara, 'Baghdad Delivers Weapons Data to U.N.', *Wash. Post*, 8 Dec. 2002, A1. See, further, BBC News Online, 'Iraq unveils weapons dossier' (http://news.bbc.co.uk/1/hi/world/middle_east/2552781.stm) (7 Dec. 2002).

[161] SC Res. 1441 (2002) (8 Nov. 2002), fourth operative para.

[162] Secretary of State Powell said that, with the 12,000-page declaration, Iraq had continued its 'pattern of non-co-operation, its pattern of deception, its pattern of dissembling, its pattern of lying': Weisman and Preston, 'Powell Says Iraq Raises Risk of War by Lying on Arms', *NY Times*, 20 Dec. 2002, A1 at A12. Apparently, '[t]here had been a debate in the administration over whether to label the latest Iraqi failure a "material breach"', but the term was used. See *ibid.* Top officials within the Bush Administration

uranium for nuclear weapons.[163] In the words of Secretary Powell in December 2002, '[t]hese are material omissions that, in our view, constitute another material breach'.[164] For its part, the United Kingdom declared in January 2003 that a 'material breach' had occurred,[165] but its basis for doing so was Iraq's non-compliance with the enhanced inspections process set out by the Security Council in November 2002.[166]

That said, we can now appreciate why, and where, these questions of fact and evidence become relevant to the success of the legal justification tendered by the United States and the United Kingdom before the Security Council in March 2003. The relevant factual accusations are those that relate to the findings of material breach made by the United States and the United Kingdom in December 2002 and January 2003 respectively — well before Secretary Powell met with the Security Council on 5 February 2003. To be clear, those determinations of the United States and the United Kingdom are fundamental to the legal justification put forward for Operation Iraqi Freedom: they work the factual claims into the language and finding of material breach and — at least on their face — comport with the letter of Resolution 1441 (2002). There, the Security Council confirmed that 'false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution *shall constitute a further material breach of Iraq's obligations* and will be reported to the [Security] Council for assessment'.[167]

However, it should be said that, according to that same resolution, upon the receipt of such a report or reports, the Council said it would 'convene immediately' in order to

considered that Iraq had committed a 'material omission'. British Foreign Secretary Jack Straw said that these omissions included 'large quantities of nerve agent, chemical precursors and munitions'. See Sanger and Preston, 'U.S. Weighs How Serious an Arms-Violation Charge to Make Against Baghdad', *NY Times*, 19 Dec. 2002, A14.

[163] Weisman and Preston, *supra* note 162.

[164] Secretary of State Colin Powell, Press Conference on Iraq Declaration (19 Dec. 2002) (http://www.state.gov).

[165] Blitz, Dinmore and Turner, 'U.K. Declares "Material Breach" by Iraq', *Fin. Times* (New York), 29 Jan. 2003, 5 (noting that the United Kingdom had declared 'for the first time that Baghdad was in material breach of [Resolution] 1441 [(2002)]'). See, also, Cowell, 'Britain Accused Baghdad, Deepening Rift in Europe', *NY Times*, 29 Jan. 2003, A17.

[166] SC Res. 1441 (2002) (8 Nov. 2002), fifth and seventh operative paras. Following, of course, the reports of Dr. Hans Blix (UNMOVIC) and Mohamed El-Baradei (IAEA) to the Security Council on 27 Jan. 2003 (in accordance with SC Res. 1441 (2002) (8 Nov. 2002), fifth operative para.). See 'Report to U.N. By the Chief Inspector for Biological and Chemical Weapons', *NY Times*, 28 Jan. 2003, A10 and 'Nuclear Inspection Chief Reports Finding No New Weapons', *NY Times*, 28 Jan. 2003, A11.

[167] See SC Res. 1441 (2002) (8 Nov. 2002), fourth operative para. (emphasis added) (which would be done 'in accordance with paras 11 and 12'). The eleventh operative para. directed the Executive Chairman of UNMOVIC and the Director-General of the IAEA 'to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution'. For the twelfth operative para., see *infra* note 168. When Dr. Hans Blix, the Executive Chairman of UNMOVIC met with the Security Council on 27 Jan. 2003, he identified problems with Iraq's behaviour, but, critically, he stopped short of using the term 'material breach' in his presentation. See 'Report to U.N. by the Chief Inspector for Biological and Chemical Weapons', *NY Times*, 28 Jan. 2003, A10 and (http://www.un.org/Depts/unmovic/Bx27.htm).

'consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'[168] — presumably to mete out the 'serious consequences' it had intimated in Resolution 1441 (2002).[169] Determinations of 'material breach' would therefore set in train a certain *procedural* consequence for the Security Council, at least as far as the Council was concerned from a reading of Resolution 1441 (2002). However, even though the United States and the United Kingdom joined the unanimous vote *for* Resolution 1441 (2002), their shared contention was that any determinations of this nature — of a 'material breach' by Iraq — would have *substantive* consequences in terms of the reactivation of the Security Council authorization.

