Legality of the 2003 Invasion of Iraq under International Law

A Review of the Legal Justifications for the 2003 Invasion and their Traction

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1 Introduction

1.1 The Topic

On 17 March 2003, the US President, George W. Bush Jr., in an address to the nation, delivered the following dramatic ultimatum to the Iraqi dictator, Saddam Hussein: leave Iraq within 48 hours - if not a military conflict will commence. Saddam Hussein, however, immediately rejected the US ultimatum, and on 19 March 2003 Operation Iraqi Freedom was launched by the USA, the UK and Australia. Within a month the US-led Coalition defeated Iraq’s armed forces and seized control over major cities, thereby ending the regime of Saddam Hussein and the Ba’ath party in Iraq.

In the immediate run-up to the invasion the permanent members of the UN Security Council (SC) - the USA, the UK, France, Russia and China - were divided as to the use of force against Iraq. They could not agree on the adoption of a resolution authorizing force following the findings in Resolution 1441 (2002) of Iraqi material breaches of its disarmament obligations under Resolution 687 (1991). The divisions obstructed further SC decision-making on the issue of disarmament of Iraq. Subsequently, the Coalition, concerned that Iraq was developing weapons of mass destruction (WMD), decided to go ahead with military action without a further SC authorization to the use of force.

However, the legitimacy of the Coalition invasion of 2003 was and remains controversial, both as a matter of policy, ethics and law.

As to the legality jus ad bellum of the invasion, which will be examined in this thesis, states were fundamentally divided. The USA, the UK and Australia, indeed, provided legal justifications for their use of force; they all invoked authorization to use force under existing SC resolutions on Iraq, i.e. implied or revived authorization under Resolutions 1441 (2002), 687 (1991) and 678 (1990). The USA, arguably, also invoked self-defense. It sought to justify the attack as ‘preemptive’ defense against the threat of Iraq’s WMD, and had also implied that it was justified as self-defense under the ‘ongoing war on terror’ following the 9/11 attacks on the USA. The UK especially also employed the rhetoric of a humanitarian intervention in the run-up to the invasion.

However, China, Russia and France all argued that the use of force was not justified under international law. As did many others. International lawyers and scholars were equally divided on the question of the legality of the use of force.

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1 The thesis builds upon knowledge of the Iraq War obtained through the candidate’s work (in Norwegian) on the legitimacy of the war in ‘Oppgaveemne i internasjonale studier’ (2009).
2 President Bush (2003a).
3 Hereinafter the Coalition.
6 While the USA, in an effort to boost the legitimacy of the invasion, proclaimed that it was acting with the support of a ‘Coalition of the Willing’ comprised of about forty-four states, only the USA, the UK, Australia and Poland contributed combat forces; other states provided mere political or logistical support (Murphy, 2003 p. 428).
In the subsequent years, the 2003 invasion has been the subject of numerous national inquiries, including the recent Report of the UK Iraq Inquiry. However, the Inquiry’s mandate did not include an assessment of the legality of the use of force; that was left to an international court. Rather the Inquiry assessed the legitimacy of the UK government’s policy-decision to go to war against Iraq. Nonetheless, it did conclude that “the circumstances in which it was decided that there was a legal basis for UK military action” were unsatisfactory; that all peaceful options for disarmament of Iraq had not been exhausted; and that the UK action had undermined the Council’s authority.

As to the court-assessment of the legality envisioned in the Inquiry, this has so far not taken place. Accordingly, no international court has authoritatively concluded on the question of the legality _jus ad bellum_. While there have been attempts to initiate Court proceedings on the legality on the national level, these tend to have faulted for jurisdictional reasons.

This is the topic of this thesis. It will review the legality of the invasion under the use of armed force in public international law, basing the assessment on the factual information available at the time of invasion.

### 1.2 Research Questions

In order to analyze the legality of the Iraq invasion under the law of recourse of armed force, it is necessary first to account for the invoked legal basis and the justifications given by the Coalition states. What was the legal basis formally invoked by the Coalition states, and were other legal justifications implied?

The second and fundamental legal issue assessed in the thesis is whether the rules on the recourse of force under international law could justify the invasion. Based on the invoked and/or implied legal justifications, the thesis will analyze the issue under three main legal bases: (1) authorization to use force under SC Resolutions, adopted under Article 42 of the UN Charter, (2) self-defense under Article 51 of the UN Charter and customary international law and (3) a possible and autonomous right of humanitarian intervention.

### 1.3 Scope of Research Questions

The Iraq war of 2003 raises many issues within the law of armed force. It did not only raise issues as regard the law of recourse of force (_jus ad bellum_), but also issues regarding the

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7 UK Iraq Inquiry, 6 July 2016.
8 UK Iraq Inquiry (2016a).
10 While there in the USA was post-war criticism of the flawed intelligence the decision to go to war rested on (cf. US Senate Report 2004), and a shift in the US Iraq policy under the Obama Administration, the question of the legality of the invasion remained untouched by official inquiries.
11 In the _Al-Jedda Case_ (2011), the ECtHR considered the issue of the legality of the internment in Iraq of a British citizen under human rights law, but made no pronouncements on the legality _jus ad bellum_.
rules or normative principles governing peace-making after conflict (*jus post bellum*) and the law governing the conduct of hostilities (*jus in bello*).\(^\text{13}\) However, due to limitations of scope, this thesis will not assess the legality *jus in bello* and *jus post bellum* of the conflict.

Furthermore, the purpose of the thesis is to assess whether the specific use of force against Iraq in 2003 was lawful, not to account for the rules on the use of force in general or the legality of use of force in other conflicts.

### 1.4 Methodology and Legal Sources

From a legal positivist perspective, the thesis will conduct a case study of the legality *jus ad bellum* of the Coalition invasion of Iraq, based on the legal sources which are applicable in international law.

While the legal sources mentioned in the ICJ Statute (1945)\(^\text{14}\) Article 38(1) formally bind only the Court’s application of the law, the enumeration of sources given there is generally recognized as the relevant sources to be applied in international law.\(^\text{15}\) Accordingly, the thesis applies treaties, international custom and general principles of law as the principal sources, and judicial decisions and legal publications as the subsidiary sources.