At the same time, we should recall that this concentration on evidence and proof rests on the most critical of assumptions made earlier,[170] that the legal justification of the United States and the United Kingdom for Operation Iraqi Freedom can indeed be described as valid under international law. Challenging the accuracy of the factual accusations made — that a 'material breach' had occurred as a matter of fact — might expose a flaw in the operation or execution of the justification in practice, but it does not speak to or address the broader (and logically prior) question of the merits and coherence of the justification itself and of its ultimate permissibility in international law. This is the question that should concern us first and foremost — but also, *in ultimo*, it should concern us most of all — because it is only an affirmative answer to this question that equips the factual and evidential questions with any legal meaning. So, for instance, we should be moved to ask: with what degree of confidence or conviction can it be said that the Security Council authorized the application of force in November 1990,[171] and that, having done so, it authorized force for purposes *other* than the restoration of the sovereignty of Kuwait?[172] What did the Security Council mean in Resolution 678 (1990) when it authorized 'all necessary means' to 'uphold

Ditto for Mohamed El-Baradei, the Director-General of the IAEA, even though he informed the Council on 27 Jan. 2003, that Iraq's declaration of 7 Dec. 2002 'did not provide any new information relevant to certain questions that have been outstanding since 1998'. See 'Nuclear Inspection Chief Reports Finding No New Weapons', *NY Times*, 28 Jan. 2003, A11.

[168] See El-Baradei, 1441 (2002) (8 Nov. 2002), twelfth operative para.

[169] *Supra* note 159.

[170] *Supra* note 100.

[171] See Dinstein, *supra* note 38, at 243 and 260 ('[T]his landmark resolution [of Resolution 678] constituted a specific mandate for the exercise of collective self-defence under Article 51. Claims that the resolution was based on Article 42 are totally unwarranted'). See, however, Warbrick, 'The Invasion of Kuwait by Iraq — Part II', 40 *ICLQ* (1991) 965, at 966. See, further, the discussion by Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', 55 *Mod. Law Rev.* (1992) 153, at 167–169 ('Resolution 678 [provided] for enforcement action rather than giving a blessing (of political, not legal, significance) to an action in self-defence which could lawfully have been mounted without the authorisation of the [Security] Council'); R. Higgins, *Problems and Process: International Law and How We Use It* (1994) 266 and Sarooshi, *supra* note 55, at 175 ('the better legal view is that the passage of [R]esolution 678 is an exercise by the [Security] Council of its collective security function').

[172] S. D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996) 185.

and implement Resolution 660 (1990)', as well as all 'subsequent' — and 'relevant' — 'resolutions *and to ensure international peace and security in the area*'?[173]

And, having passed Resolution 678 (1990), did the Security Council then suspend or terminate its authorization with the adoption of the 'cease-fire resolution' of Resolution 687 (1991)?[174] And, in the event of suspension, how and when did the occurrence of material breach come to result in the reactivation of the authorization from November 1990? When the Security Council first invoked the term, in Resolution 707 (1991) of August 1991?[175] Or when the United States and the United Kingdom first chose to run the justification, in January 1993?[176] Or on their second attempt in December 1998 with Operation Desert Fox?[177] Or when the Security Council invoked the term in Resolution 1441 (2002), when it declared 'that Iraq *has been and remains in material breach* of its obligations under relevant resolutions, including Resolution 687 (1991)'?[178] But what, then, of the 'final opportunity' deigned by Resolution 1441 (2002)?[179] Or of the 'serious consequences' threatened by the Security Council in Resolution 1441 (2002)?[180] And what impact of these provisions on the *ongoing material breaches* determined by the Security Council in

[173] SC Res. 678 (1990) (29 Nov. 1990) (emphasis added). See, further, the position of Paul Szasz:

> The phrase 'all subsequent resolutions' must be read in terms of the previous reference to the 'above-mentioned resolutions'. Thus, the word 'subsequent' cannot mean resolutions subsequent to Resolution 678. It obviously refers, grammatically, to the resolutions that had already been referred to. Resolution 678 authorised the use of force if Iraq failed to comply with the requirements of the previously adopted resolutions. Those resolutions . . . had [nothing] to do with the inspection system set up some five months later in April 1991 by Resolution 687.

92 *Proceedings ASIL* (1998) 136, at 140.

[174] Note that where the Security Council had previously intended to keep alive its authorization from Resolution 678 (1990) after the restoration of Kuwaiti sovereignty, it had done so in explicit terms: Resolution 686 (1991) (2 March 1991) set out the framework for cease-fire, and, in the fourth operative para., the Security Council 'recognise[d] that during the period required for Iraq to comply with paras 2 and 3 above, *the provisions of para. 2 of Resolution 678 (1990) remain valid*' (emphasis added).

[175] SC Res. 707 (1991) (15 Aug. 1991), first operative para. (in which the Council condemned 'Iraq's serious violations of a number of its [disarmament] obligations under . . . Resolution 687 (1991)' and described them as 'a material breach of the relevant provisions of that resolution *which established a cease-fire and provided the conditions essential to the restoration of peace and security*') (emphasis added). See, also, preambular para. 11, in which the Security Council affirmed that 'the aforementioned failures of Iraq to act in strict conformity with its obligations under Resolution 687 (1991) constitute a material breach of its acceptance of the relevant provisions of that resolution which established a ceasefire and provided the conditions essential to the restoration of peace and security in the region'.

[176] *Supra* note 50.

[177] *Supra* notes 51 to 53.

[178] See SC Res. 1441 (2002) (8 Nov. 2002), first operative para. ('in particular through Iraq's failure to co-operate with United Nations inspectors and the IAEA, and to complete the actions required under paras 8 to 13 of Resolution 687 (1991)' (emphasis added). Note how Secretary Powell used Resolution 1441 (2002) in his presentation to the Security Council in Feb. 2003, notwithstanding this position of the Security Council: 'Iraq has now placed itself in danger of the serious consequences called for in [United Nations] Resolution 1441 [(2002)]. And this body places itself in danger of irrelevance if it allows Iraq to continue to defy its will without responding effectively and immediately'. See *supra* note 109.

[179] *Supra* note 158.

[180] *Supra* notes 159 and 169. See, further, Scott, 'Iraq and the Serious Consequences of Word Games: Language, Violence and Responsibility in the Security Council', 3 *German LJ* (2002), [17]–[27].

Resolution 1441 (2002)?[181] Or could it be determinations of 'material breach' only made after Resolution 1441 (2002)? And which material breaches? Any material breach? Or a sum total of material breaches, whatever those might be? Or only those material breaches pre-ordained by the Security Council?[182] And material breaches as determined and decided by whom? The Security Council?[183] Or any member of the Security Council? Or only any permanent member of the Security Council? Or any member state of the United Nations? Or just the United States?[184] Or just the United Kingdom? Or the United States, but only when it acted in concert with the United Kingdom? But what role, then, for the reports of United Nations weapons inspectors set out in Resolution 1441 (2002)?[185]

5.

Thus far, our assessment of the lawfulness of Operation Iraqi Freedom has been conceived in the formal terms of its protagonists, but what room is left to factor the supposed humanitarian and political benefits of the intervention as a fraction of the legal justification for action?

For some, the reigning narrative of the intervention of Iraq was captured and eternalized by the very name awarded to that intervention — that of 'Operation Iraqi Freedom'[186] — as well as by the potent images of resounding welcomes that greeted incoming 'freedom' forces.[187] 'Freedom' meant liberation from a generation of tyranny here, and the idea of 'liberation' was indispensably in the air when the statue of President Hussein fell to earth amidst spectacular scenes in Fardus Square in

[181] *Supra* note 178.

[182] See, in particular, the formulation in the fourth operative para. of SC Res. 1441 (2002): *supra* note 167.

[183] See Franck, 'Inspections and Their Enforcement: A Modest Proposal', 96 *AJIL* (2002) 899, at 900 (suggesting that '[t]he only way out of this double conundrum [of] enforcement by anyone and enforcement by no-one is to authorise the Security Council to determine whether a material breach has occurred, but to do so by a majority of nine of the fifteen members, without a veto').

[184] Taft and Buchwald record the position of the United States with respect to Operation Desert Fox thus: 'The U.S. view was that whether there had been a material breach was an *objective fact*, and it was not necessary for the Council to so determine or state' (emphasis added). This position, they argue, was 'well understood in the negotiations leading to the adoption of Resolution 1441'. See *supra* note 31, at 560.

[185] SC Res. 1441 (2002) (8 Nov. 2002), fourth, eleventh and twelfth operative paras. See, further, Franck, 92 *Proceedings ASIL* (1998) 136, at 139.

[186] See Blumenstein and Rose, 'Name That Op: How U.S. Coins Phrases of War', *Wall St. J.*, 24 March 2003, B1.

[187] Although, see Filkins, 'Muted Joy as Troops Capture Iraqi Town', *NY Times*, 22 March 2003, A1; Jaffe, Robbins and Cooper, 'U.S. Meets Some Resistance in South', *Wall St. J.*, 24 March 2003, A1 and Filkins and Wilson, 'Marines, Battling in Streets, Seek Control of City in South', *NY Times*, 25 March 2003, A1.

Baghdad on 9 April 2003.[188] As the war progressed, the Bush Administration sold its message to Middle Eastern audiences through television outlets under the rubric of *Iraq: From Fear to Freedom*.[189] 'Think of the scenes we [have] all witnessed', United States Defence Secretary Donald H. Rumsfeld went on to tell American troops when he visited them in Qatar at the end of that month, 'of free Iraqis pulling down statues of Saddam Hussein and embracing coalition forces celebrating their new-found freedom'.[190] If Operation Iraqi Freedom had begun life as an enforcement action for disarming Iraq, the argument would be that it had always formed part of a much larger historical life-force,[191] or, perhaps, that its character had changed with the passage of time and that it had assumed a much greater resonance than its original configuration allowed.[192] Discoveries of weapons of mass destruction had somehow become eclipsed by other priorities and other discoveries — of mass graves and torture chambers, of the techniques for and bureaucracies behind brutalization.[193]

To be sure, this narrative of the intervention did not surface from nowhere: it did not break like a bolt from the blue. It had appeared throughout preparations for Operation Iraqi Freedom, whether in the form of *Saddam Hussein: Crimes and Human Rights Abuses*, the dossier released by the Foreign and Commonwealth Office of the United Kingdom in December 2002,[194] or from Secretary of State Powell's presentation to the Security Council in February 2003 ('a subject', he declared, 'of deep and continuing concern to this Council').[195] He concluded the revelations from his portfolio of evidence on Iraq's weapons of mass destruction with a damning resumé of President Saddam Hussein's human rights record — of 'his utter contempt for human life'.[196] That resumé included the campaign of repression, of 'mass summary executions, disappearances, arbitrary jailing, ethnic cleansing and the destruction of some 2,000 villages' of the Kurdish population from 1987 to 1989, as well as the ethnic cleansing