Throughout the thesis, it is necessary to interpret treaties, especially the UN Charter. The rules of interpretation are set forth in the VCLT (1969)\(^\text{16}\) Article 31 to 33. Under the general rule of interpretation in Article 31 a treaty is to be interpreted in accordance with “the ordinary meaning” of the terms of the treaty “in their context”, i.e. the textual approach. But the text should also be interpreted in the light of the “object and purpose” of the treaty, i.e. the purposive approach. This entails to seek the interpretation that most effectively fulfills the object and purpose of the treaty (the principle of effectiveness).\(^\text{17}\) Thirdly, the text should also be interpreted “in good faith”, implying a loyal interpretation that seeks the real intentions of the drafters, i.e. the subjective approach. While there is no hierarchy between these methods of interpretation implied in the provision, the ICJ has held that reliance on the text of a treaty is the most important.\(^\text{18}\)

However, as regard the interpretation of the UN Charter, as the constituent treaty of the UN, some special principles apply. Firstly, special significane should be given to the purposive approach, i.e. to seek the construction of the text that best fulfills the object and purpose of the Charter and of the UN.\(^\text{19}\) Secondly, since the Charter must be regarded as a living instrument, the subsequent practice of not only the parties to it, but also the UN organs themselves can be of significance for the interpretation in cases where the text is ambiguous or silent, cf. VCLT (1969) Art. 31(3)(b).\(^\text{20}\)

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\(^\text{13}\) As to the terminology and conceptualization of the categories, cf. Stahn (2007).
\(^\text{14}\) Statute for the International Court of Justice (ICJ), June 26, 1945.
\(^\text{15}\) Evans (2014) p. 94.
\(^\text{17}\) Evans (2014) p. 178.
While treaties only bind the parties, a rule of customary international law is, as a main rule, binding on all states. However, both the Coalition states and Iraq were, of course, parties to the UN Charter, which is thus applicable. In some instances, however, the Charter must be supplemented by customary law, especially the rule of self-defense under UN Charter Article 51.

Whether a customary rule exists, depends on two main requirements, cf. the ICJ Statute (1945) Article 38(1)(b). First, there must be a “general practice”. Under the jurisprudence of the ICJ this entails that the state practice must be adhered to by a significant number of states (“widespread”), be reasonably consistent (“constant and uniform”) and normally – but not necessarily - be adhered to over a certain period. The second requirement is that the practice must have been “accepted as law”, i.e. adhered to by states in the belief that it is a binding rule (opinio juris).

With respect to the case-law on the use of force applied in the thesis, the decisions of the ICJ are not binding precedents, cf. ICJ Statute (1945) Article 59. The case-law is also generally sparse, due to the consent-based jurisdiction of the Court and the fact that the use of force is a controversial issue. Yet, those decisions and advisory opinions the Court has passed, are significant authorities when interpreting the UN Charter’s provisions on the use of force and play a significance part in the identification of the rules on the use of force, most notably relating to the rule of self-defense.

As to the legal theory, in general, there are two main schools as regard the law of recourse of force – those arguing that the prohibition to refrain from use of force under the UN Charter Article 2(4) must be strictly interpreted, and those (mostly US writers) arguing that it is a limited prohibition which may be interpreted narrowly to allow the use of force beyond the text of the explicit exceptions of the Charter. There is extensive scholarly work from both point of views on the issue of the Iraq invasion (2003), and the thesis will consistently attempt to conduct an analysis of the arguments on both sides, and decide what is ‘the better view’.

1.5 Thesis Outline

The thesis first gives an overview of the invoked legal basis and justifications given or implied as the basis for use of force against Iraq (chapter 2). In chapter 3, it is assessed whether the invasion of Iraq was lawful under the rules on the use of force in international law - with a legal basis in either a SC authorization (chapter 3.2), the rule of self-defense (chapter 3.3) or in an autonomous rule of humanitarian intervention (chapter 3.4). In chapter 4, the thesis proposes a conclusion on the lawfulness of the invasion.

22 *North Sea Continental Shelf* (1969) para. 77.
2 The Legal Justifications for the Use of Force Against Iraq

2.1 Background and Relevant SC Resolutions on Iraq

As a background for the invoked legal basis and justifications and to analyze the legality *jus ad bellum* of the invasion, it is necessary first to account for the factual events and relevant SC resolutions leading up to the invasion.

In response to Iraq’s invasion of Kuwait on 2 August 1990, the SC adopted *Resolution 678* (1990), which determined that unless Iraq withdrew from Kuwait within 15 January 1991, UN Member States cooperating with Kuwait were authorized “to use all necessary means” to secure the withdrawal of Iraqi troops under Resolution 660 (1990) and “to restore international peace and security in the area”. When Iraq failed to withdraw, the allied forces started *Operation Desert Storm* on 17 January 1991, and drove Iraq out of Kuwait within a short period of time.\(^\text{24}\)

In the subsequent ceasefire resolution, *Resolution 687* (1991), the SC required Iraq to accept a series of strict and detailed terms, among others that it had to destruct its chemical and biological weapons, ballistic missiles and materials used to develop nuclear weapons, and to agree to inspections of the IAEA and the UN. Under operative paragraph (OP) 33 a formal ceasefire between Iraq and Kuwait and the cooperating UN Member States was to be effective from the time Iraq accepted the resolution’s provisions, something which Iraq did in a letter to the UN of April 6, 1991.\(^\text{25}\) Thus, the ceasefire formally entered in to force.

Meanwhile, in *Resolution 688* (1991) the SC condemned Iraq’s repression of the Iraqi civilian population in many parts of Iraq, including the attacks on the Kurds, which led to a flow of refugees across international borders. The Council noted that such consequences “threatened international peace and security in the region”, and demanded that Iraq immediately ended the repression.

Despite Iraq’s formal acceptance of the monitoring regime set up in *Resolution 687* (1991) and the weapons inspectors’ supervision of the destruction of a range of illegal weapons, there was great trouble over the implementation of the regime in subsequent years.\(^\text{26}\) In response to Iraq’s withdrawal of cooperation, the USA, the UK and France in 1993 launched air attacks on facilities connected with Iraq’s nuclear weapons program, a military intervention which was described publically by the UN Secretary-General at the time as having its mandate in Resolution 678 (1990).\(^\text{27}\) But the difficulties in securing Iraqi compliance with the ceasefire regime continued. In *Resolution 1154* (1998) the SC warned Iraq that any violation of the regime would have the “severest consequences”, and in *Resolution 1205* (1998) Iraq’s decision to cease its cooperation with the weapons inspectors was condemned as a “flagrant violation” of Iraq’s obligations. Subsequently the USA and the UK launched *Operation Desert Fox*, an extensive air-strike operation aimed at decreasing Iraq’s WMD capabilities.

\(^\text{25}\) S/22456.
In response to Iraq’s subsequent refusal to allow the weapons inspectors to return, the SC unanimously passed Resolution 1441 (2002). Under OP 1 the Council decided that Iraq “has been and remains in material breach” of its obligations under previous resolutions, particularly through its failure to cooperate with the weapons inspectors and to disarm as required under resolution 687 (1991). Iraq was afforded “a final opportunity to comply” with its disarmament obligations under an enhanced inspection regime (OP 2). It was to provide the inspectors and the SC with a complete declaration of its weapons programs, and any false statements or omissions would constitute “a further material breach” (OP 3 and 4). The SC was to convene immediately upon receipt of reports from the weapons inspectors, “in order to consider the situation and the need for full compliance” with the obligations “in order to secure international peace and security” (OP 12). In that context, the Council recalled that it had repeatedly warned Iraq that continued violations of its obligations would result in “serious consequences” (OP 13).

The UN weapons inspectors subsequently returned to Iraq and commenced inspections. Iraq submitted a lengthy declaration on the state of its weapons program, which maintained that Iraq did not possess any WMD.\(^{28}\) The head of the UN weapons inspectors, Hans Blix’s, reports to the SC in January 2003 concluded that Iraq had failed to provide adequate answers to questions about its weapons programs and that certain banned weapons were unaccounted for, but Blix also stated that the inspectors did not uncover any ‘smoking gun’ evidence that Iraq had resumed secret programs. Moreover, the inspectors had not found any WMD. At a further meeting of the SC, Blix also challenged several of the US Secretary of State Colin Powell’s claims on Iraqi efforts to evade its disarmament obligations, which was based on US intelligence and had been made in an address by Powell to the SC.

The USA and the UK argued that Iraq was in further material breach of its disarmament obligations, and made persistent diplomatic attempts to secure a second resolution explicitly or implicitly authorizing use of force. A draft resolution stipulating “that Iraq has failed to take the final opportunity afforded to it by resolution 1441 (2002)” was circulated among SC members on 24 February 2003.\(^{29}\) The draft was, however, withdrawn when it became clear that it would not attract sufficient support in the SC and would be vetoed by the permanent members of France and Russia if formally proposed. These states preferred instead to continue with the weapons inspections and to strengthen the inspection regime further.

Consequently, the USA and the UK decided to go ahead with military action against Iraq without a second resolution. Other members of the SC opposed the invasion. Both China and Russia rejected the US-UK case for force, and France stated in an address to the Council on 19 March 2003 that the use of force is legitimate only if it respects international law.\(^{30}\) Subsequently, also other NATO and EU states argued that force should not be used without express SC authorization.\(^{31}\)

\(^{28}\) Murphy (2003) pp. 419-422.

\(^{29}\) Murphy (2003) pp. 423-424. For the proposed paragraphs of the draft, see UK Iraq Inquiry (2016c) p. 80.


2.2 The Invoked Legal Basis and Justifications

2.2.1 SC Authorization

The principal invoked legal basis for the Coalition states’ invasion was authorization to use of force under the already existing SC Resolutions on the situation in Iraq.

2.2.1.1 The US Position

In the US letter to the SC on 20 March 2003, which informed the UN of the actions undertaken, the USA asserted that the use of force was authorized under existing Council resolutions, including Resolution 678 (1990) and 687 (1991). Resolution 687 imposed a series of obligations on Iraq, most importantly disarmament obligations, which were to be understood as conditions of the ceasefire established under it. The USA asserted that material breaches of these obligations removed the basis of the ceasefire and revived the authorization to use force under Resolution 678. The revival of Resolution 678 had been the basis for Coalition use of force against Iraq in the past and had been accepted by the Council, as evidenced by the Secretary-General’s announcements in January 1993 following Iraq’s former material breach of resolution 687.

In the present case the USA supported its view that the basis of the ceasefire had been removed and authority to use force under Resolution 678 (1990) was revived, upon the fact that the SC in Resolution 1441 (2002) had determined that Iraq continued to be “in material breach” of its disarmament obligations, recalled that Iraq would face “serious consequences” upon continued non-compliance and provided Iraq with “a final opportunity to comply”, but that Iraq had decided not to avail itself of this opportunity by committing additional breaches.

2.2.1.2 The UK and Australian Position

The UK and Australia followed a similar line in their letters to the SC, and both noted Iraq’s non-compliance with its disarmament obligations and referred to Resolution 678 (1990), 687 (1991) and 1441 (2002). But the letters did not concretize the legal basis for the invasion further. In response to domestic pressure for a legal justification, however, the UK and Australian Attorney-Generals elaborated on the legal case for military action, and took similar approaches. This thesis focuses primarily on the UK justifications of the two.

The UK position, clarified by the Attorney-General in a response to a parliamentary question and by the Foreign and Commonwealth Office in a paper on 17 March 2003, sets out a series of logical arguments for the authorization to use force based on the combined effect of Resolutions 678, 687 and 1441.

The argumentation emphasized that Resolution 678 (1990) authorized the use of force against Iraq “to restore international peace and security in the area”. Ceasefire Resolution 687,

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32 UN Doc S/2003/351.
which imposed continuing obligations on Iraq to eliminate its WMD in order to restore peace, *suspended* Resolution 678, but did *not terminate* it.

Consequently, when the SC under Resolution 1441 (2002) decided that Iraq was “in material breach” of its obligations under Resolution 687, the authorization to use force under Resolution 678 was *in principle capable of being revived*. The fact that Resolution 1441 in its preamble referred to Resolution 678 confirmed that Resolution 678 was still in force.

However, Resolution 1441 (2002) did not revive Resolution 678 immediately – there was no ‘automaticity’ as the USA argued. Iraq was given “a final opportunity” and the SC was to “consider” if Iraq had complied with its obligations. This did not mean, however, that no further action could be taken without a new resolution. If that had been the Council’s intention, it would have used the word “decide” instead of “consider”. The Council’s choice of the word “consider” was deliberate, and all that the resolution required was reporting and discussion by the SC of Iraq’s failure to comply. The Council’s consideration had taken place regularly since the adoption of Resolution 1441. Based on the UN inspectors’ statements and reports it was plain that Iraq had not complied as required with its disarmament obligations, as evidenced by the fact that no other member of the Council had questioned this conclusion. In these circumstances the authorization to use force under Resolution 678 was *revived*.