[188] Tyler, 'Hussein Statue is Toppled — Rumsfeld Urges Caution', *NY Times*, 10 Apr. 2003, A1. See, in particular, 'Excerpts From Remarks by Bush and Blair: "Iraq Will Soon Be Liberated"', *NY Times*, 9 Apr. 2003, B7. According to Jürgen Habermas, 'the public perception of the war in Iraq seemed to perform an about-face at this one scene': 'Interpreting the Fall of A Monument', 4 *German LJ* (2003) 701. 9 Apr. was declared the national day of the new Iraq state when the Governing Council — the first interim government of Iraq after Operation Iraqi Freedom — convened in Baghdad on 13 July 2003. See Tyler, 'Interim Leaders, Supported by U.S., Meet in Baghdad', *NY Times*, 14 July 2003, A1.

[189] Becker, 'The United States' Message of a Humanitarian War Is Faltering in the Arab World', *NY Times*, 5 Apr. 2003, B10.

[190] Loeb, 'Rumsfeld Assails War Critics and Praises the Troops', *Wash. Post*, 29 Apr. 2003, A11.

[191] See *supra* note 154 and *infra* note 231.

[192] See P. Stothard, *Thirty Days: Tony Blair and the Test of History* (2003) 38–40 and Friedman, 'The War over the War', *NY Times*, 3 Aug. 2003, 11 (Wknd. Rvw.).

[193] See Fisher, 'Threat Gone, Iraqis Unearth Hussein's Nameless Victims', *NY Times*, 25 Apr. 2003, A1. See, further, Schmitt, 'Wolfowitz Visits Mass Graveyard of Hussein's Victims', *NY Times*, 20 July 2003, A1 (noting the 62 'mass graveyards' uncovered in southern Iraq since the end of hostilities). See, also, *supra* note 154.

[194] See United Kingdom Foreign and Commonwealth Office, *Saddam Hussein: Crimes and Human Rights Abuses* (2002).

[195] *Supra* note 109, at A16.

[196] *Ibid.* Powell described the use of mustard and nerve gas against the Kurds in 1988 as 'one of the 20th century's most horrible atrocities'.

of the Shi'ite Iraqis and Marsh Arabs 'whose culture has flourished for more than a millennium'.[197] Even President Bush had adverted to this cause during his address to the General Assembly on the enforcement of Iraq's disarmament obligations in September 2002:

> The United States has no quarrel with the Iraqi people; they've suffered too long in silent captivity. Liberty for the Iraqi people is a great moral cause, and a great strategic goal. The people of Iraq deserve it; the security of all nations requires it. Free societies do not intimidate through cruelty and conquest, and open societies do not threaten the world with mass murder. The United States supports political and economic liberty in a unified Iraq.[198]

The same message was reiterated in a televized presidential address on the eve of Operation Iraqi Freedom which synthesized the ideas of security and freedom,[199] so that, even if we were to cast doubt on the status of *freedom* as the meta-narrative of intervention, we cannot extricate it from the *meaning* of Operation Iraqi Freedom — from what the intervention was in part *for*.

Yet, notwithstanding the existence of these (and other) pronouncements on *this* virtue of Operation Iraqi Freedom, in deference to the *Nicaragua* case, the question should be asked — indeed, it is now inescapable for us — as to why no corresponding legal justification was crafted by either the United States or the United Kingdom in their communications to the Security Council in March 2003. True, the imperative for Operation Iraqi Freedom might well have taken its inspiration from the cause of humanity or freedom — this, to cite again from *Nicaragua*, might have even been the 'decisive' motive behind intervention[200] — but, in that case, the International Court of Justice warned us off the act of computing, without more, political or moral or strategic justifications into the legal justifications for action. That is why the Court paid scrupulous attention to whether the allegations of human rights violations by the Sandinista Government of Nicaragua had been 'relied [upon] by the United States Government as *legal justifications* of its conduct towards Nicaragua, or merely as *political arguments*'.[201]

For all its reputed worth, and for better or for worse, we are left with the fact that Operation Iraqi Freedom was never formally quantified before the Security Council in terms akin to those advanced for, say, Operation Allied Force, the 'humanitarian intervention' launched by member states of NATO against the Federal Republic of Yugoslavia in March 1999.[202] In this respect, we should take a leaf out of the chapter of Operation Enduring Freedom from October 2001 because many of its narratives

[197] *Ibid.*

[198] See President's Remarks at the United Nations General Assembly: 12 Sept. 2002 (http://www.whitehouse.gov/news/releases/2002/09/20020912–1.html).

[199] See President Bush Addresses the Nation: 19 March 2003 (http://www.whitehouse.gov/news/releases/2003/03/20030319–17.html) ('We have no ambition in Iraq,' President Bush told his audience, 'except to remove a threat and restore control of that country to its own people').

[200] *Supra* note 14.

[201] *Nicaragua Case*, *supra* note 5, at 92 (para. 171) (emphasis added) (and, in so deciding, ruled upon the facts that were relevant — and those that were irrelevant — to the legal case of the United States).