The UK also referred to the military actions in Iraq in 1993 and 1998 as precedents of the revived authority to use force under Resolution 678, and that the UN Secretary-General in his statement of January 1993 had accepted the legality of the military action in 1993. Additionally, the SC in Presidential Statements of January 1993 had determined that Iraq was in “material breach” of its obligations and warned of “serious consequences” if this continued.

In response to domestic political pressure, the Attorney-General’s internal advice to Prime Minister Blair of 7 March 2003 was made public in 2005. The advice elaborated on ‘the revival argument’, but took a more cautious and balanced approach. It concluded that “the safest legal course” was to adopt another resolution establishing that Iraq had failed to take its final opportunity offered by Resolution 1441, but that under ‘the revival argument’ a second resolution - explicitly authorizing force or not - was unnecessary. Accordingly, a “reasonable case” could be made that Resolution 1441 could revive the authorization in Resolution 678, provided there were “hard evidence” that Iraq had failed to take the final opportunity.

### 2.2.2 Self-Defense

#### 2.2.2.1 The US Position

The USA, arguably, also invoked self-defense as an alternative or combined legal basis for the invasion. The US letter to the SC stated that the actions were necessary “to defend the

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36 FCO paper paras. 5-7.
38 Meaning that a Court could conclude otherwise.
United States and the international community from the threat posed by Iraq”. But the USA did not concretize this position further in its letter to the SC.

In issuing his ultimatum to Saddam Hussein, President Bush, however, linked the forthcoming operation to a broad US concept of ‘preemptive’ (preventative) self-defense, by contemplating possible Iraqi attacks or Iraqi-supported terrorist attacks against the USA in the future and stating the need to meet those threats before they materialized. In the aftermath of the 9/11 (2001) attacks on the USA, the President in his first State of the Union Address in January 2002 had employed dramatic rhetoric about the dangers posed by the ‘Axis of Evil’: Iraq, Iran and North-Korea. In particular, he had expressed concerns that Iraq was developing WMD, which they might use themselves or supply to terrorist organizations hostile to the USA, seemingly with the intent to expand the ‘war on terror’ to cover Iraq. These concerns had culminated in the ‘Bush doctrine’ of ‘preemptive’ self-defense, which was elaborated on in the US National Security Strategy of September 2002. In this policy paper the USA asserted that the rule of self-defense had expanded far beyond its traditional scope as a response to an actual attack, and indicated that it also included preventative measures against future threats of attacks by terrorists and rogue states with WMD. Particularly, it was necessary to adapt the requirement of an imminent attack “to the capabilities and objectives of today’s adversaries”.

Thus, it could be argued that the USA implicitly justified the invasion legally in a broad doctrine of ‘preemptive’ self-defense against the threat of Iraq’s WMD and Iraqi-affiliated terrorists.

Additionally, the US administration also claimed publically - before, during and after the invasion - that there were ties between the Iraqi regime and Al Qaida, implicating that Iraq was ‘complicit’ in the 9/11 attacks even in the absence of a direct Iraqi involvement or an operational link to the attacks. Thus, the legal implication was that the invasion was justified as self-defense against the 9/11 attacks under the ‘ongoing war on terror’, based on the precedent of Afghanistan.

2.2.3 Humanitarian Intervention?

The Coalition states, especially the UK, also legitimized the invasion on humanitarian grounds. However, humanitarian intervention was not formally invoked as a legal basis in the respective letters of the Coalition states to the SC. It was relied on primarily as a moral justification.

Accordingly, the UK did not formally invoke the application in Iraq of its doctrine of an exceptional right of use of force to avert an overwhelming humanitarian catastrophe. Nonethe-

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40 UN Doc S/2003/351.
41 President Bush (2003a).
42 President Bush (2002).
less, the UK Prime Minister in the run up to the invasion publically employed the rhetoric of a humanitarian intervention.\textsuperscript{47} The SC had also adopted Resolution 688 (1991), which was passed with a humanitarian end.

This raises the issue as to whether a humanitarian intervention legally could have justified the 2003 invasion if invoked, based on an autonomous right for individual states to use force to avert a humanitarian catastrophe and/or an implied authorization by the SC in Resolution 688 (1991).

3Was the invasion Lawful under the Rules on the Use of Force?

3.1 The Obligation to Refrain from Use of Force in UN Charter Article 2(4)

The starting point for the assessment of the legality of use of force in Iraq is UN Charter Article 2(4), which prohibits the threat or use of force by states in their international relations. The prohibition is a fundamental treaty obligation as regard the rules on the use of force, but is also generally recognized by states and commentators alike as customary international law, and even as \textit{jus cogens}.\textsuperscript{48}

While states disagree on the exact scope of the prohibition to use force, the article taken in isolation is framed as an absolute prohibition with only two \textit{express} exceptions in the UN Charter, i.e. SC authorization under UN Charter Chapter VII (Article 42) and self-defense under Article 51. The \textit{jus cogens} nature of the prohibition entails that it is a peremptory and non-derogable norm, which states - beyond the Charter’s explicit exceptions – in general cannot derogate in treaty or customary law, cf. VCLT (1969) Article 53 and 64.

3.2 SC Authorization

3.2.1 Introduction

In relation to the 2003 invasion, the first issue is whether the invasion was authorized in SC Resolutions 1441 (2002), 687 (1991) and 678 (1990) - separately or combined. Before the issue can be analyzed, it is necessary to examine how SC resolutions should be interpreted.

3.2.2 Interpretation of SC Resolutions

There are no codified rules and little authority on the interpretation of SC resolutions.\textsuperscript{49} Such resolutions are not regarded as a formal legal source, cf. the enumeration of sources in Article 38(1) of the ICJ Statute (1945). While certain decisions of the SC are legally binding upon the


\textsuperscript{49} Wood (1998) pp. 74 and 86.
member states, their legal force derives from the UN Charter as a treaty, since the member states agree to accept and carry out such decisions under Article 25 of the UN Charter.\(^{50}\)

Thus, as a starting point, the principles of interpretation which applies to treaties should, by extension or analogy, also be applied to the interpretation of SC resolutions.\(^{51}\) But one should take into consideration that such resolutions are passed by the SC as a political organ in the context of a specific function and mandate conferred to it by the UN Charter\(^ {52}\), and that such decisions are not treaties in a formal legal sense.\(^ {53}\) Thus, the analogy to the law of treaties should not be drawn too far; the more ‘legislative’ rather than contractual character of binding SC resolutions require a somewhat different interpretative approach than what applies for treaties.\(^{54}\)

While most UN member states would turn to the principles of interpretation under the law of treaties when constructing whether SC resolutions authorize use of force, states disagree on the scope of the principles’ application. An analogy of the general rule of interpretation in the VCLT (1969) Article 31 entails that great significance should be given to the wording (“the ordinary meaning”) of the terms of the resolution “in their context”, i.e. the textual approach. But under the analogy the text should also be interpreted in the light of the resolution’s “object and purpose” (the purposive approach), i.e. to seek the interpretation that most effectively fulfills these. However, in the event of a conflict between the agreed text and supposed purposes of a resolution, it appears most states would give precedence to the text.\(^ {55}\) Thus, the wording of the terms under a purposive approach should not be ‘stretched’ beyond the plausible intensions of the SC in order to allow the use of force, and broad language that might be read to encompass force should be interpreted narrowly.\(^ {56}\) Moreover, an analogy of Article 31(1) implies a loyal interpretation of the resolutions “in good faith”, indicating that there should be a real majority of the SC behind any decision to use force.\(^ {57}\)

In any event the UN Charter purpose of resolving disputes by peaceful means\(^ {58}\) presumes that the use of force should have a clear and unambiguous indication in the text of the resolution.\(^ {59}\) Since SC authorization is an exception to the general prohibition of the use force under UN Charter Article 2(4), which is recognized as non-derogable (jus cogens), states should not be able to derogate and erode the prohibition by invoking and unilaterally enforcing unclear or ambiguous (implied) authorizations to the use force in SC resolutions.\(^ {60}\) The need for member states to be able to predict their legal position, i.e. the rule of law, further supports the requirement of a clear basis for the use of force; if the SC imposes obligations on states they

\(^{50}\) Evans (2014) p. 113.


\(^{52}\) The maintenance of peace and security under UN Charter Art. 24, exceptionally entailing decisions involving the use of force under Art. 42.


\(^{54}\) Simma (2012) p. 1264.


\(^{58}\) Cf. UN Charter Art. 1(1) and 2(3).


should have a fair warning of the effects if they do not comply.\textsuperscript{61} Such a requirement prevents states from arbitrarily deducing and enforcing implied authorizations to use force in their own national interest.

Under an analogy of VCLT (1969) Article 31(3) subsequent resolutions (or other formal acts) and subsequent practice of the Council should also be considered. If they express or establish an agreement on the interpretation or shed some light on the intentions of the Council, they are of great significance as ‘authentic’ interpretations.\textsuperscript{62} Under the analogy the preparatory work of the resolutions, however, is only relevant as a supplementary means of interpretation, i.e., primarily as a supporting argument confirming the meaning resulting from the general rule of interpretation.\textsuperscript{63} While the political nature of the resolutions could indicate that greater significance should be given to the travaux préparatoires compared to treaty interpretation, the fact that Council resolutions are directed at several member states not participating in the decision-making process, the lack of published records and the negotiations being conducted in private, indicate lesser significance and a more objective approach.\textsuperscript{64}

3.2.3 Authorization to Use Force in SC Resolution 1441 (2002)

The first question is whether Resolution 1441 (2002) alone authorized use of force against Iraq. This depends on an interpretation of the resolution.

Resolution 1441 (2002) was adopted under Chapter VII of the UN Charter. In its preamble\textsuperscript{65} the SC recalled all previous relevant resolutions, including Resolution 678 and 687. It recalled that Resolution 678 authorized member states to use force (“all necessary means”) to implement Resolution 660, i.e. Iraq’s withdrawal from Kuwait, and all relevant subsequent resolutions and “to restore international peace and security in the area”. It further noted that resolution 687 imposed obligations on Iraq as a necessary step for achieving the objective of “restoring international peace and security in the area”. The reference to these resolutions could indicate that the SC intended that it was a continuous situation from the previous resolutions onwards to Resolution 1441 (2002), which recognized that Iraq’s non-compliance of its obligations posed a threat to the peace and determined that Iraq was “in material breach” of Resolution 687.\textsuperscript{66} In this situation it could be argued that the preambular reference in Resolution 1441 (2002) to the use of “all necessary means”, authorized the use of force against Iraq to restore the peace.\textsuperscript{67}

However, such an interpretation is unconvincing. Authorizations to use force should, as pointed out above, be clearer; the preamble only recalled a previous authorization, and Resolution 1441 (2002) did not decide that force may be used. And a mere recognition of a threat to the peace is neither sufficient to authorize force; UN Charter Article 39 also requires a SC deci-

\textsuperscript{63} Cf. VCLT (1969) Article 32.
\textsuperscript{65} Cf. preambular paras. 1, 4 and 5.
\textsuperscript{66} Cf. preambular para. 3 and OP 1.
\textsuperscript{67} Alternatively, that the reference implicitly signified revival of the authorization in Resolution 678 (cf. chapter 3.2.4.1)
sion on the measures to be taken to maintain or restore the peace. It should also be the operative part of the resolution that authorizes such an intrusive measure as military force, particularly with consideration for the member states need to be able to predict their legal situation. The preambles should also be read with caution since they tend to be used as a dumping ground for proposals not accepted as a part of the operative paragraphs during the negotiations. Thus, a more plausible interpretation of the preambular references to Resolution 678 and 687, is that they confirmed the purposes with these resolutions and that they still were in force.

Under operative paragraph 8, however, the Council decided that Iraq should not take hostile acts directed against UN or IAEA representatives or “any Member State taking action to uphold any Council resolution”. But this was hardly an implicit admittance by the Council that the member states could take action in the form of military force. In any event an authorization to the use of force should have a more explicit indication.

Neither the Council’s reference in paragraph 13 to its repeated warnings that Iraq would face “serious consequences” upon continued violations, should be interpreted as authorizing force itself. While the wording could be read to indicate military measures, the paragraph was formulated as a recollection of earlier warnings, not as an independent authorization to use force. It should be interpreted narrowly. Additionally, paragraph 13 stipulated that the warnings of serious consequences were to be read “in that context” that the Council under paragraph 12 was to convene to consider the situation and the need for compliance. This indicates that it was not until the time the Council convened there could be talk of authorizing use of force, and then either in a further resolution and/or by relying on authorization in existing resolutions.