[202] See, for example, UN Doc. S/PV. 3988 (24 March 1999) 8 (the Netherlands) and 12 (the United Kingdom).

ricocheted during the sequel intervention of Operation Iraqi Freedom. However, once we concentrate our analysis on the significance of Operation Enduring Freedom from the perspective of the legal regulation of force, we discover that its precedential relevance lies in the definition which it gave to the scope of individual and collective self-defence under international law.[203] This was — and remains — its most important normative contribution when studied from *that* perspective, but this observation should not halt our critical appreciations of the other narratives that arose from that intervention (such as the 'enduring freedom' produced for the Afghani people by the change of regime in Kabul).

That no formal appeal was made to this aspect of Operation Iraqi Freedom in the legal justification for action can, perhaps, be reasoned in terms of the supreme confidence which the United States and the United Kingdom held in the 'authorization' which, or so they claimed, the Security Council had provided. If this claim is valid, that confidence would be justified and there would have been no need to mobilize other legal justifications for action; these would have been surplus to requirements because, under the present juridical climate, an intervention underwritten by an authorization from the Security Council is as safe or as good as houses.[204] Then again, we have also learnt that, in cases of close calls, the 'fact-based factors' or 'elements' approach advises states to reach for a panoply of justifications, in a bid to create the apparent cogencies of an ensemble.[205] Given that this was no straightforward case of authorization from the Security Council,[206] it would not have therefore come as a surprise if the intervening states *had* pleaded an ensemble of justifications — although, to be sure, it is conceivable for an ensemble to occur where the lawfulness of an intervention can survive on any of the grounds that comprise the ensemble.[207] So, assuming supreme confidence in the justification concerning authorization from the Council, why, then, had this aspect of the intervention — its goodwill narrative if you like — not made the cut of the official proclamations of either the United States or the United Kingdom in March 2003?

It is at this point that we can begin to appreciate the burdens which would have attended any conversion of such arguments from political justifications (sampled at the start of this section) into legal justifications for Operation Iraqi Freedom — for what legal justification could have successfully availed itself in these circumstances in the name of humanity or freedom? A 'right of humanitarian intervention', pleaded once before in the context of Operation Provide Comfort in northern Iraq (1991) and

[203] See, in particular, Greenwood, *supra* note 94, at 16–18. See, further, *supra* note 87.

[204] Gardner, 'Neither Bush Nor the "Jurisprudes"', 97 *AJIL* (2003) 585, at 588–589 (arguing that the 'new Bush pre-emption doctrine' is 'neither necessary nor desirable'). See, further, Franck, 'The "Powers of Appreciation": Who Is the Ultimate Guardian of U.N. Legality?', 86 *AJIL* (1992) 519; Alvarez, 'Judging the Security Council', 90 *AJIL* (1996) 1 and *supra* note 150.

[205] *Supra* note 71.

[206] *Supra* note 155 (and accompanying text).

[207] See, further, *supra* note 77.

southern Iraq (1992),[208] might have been suggested to the United States and the United Kingdom, but its invocation here would have entailed a much more generous, and controversial, proximate threshold for activation than has gone (or been known) before.[209] This is because the United States and the United Kingdom would have had to rely on a historical and generalized pattern of human rights abuses committed by the Hussein regime in Iraq as the trigger mechanism for the exercise of the right on this occasion. However, we find that, within international law and practice, states have reserved the right of humanitarian intervention for extreme situations of acute or aggravated humanitarian need (such as the 'humanitarian catastrophe' which provoked Operation Allied Force).[210] In so doing, they have not adopted the more general conception of humanitarian intervention floated by the International Court of Justice in 1986, when it declared that 'the use of force could not be the appropriate method to monitor or ensure such respect' for human rights.[211] States have in fact stepped back from this broad reach of humanitarian intervention — both in their policy formulations and, as it would appear from Operation Iraqi Freedom, in their legal practices.[212]

What of Operation Iraqi Freedom as the latest testament of the so-called right of 'pro-democratic intervention' in action? Had the intervention not heralded the fulsome demise of the regime of President Saddam Hussein and marked the rise of a constitutional discipline within Iraq? Had Operation Iraqi Freedom not set Iraq upon an inexorable march towards its own democratic fulfilment? Again, we find that where such a justification has been pleaded in the formal sphere in recent years, it is an unsettled matter as to whether it has been advanced at the 'political level' (as the Court so memorably put it in 1986),[213] or in the form of a legal justification. Indeed,

[208] See, in particular, 63 *BYbIL* (1992) 824 and 827 and Scheffer, 'Use of Force after the Cold War: Panama, Iraq and the New World Order', in L. Henkin (ed.), *Right v Might: International Law and the Use of Force* (2nd ed., 1991) 109, at 146–147. See, further, Greenwood, 'Is There a Right of Humanitarian Intervention?', 39 *World Today* (1993) 34. However, cf. Chesterman, *supra* note 55, at 196–206.

[209] See, in this respect, Byers, 'Terrorism, the Use of Force and International Law after 11 September', 51 *ICLQ* (2002) 401, at 405 (claiming that the use of humanitarian intervention as a justification for Operation Enduring Freedom against Afghanistan 'would have been more sweeping than that arising out of Kosovo').

[210] See *Legality of Use of Force Case* (Provisional Measures), ICJ (11 May 1999): Germany (CR 99/18); the Netherlands (CR 99/20); Spain (CR 99/22); United Kingdom (CR 99/23) and United States (CR 99/24). See, further, Chesterman, *supra* note 55, at 213. See, also, the scenario that opens the essay of Holzgrefe, 'The Humanitarian Intervention Debate', in J. L. Holzgrefe and R. O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 15, at 15–17.

[211] *Nicaragua Case*, *supra* note 5, at 134–135 (para. 268). The Court did not make reference to 'humanitarian intervention' by name; such, at least, is the construction placed on what it said by others. See Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court', 38 *ICLQ* (1989) 321, at 327–328. Earlier, at 134 (para. 267), the Court had said that 'where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves'.

[212] In the *Nicaragua Case*, the Court said it 'may take note of the absence of any such claim . . . as an indication of *opinio juris*' (*supra* note 5, at 111 (para. 211)), and that may be relevant here for defining the *scope* — as opposed to the *existence* — of the right of humanitarian intervention.

[213] *Supra* notes 5 and 9.

even if we were to concede the latter of these propositions, it should be noted that such a 'right' has been confined to the specific factual context of the *restoration* — and not the *introduction* or *imposition* — of (evicted) constitutional governments to power. Such was the case, for example, with the Nigerian-led intervention into Sierra Leone in May 1997,[214] but these circumstances also existed when the Security Council authorized action in Haiti in Resolution 940 (1994) of July 1994.[215] These episodes themselves constitute a conceptual departure from the Court's rendering, in 1986, of 'a right of intervention by one state against another on the ground that the latter has opted for some particular ideology or political system'[216] — but it is also true that they have no usefulness as empirical corroborations for activating this 'right' in the context of Operation Iraqi Freedom.[217] Furthermore, even if the factual circumstances of Operation Iraqi Freedom *had* coincided with these earlier episodes, it remains the case that, *pace Nicaragua*, our attentions would still have had to turn to and take as their focus the legal justifications given by the United States and the United Kingdom in the formal sphere.

6.

With these manifold properties, it is small wonder that Operation Iraqi Freedom has earned an ignoble reputation for its 'cognitive stew' of justifications for intervention,[218] or, truth be told, of possible justifications for intervention. Here lies the source of much of the confusion that has riddled assessments of the lawfulness of Operation Iraqi Freedom thus far — a confusion derived from the failure to discriminate between *legal* and *political* justifications for intervention and between *ascribed* and *actual* legal justifications pleaded in the formal sphere of state action.[219]

[214] See Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Case of ECOWAS in Liberia and Sierra Leone', 12 *Temple Int'l & Comp. LJ* (1998) 321 and Nowrot and Schabaker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', 14 *Am. Univ. Law Rev.* (1998) 321.

[215] As in the case of the United States intervention in Haiti in September 1994: see SC Res. 940 (30 July 1994). See, further, Corten, 'La Résolution 940 du Conseil de sécurité autorisant une intervention militaire en Haïti: l'émergence d'un principe de légitimé démocratique en droit international', 6 *EJIL* (1995) 166 and Sarooshi, *supra* note 55, at 233–244.

[216] *Nicaragua Case*, *supra* note 5, at 133 (para. 263), and *supra* note 23. See, further, Reisman, *supra* note 11, and the exchange between Reisman, 'Coercion and Self-Determination: Construing Article 2 (4)', 78 *AJIL* (1984) 78 and Schachter, 'The Legality of Pro-Democratic Invasion', 78 *AJIL* (1984) 645.

[217] See, further, Byers and Chesterman, '"You, the People": Pro-Democratic Intervention in International Law', in G. H. Fox and B. R. Roth (eds), *Democratic Governance and International Law* (2000) 259, at 271–279.

[218] Mailer, 'The White Man Unburdened', *NY Rev. Bks.*, Vol. 50, No. 11, 17 July 2003, 4.

[219] As Lowe has argued, our 'first step' as lawyers must be to 'identify the claim with precision': *supra* note 3, at 860.

This confusion has threatened to give indefinite postponement to any conclusions — we could even suggest any *provisional* conclusions — on where Operation Iraqi Freedom stands as a matter of the *jus ad bellum*, but such has been our mire since 'justifications' for intervention against Iraq first transcended the political consciousness of the United States in December 2001,[220] if not before.[221]

To rescue us from these perennial confusions, and in search of a compass to help steer our deliberations, we returned to the *Nicaragua* case of 1986. There, we found that the International Court of Justice observed a world of formal and informal spheres of state action and of legal and political justifications occurring within those spheres — but we also discovered the possibility of multiple realities occurring within *each* of those separate spheres.[222] All told, in its jurisprudence in that case, the Court developed a principled and systematic approach for sorting through the miasma of considerations that had invariably descended upon it, even though some might accuse the Court of having shown infidelities to its own thinking at certain times.[223] Nevertheless, for all the derision that might be directed at the Court on that front, and for the substantive findings that it made in that case,[224] the methodological components it set out in the *Nicaragua* case emerge as a coherent and viable framework for the identification and assessment of justifications given for the application of force under international law: we have discerned a discrete *modus operandi* at work in that jurisprudence, but it remains a *modus operandi* nonetheless.