At the time of adoption, the SC members also agreed that Resolution 1441 (2002) alone was not sufficient to authorize force, as confirmed by the SC records. China, Russia and France and other members would not have agreed to the resolution if it had contained an authorization of use of force itself. And even the USA and the UK did not argue that resolution 1441 (2002) alone authorized force. Decisively, the former practice of the Council had also been to adopt an explicit authorization, using the phrase “all necessary means”, when it intended to authorize use of force, such as in resolution 678 (1990).

Accordingly, Resolution 1441 (2002) alone could not authorize the use of force.

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72 S/PV.4644 (2002).
75 S/PV.4644 and 4625 (2002).
77 UN Docs S/2003/351, FCO paper para. 1.
3.2.4 Authorization to Use Force under the Combined Effect of SC Resolutions 1441 (2002), 687 (1991) and 678 (1990)

The next issue is whether the combined effect of Resolutions 1441 (2002), 687 (1991) and 678 (1990) could authorize the use of force against Iraq. As regard SC authorization, it was this that was invoked by the Coalition states as the legal justification for the use of force.

The case for force as it was invoked under ‘the revival argument’ rested on the following crucial assertions and assumptions.

Firstly, that Resolution 1441 (2002) in general justified the revival of the explicit authorization to use force in Resolution 678 (Chapter 3.2.4.1).

Specifically, the Council’s finding in Resolution 1441 (2002) of a “material breach” of Iraq’s ceasefire obligations under Resolution 687 (1991), signified that the Coalition states could terminate the ceasefire and thus revive the suspended authorization to use force in Resolution 678 (1990) (Chapter 3.2.4.2).

Furthermore, the Coalition states assumed that Resolution 678 (1990) also could authorize the use of force against Iraq in 2003 (Chapter 3.2.4.3).

Finally, the Coalition states asserted that the SC in its previous practice had accepted that material breaches of the ceasefire resolution revived the authorization to use force under Resolution 678 (1990), and that this understanding also applied to the situation in 2003 (Chapter 3.2.4.4).

3.2.4.1 Did SC Resolution 1441 (2002) Revive the Authorization to Use Force in SC Resolution 678 (1990)?

The first issue is whether Resolution 1441 (2002), on the interpretation, justified the revival of the authority to use force in Resolution 678, and whether it required a second decision before force could be authorized.

It is clear Resolution 1441 (2002), a diplomatic compromise between the Council members, neither expressly revived or rejected the revival of authority to use force in previous resolutions.

The preamble recalled the authorization of use of force in Resolution 678, recognized the threat that Iraq’s non-compliance of Council resolutions posed to peace and recalled that Resolution 687 imposed obligations on Iraq as necessary to achieve the objective of restoring peace. However, one should, as argued above, be careful to read too much into the preamble; a revival of use of force should also in principle be deduced from the operative paragraphs of the resolution and have a more explicit statement. The Council’s finding that Iraq had been and remained “in material breach” of its obligations and its decision that certain continued violations would constitute a “further material breach” under operative paragraph 1 and 4, however, could implicitly be read as indicating revival of use of force. But this is the case only if one accepts the US-UK premise that the ending of the ceasefire and revival of force
was the intended legal consequence of this term. The same applies to the warning of “serious consequences” under paragraph 13.

Under operative paragraph 2 the Council decided that Iraq was given a “final opportunity” to comply with its obligations. This would have the effect of suspending any intended legal consequences of the determination of a material breach under paragraph 1. While the USA seemed to argue that the Council’s determination under paragraph 1 remained valid, the UK seemed to acknowledge that paragraphs 4 and 12 indicated that an additional Council consideration was to be made under paragraph 12 before any revival of force. There was, however, no further formal determination by the Council of an Iraqi material breach, other than those in paragraph 1 and 4. Nor a determination that Iraq had failed to take its final opportunity. This would imply that the procedural requirement to revive force, i.e. final Council determination, was not satisfied.

The UK proceeded to argue, however, that all that was needed was a Council discussion, which had taken place regularly since the adoption of the resolution, and that it was plain Iraq continued to be in material breach.

The question then is whether paragraph 12 required a further formal SC determination before use of force could be authorized or whether a Council discussion was sufficient.

The word “consider”, as opposed to “decide”, could as the UK argued indicate that all that was required under paragraph 12 was that the Council would meet to discuss the situation and the need for Iraqi compliance, not that a further Council decision had to be made in a resolution or by another formal act. The Coalition argued the word was chosen intentionally to leave the possibility open for use of force. The UK-US attempts to secure a second resolution, on the other hand, could be taken to indicate that they at the time in fact were of the opinion or agreed that a second decision was required to authorize force. They made, however, clear this was not the case; the purpose was to increase the political and moral legitimacy in the event of use of force.

Nevertheless, the word “consider”, especially when taken with the word “assessment” in paragraph 4, could also be taken to signify that a further decision by the Council was necessary. Moreover, the phrase “in order to secure international peace and security” in paragraph 12 could indicate that the Council was to exercise more than a deliberative role, since it reflected the special responsibility of the Council to decide measures to maintain international peace and security under Article 39 of the UN Charter. Additionally the word “secure”, as opposed to “restore”, indicate that the Council at that stage had not conceded to use of force without a further decision. Significantly, the UK interpretation that a Council discussion was sufficient

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79 Cf. chapter 3.2.4.2.
81 UN Doc S/2003/351, FCO paper paras. 10-11.
83 UK Attorney-General (2003b) para. 9, FCO paper paras. 11-12.
84 FCO paper para. 11.
would also reduce the role of the Council under paragraph 12 to a mere procedural formality, since it would only require the Council to meet for a discussion, but having in effect delegated the authority to decide to use force to the member states, even where several members of the Council opposed the use of force. That the other Council members had conceded to such an effect, which undermined the authority and purpose of the Council, seemed unlikely.

From the statements in the official records at the time of adoption of the resolution, it is also clear many Council members expressed or indicated that a second decision was required to authorize use of force.

Accordingly, paragraph 12 - a compromise formulae - at least seemed to imply a further Council resolution or some other form of formal determination before use of force could be revived. A mere regular discussion after the adoption of the resolution on the matters of further material breach and Iraq’s final opportunity would thus not, as the UK claimed, be sufficient to revive the authority to use of force. In any event, the UK implication that the Council had settled the matter in its discussions was flawed. That none of the Council members in the discussions had doubted the Coalition’s conclusion that Iraq was non-compliant with its disarmament obligations could not amount to a Council agreement on the matter of further material breach, and the Council could also not agree on a second resolution stipulating that Iraq had failed to take its final opportunity. In fact, it therefore seemed both the USA and the UK asserted a right for themselves to determine these matters in the absence of a further decision by the Council. This essentially unilateral determination was incompatible with the systemic functioning of the Council and with Resolution 1441 (2002), since the Council had not delegated its determination to the individual member states.