For the Court, dissections of the formal realities of state behaviour need to be undertaken — between law and politics and into law and fact.[225] This is the

[220] Consider the following account of David Frum, who served as the special assistant to President Bush for economic speech-writing during the period Jan. 2001 to Feb. 2002: 'It was late December 2001, and Mike Gerson [chief speech writer and principal author of President Bush's inaugural address] was parcelling out components for the forthcoming State of the Union speech. His request to me could not have been simpler: I was to provide a justification for a war [with Iraq]'. See D. Frum, *The Right Man: The Surprise Presidency of George W. Bush* (2003), 224. See, further, Lemann, 'How It Came to War', *New Yorker*, 31 March 2003, 36.

[221] Zakaria, 'The Arrogant Empire', *Newsweek*, 24 March 2003, 18 at 30. See, further, Kessler, 'U.S. Decision on Iraq Has Murky Past', *Wash. Post*, 12 Jan. 2003, A1 and Gumbel, 'Bush Was Demanding Excuse to Invade Iraq in January 2001, Says Ex-Treasury Secretary', *The Independent* (London), 12 Jan. 2004, 1. However, see Milbank, 'White House Fires Back at O'Neill on Iraq', *Wash. Post*, 13 Jan. 2004, A1 and Stevenson, 'Bush Disputes Ex-Official's Claim that War with Iraq Was Early Administration Goal', *NY Times*, 13 Jan. 2004, A22.

[222] Reinforced most prominently in the recent *Oil Platforms Case* (2003), which illustrated how varied legal assessments can occur of *justifications* for recourses to force — depending on the 'basis' of 'analysis' used: see *supra* note 41. The *Nicaragua* case is a further example: there the Court decided matters on the basis of the customary *jus ad bellum* because of a multilateral treaty reservation entered by the United States upon its acceptance of the jurisdiction of the Court: 61 Stat. 1218 (1947). See (1984) ICJ Reports 392, at 425–426 (para. 76).

[223] *Supra* notes 17, 26 and 29.

[224] See, for example, Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations', 81 *AJIL* (1987) 116, at 120; Hargrove, 'The *Nicaragua* Judgment and the Future of the Law of Force and Self-Defence', 81 *AJIL* (1987) 135 and Moore, 'The *Nicaragua* Case and the Deterioration of World Order', 81 *AJIL* (1987) 151. See, further, D'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987) 101.

[225] *Supra* notes 5, 15 and 201.

methodological essence of the *Nicaragua* case, when it is stripped of its textual intonations and insinuations to its core. We then sought to transport this template and transcribe it to Operation Iraqi Freedom, in order to give us some sense of how best to treat the multiple realities that had arisen in *that* context — *its* justifications and pretexts, changes and contradictions, strategies and hyperboles. According to the Court, examinations of the lawfulness of a given intervention are facilitated only once these dissections have taken place, because we are then able to allocate relevance and weight to each of the considerations before us.[226] So, it follows that the lawfulness of Operation Iraqi Freedom can be investigated, even if, in the same breath, we harbour apprehensions that the intervention occurred at the behest of an ambitious quest for empire,[227] or as part of some grand design for peace in the Middle East,[228] or, perhaps, as the latest salvo in the settlement of scores between feuding political families.[229] The *Nicaragua* case throws us a crucial lead for mapping and connecting these realities, for imposing some sort of discipline and coherence on them so that our assessments of the lawfulness of intervention can begin in earnest — an approach that is so often followed in the scholarship in this field,[230] but one that is seldom articulated in practice.

That realization does not come without its hazards, however, and we should be aware that these, too, might be perennial. As a jurisprudential ode to formalism, the *Nicaragua* case might well resolve or defuse the many confusions that have amassed during the course of Operation Iraqi Freedom; it might bring hope where there is otherwise despair and light where there is nothing but shades of darkness. Yet, our endeavours should not cease there, because we then encounter the extent to which this formalistic mentality is relevant, satisfactory, even desired in the present day — if, indeed, it ever was: for, what the Court might have given with one hand in the *Nicaragua* case in terms of analytical sanity, it might have denied with the other in terms of respect for fair and just outcomes in the grander scheme of things.[231] Has the time not come, we could ask, to rethink the laws of the *jus ad bellum* in relation to states and regimes that are persistent outlaws and unrepentant violators of international law? Or to reconsider our conceptions of 'international peace and security' after the

[226] *Supra* notes 10 and 201.

[227] See, for example, N. Mailer, *Why Are We At War?* (2003).

[228] See 'Is Iraq More Crucial to Regional Peace than Palestine?', *NY Times*, 12 Apr. 2003, A9.

[229] Byers, 'Ready for a Rematch', *London Rev. Bks.*, Vol. 23. No. 3 (8 Feb. 2001), 7. See, also, Purdum, 'After 12 Years, Sweet Victory: The Bushes' Pursuit of Hussein', *NY Times*, 16 Dec. 2003, A1.

[230] See *supra* note 38.

[231] See Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-Defence', 97 *AJIL* (2003) 576. The capture of Saddam Hussein in al-Dawr, near Tikrit, Iraq, by American forces in Operation Red Dawn of 13 Dec. 2003 returned us to the issue of the 'justification' for Operation Iraqi Freedom, at the same time that it threatened to throw it into even more of a tailspin: 'Hussein Caught in Makeshift Hide-out; Bush Says "Dark Era" for Iraqis is Over', *NY Times*, 15 Dec. 2003, A1. However, also *quaere* the impact — if such it be — of Operation Iraqi Freedom on the decision of Libya, announced in Dec. 2003, to renounce all of its nuclear, chemical and biological weapons: President Bush asserted a 'direct link' with Operation Iraqi Freedom; Libya announced that it had reached the decision of its own 'free will'. See Sanger and Miller, 'Libya to Give Up Arms Programs, Bush Announces', *NY Times*, 20 Dec. 2003, A1.

cataclysmic events of 11 September 2001? And does — and should — international law take stock of the *vox populi* of the target state in calibrating the lawfulness of a particular intervention?[232] And, if so, over what course of time? And is there adequate accommodation for the pleading of multiple justifications? And should there be? And, again, if so, over what course of time? Or are the laws of the *jus ad bellum* as durable now and as appropriate as they have ever been?[233]

That final reflection might well serve as our concluding preference, but the anthem has once again been sounded — this time, in the context of Operation Iraqi Freedom — that the intervention was 'unlawful' but 'legitimate'.[234] It is a refrain first heard in the shadows of Operation Allied Force in March 1999,[235] and whether its invocation here — indeed, whether its invocation at all — is apposite depends on how confident

[232] See *supra* note 187. For a further example, consider the analysis of Sengupta, 'Oh, If Only the G.I.'s Would Come Marching In', *NY Times*, 30 July 2003, A4 (in the context of the 2003 Liberian crisis). In Resolution 1497 (2003), of 1 Aug. 2003, the Security Council authorized (in its first operative para.) 'member states to establish a multinational force in Liberia to support the implementation of the 17 June 2003 ceasefire agreement, including establishing conditions for initial stages of disarmament, demobilisation and reintegration activities, to help establish and maintain security in the period after the departure of the current President and the installation of a successor authority, taking into account the agreements to be reached by the Liberian parties, and to secure the environment for the delivery of humanitarian assistance, and to prepare for the introduction of a longer-term United Nations stabilisation force to relieve the multinational force'. The Security Council acted under Chapter VII of the Charter and passed the resolution by 12 votes to 0 — with France, Germany and Mexico abstaining. See Barringer, 'U.N. Council Votes to Back Liberia Force', *NY Times*, 2 Aug. 2003, A3. The first contingents of (West African) troops began to arrive in Liberia on 4 Aug. to an ecstatic welcome: Sengupta, 'Peace-keeping Unit Arrives in Liberia', *NY Times*, 5 Aug. 2003, A1.

[233] Note in this respect the important critique offered by Scott, whose concern 'is to insist on states taking responsibility for their involvement in structuring a textual environment in which the [United States] *is given license to rationalise its power-based and particular national-interest calculations in the form of legal arguments*': see Scott, *supra* note 180, at [29]. For more 'semantic politics' and 'diplomatic signaling games' (*ibid.*, at [28]), it is useful to recall China's abstention from SC Res. 1244 (1999) of 10 June 1999, on the grounds of its implied ratification of Operation Allied Force: 'the "human rights over sovereignty" theory . . . serves to . . . promote hegemonism under the pretext of human rights'. See SCOR (LIV), 4011th Meeting, 10 June 1999, at 9. See, further, Pellet, 'State Sovereignty and the Protection of Fundamental Human Rights: An International Law Perspective', in *Pugwash Study Group on Intervention, Sovereignty and International Security*, Pugwash Occasional Papers, Vol. I, No. 1, 42 (Feb. 2000).

[234] Slaughter, 'Good Reasons to Go Around the U.N.', *NY Times*, 18 March 2003, A18. See, also, Falk, 'What Future for the UN Charter System of War Prevention?', 97 *AJIL* (2003) 590, at 591–594.

[235] See the finding of the Independent International Commission on Kosovo, that Operation Allied Force was 'legitimate but not legal, given existing international law': *The Kosovo Report: Conflict, International Response, Lessons Learned* (2002) 289. In the context of Operation Allied Force, Christine Chinkin argued:

> How can I, as an advocate of human rights, resist the assertion of a moral imperative on states to intervene in the internal affairs of another state where there is evidence of ethnic cleansing, rape and other forms of systematic abuse, regardless of what the Charter mandates about the use of force and its allocation of competence?

Chinkin, 'Kosovo: A "Good" or A "Bad" War?', 93 *AJIL* (1999) 841, at 843. Antonio Cassese concluded that, 'from an *ethical* viewpoint, resort to armed force [against the Federal Republic of Yugoslavia in March 1999] was justified' but, in his capacity as a legal scholar, 'cannot avoid observing in the same breath that this moral action is *contrary to current international law*'. See Cassese, '*Ex Iniuria ius oritur*: Are We Moving towards Legitimation of Forcible Humanitarian Counter-measures in the World Community?', 10 *EJIL* (1999) 23, at 25. See, finally, Franck, *supra* note 38, at 175.

we are of the methodological framework which the International Court of Justice began to sketch in 1986. For, as long as that refrain gains in frequency and in volume,[236] there is one thing of which we can all be certain: that it is the Court's framework that stands at equal risk as the law itself of being taken to task for creating the real or imagined gulf between international law and *its* legitimacy.

[236] To be sure, though the refrain was commonly heard during Operation Allied Force, this intensity was not repeated during Operation Iraqi Freedom: see *supra* notes 234 and *ibid.*