Consequently, Resolution 1441 (2002), on balance, did not justify the revival of the authority to use force in previous resolutions. While the Council had decided that Iraq was “in material breach”, it had given Iraq a final opportunity, but never formally determined or agreed that this opportunity was exhausted. On the other hand, Resolution 1441 neither expressly required a second decision before use of force could be authorized, but some form of formal determination was implied.

In other words, Resolution 1441 (2002) did not strengthen, but arguably weakened ‘the revival argument’.

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89 S/PV.4644 (2002).
90 An alternative view is that paragraph 12 left the position open. Thus, Resolution 1441 neither confirmed or rejected the revival of use of force in previous resolutions (Ulfstein, 2003 p. 459).
92 The revival doctrine - based on an advice given in 1992 by the then UN Legal Advisor, Carl-August Fleischhauer, to the Secretary-General regarding use of force against Iraq - stressed a pre-condition for use of force was that the Council were in agreement that there was a material breach. The assessment was to be made by the Council itself, and not be left for the subjective evaluation of the individual member states (UK Iraq Inquiry, 2016c pp. 23-24)
3.2.4.2  Back to the Future I: “Material breach” of SC Resolution 687 (1991)

Despite the general implications of Resolution 1441 (2002), the Coalition states asserted that the Council’s finding of a “material breach” of Iraq’s ceasefire obligations under Resolution 687 was sufficient to revive the authorization to use force in Resolution 678.

The argument was that since the SC in Resolution 1441 (2002) determined that Iraq was in “material breach” of its ceasefire obligations under Resolution 687 (1991), the ceasefire ended. Thus, the suspended authorization to use force under Resolution 678 (1990) revived. Consequently, the Coalition states, as UN member states, could invoke and enforce the breach in 2003.

It was undisputed that Resolution 687 (1991) alone did not authorize the member states to use force upon breaches of the ceasefire obligations. This resolution did not contain an explicit authorization to use force.

The issue then is whether the ceasefire under Resolution 687 lapsed and the authorization to use force under Resolution 678 revived, since the SC in Resolution 1441 (2002) decided that Iraq was in “material breach” of Resolution 687.

Neither operative paragraph 1 or 4 of Resolution 1441 (2002) defined the term or provided what the legal consequences of a “material breach” were to be. The term, however, derives from the law of treaties. While the Coalition itself not expressly drew the analogy, the material breach argument entailed an argument that the Council by using this term intended that the rules on termination and suspension of treaties under Article 60 of the VCLT (1969) should apply in the event of a material breach of ceasefire resolution 687 (1991). This would, it was argued, enable the Coalition states to terminate or suspend Resolution 687 (1991).

In the multilateral context under VCLT (1969) Article 60(2), a material breach of a treaty can result in the suspension of the operation of the treaty (in whole or in part) or its termination. However, there is no automaticity and such legal consequences can only be invoked either unanimously by the other parties to the treaty (section 2(a)), by a party “specially affected” by the breach (Section 2(b)), or by any other party other than the defaulting State if the treaty is of such a character that “a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty” (Section 2(c)).

The question then is whether the Coalition states could terminate or suspend Resolution 687 based on the analogy.

The starting point is that the law of treaties in general does not apply to SC resolutions. But if one is to test the analogy, the question under it is whether a party to Resolution 687 (1991) could decide to suspend or terminate it. This raises the essential issue as to who should be regarded as the equivalent to a “party” to the ceasefire resolution under the analogy.

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The most plausible analogy of Article 60(2)(a) would be that the SC decided to suspend or terminate the resolution. The Council, however, under Resolution 1441 (2002) only decided that Iraq was in “material breach”; it did not expressly suspend or terminate Resolution 687 (1991). Iraq was given a “final opportunity” and the Council never formally determined that this opportunity was exhausted.

Under the analogy of Article 60(2)(b) the question would be whether the Coalition member states could be regarded as “specially affected” by the Iraqi breaches of the ceasefire resolution, and thus unilaterally could suspend it. This was, however, questionable. A more plausible interpretation would be to regard the states in the Middle East as specially affected, since the resolution was aimed primarily at neutralizing an Iraqi military threat against other Middle Eastern countries. True, the USA had a special role in Iraq since the military invasion in 1991 was US-led, but it is difficult from that to argue forcefully that the USA consequently was specially affected or threatened by Iraq due to its violations of the disarmament obligations. The same applies to the fact that the USA had suffered the 9/11 attacks, something which also at the time of invasion did not have a clear link to Iraq and an Iraqi threat.

An analogy of Article 60(2)(c) would imply that all UN member states (“any other party”), save Iraq, unilaterally could suspend the ceasefire resolution since the Iraqi material breaches of a ceasefire authorized by the SC radically changed their position and was a threat to all member states. However, that Iraq’s violations of the ceasefire was a threat to all the member states was arguable; the Council under Resolution 1441 (2002) recognized in the preamble the threat to peace posed by Iraqi breaches, but had in the operative part opted the formula that it would convene to consider the situation as regarded “international peace and security” (OP 12).

Nonetheless, it was also argued that Resolution 687 (1991) in fact established an interstate ceasefire agreement, and that under VCLT (1969) Article 60(2)(b-c) the defaulted state parties to the ceasefire agreement were entitled unilaterally to invoke an Iraqi material breach and suspend the agreement. Under the ceasefire agreement, it was argued, the UN itself was not a party; the parties instead were “Iraq and Kuwait and the [UN] Member States cooperating with Kuwait in accordance with Resolution 678 (1990)”, cf. operative paragraph 33 of Resolution 687 (1991). When the ceasefire was suspended by a state party to it, the Coalition was free to resume the authority to use force under Resolution 678 (1990). Additionally, it was argued that Resolution 687 (1991) only established an armistice, unlike a peace treaty it did not terminate the state of war. Thus, the armistice could be denounced and hostilities resumed under Hague Convention IV (1907) Article 40.

97 Hoffmann (2002) p. 27.
98 Kirgis (2002).
101 Yoo (2003) pp. 568-569. Yoo was Deputy Assistant Attorney-General at the U.S. Department of Justice at the time.
103 Convention respecting the Laws and Customs of War on Land, October 18, 1907.
These arguments are, however, unconvincing and seem to be rooted in an antiquated view of the exclusivity of states as subjects of international law. The ceasefire was established in a SC resolution and was thus not an ordinary and independent interstate ceasefire agreement between Iraq, Kuwait and the other states of the coalition in the Gulf War, but a ceasefire resolution established by an international organization, the UN, which under international law for a long time has been recognized as a legal subject in its own right.⁴ Thus, the obligations on Iraq derived from the ceasefire resolution, applied between Iraq and the UN, not between the individual member states themselves. This is also evident under paragraph 33 of Resolution 687 (1991), since Iraq was to accept the ceasefire conditions towards the SC, not towards the member states. Thus, the member states could not unilaterally invoke Iraqi breaches of its obligations vis-à-vis the UN as a ground for suspension based on the ceasefire as an interstate agreement.

In any event, the analogy to the law of treaties in this area has been forcefully rejected from a more fundamental and procedural perspective. As Ulfstein argues, while treaties are concluded between formally equal parties, which retain reciprocal control over the operation of the treaty, SC decisions are established by an organ of an international organization.⁵ Thus, it should be the organ which handed down the original decision, i.e. the SC, which decides whether a resolution is suspended or terminated.⁶ The Council on this issue had decided that the conditions for suspension or termination of Resolution 687 (1991) were satisfied, through its finding that Iraq was in “material breach” of its obligations, but it must also be for the Council to determine whether the legal consequences, suspension or termination, were to be enforced where there was a binding ceasefire imposed by the Council.⁷ Since the Council had not delegated this decision to the member states, these could not unilaterally enforce such legal consequences and end the ceasefire.⁸ Otherwise, the individual member states would arrogate power that properly resided with the SC.⁹

Accordingly, the conclusion is that the Council’s finding of a material breach in Resolution 1441 (2002) did not suspend or terminate Resolution 687 (1991). The ceasefire resolution was still effective; it still suspended the mandate to use force under Resolution 678. Consequently, the authority to use force under Resolution 678 (1990) neither could revive and be invoked by the Coalition states against Iraq in 2003.

### 3.2.4.3 Back to the Future II: Could SC Resolution 678 (1990) Authorize the Use of Force Against Iraq in 2003?

If one accepts that Resolution 687 (1991) was suspended or terminated because of a “material breach”, the secondary issue whether Resolution 678 (1990) authorized the use of force against Iraq in 2003 arises.

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Resolution 678 (1990), passed in response to Iraq’s invasion of Kuwait, clearly authorized use of force (“to use all necessary means”) to secure the withdrawal of Iraqi troops under Resolution 660 (1990), i.e. to oust Iraq from Kuwait upon Iraq’s failure to withdraw within the specified time frame.

The question, however, is whether Resolution 678 (1990) also could be understood as to have authorized the Coalition states’ use of force to enforce Iraqi material breaches of ceasefire Resolution 687, based on the authorization in operative paragraph 2 of Resolution 678 (1990) for the UN member states to use force “to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area”.

On the face of it, this authority to use force is very extensive and open-ended as regard its material and temporal reach. There is no explicit time limit and the authority to use force under Resolution 678 (1990) was never explicitly withdrawn by the SC. Thus, two interpretational issues arise as regard the scope of application of the mandate. Firstly, whether the authority to use force should be interpreted to be confined to the purpose of driving Iraq out of Kuwait, and secondly, whether the authority embodied a temporal limit on the use of force. How extensive can the material reach of SC authorizations to use force be taken to be and how far can authorizations to use force reasonably be taken to reach in time?

Based on a purely textual approach and taken in isolation the phrase “and all subsequent relevant resolutions” indicates that the authority to use force applied to all subsequent resolutions that prescribed obligations on Iraq as regard peace and security in an unlimited future. The Council had passed several resolutions that prescribed obligations on Iraq subsequent to Resolution 678, including Resolution 687 (1991). However, that the SC intended that use of force was authorized to enforce obligations in all these resolutions seems unlikely and constitutes an unreasonable broad interpretation. Firstly, resolution 678 (1990) did not prescribe an express condition of a material breach, which would imply that the member states could use force even where there were minor breaches of the subsequent resolutions. Secondly, it neither stipulated what measures to be used as regard different breaches, implying that it would be left to the member states’ discretion to decide military measures. Thirdly, the authority would be given to all UN member states cooperating with Kuwait, implying that all these could use force upon Iraqi breaches.

The scope would, however, be more limited if the phrase and authority to use force was read to include only Resolution 687 (1991), as the Coalition seemed to presume. When Resolution 1441 (2002) determined that Iraq was in “material breach” and referred to Resolution 678 (1990) in its preamble, and the Council had considered the Iraqi compliance, the arbitrary character of the authorization in Resolution 678 to use force was reduced and use of force could be revived. However, from the perspective of Resolution 678 (1990), a future cease-

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110 Mine italics.
fire resolution was not given a special position; it only referred to “all subsequent resolutions”. Additionally, the authorization would still be very broad as to who could enforce it.\textsuperscript{116}

If one reads the phrase in relation to its first part ("to uphold and implement resolution 660") a more plausible interpretation of “and all subsequent resolutions” seemed to be that the Council intended a reference to all resolutions passed between Resolution 660 and 678 (1990).\textsuperscript{117} This interpretation also correlates with preambular paragraph 1 of Resolution 678 (1990), which expressly mentioned all resolution from 660 to 677, and with the situation when Resolution 678 (1990) was passed - where Iraq was standing in Kuwait and the focus was to repel the Iraqi attack, and when it was not possible to predict neither the factual or legal situation after Iraq was driven out of Kuwait.\textsuperscript{118} Moreover, the phrase “Member States co-operating with the Government of Kuwait” in operative paragraph 2 also indicates it was the situation in Kuwait that was the real purpose behind the authority to use force. Given that a SC authorization is an exception to the principle of the prohibition of the use of force and the \textit{jus cogens} nature of this principle, it also seems implausible that a member state could invoke a previous authorization several years after it was passed in relation to the concrete conflict situation in 1990, which aroused in another context and was based on different circumstances than in 2003.\textsuperscript{119}

The next issue is whether the phrase “and to restore international peace and security in the area” under Resolution 678 (1990) should be read as an independent ground to use force, such as to authorize the invasion in 2003, or whether the phrase was related to the purpose of repelling the Iraqi attack on Kuwait. It was this phrase the Coalition seemed to rely most heavily on. Australia argued explicitly that there was no finite time limit embodied in the authorization under resolution 678 (1990), and that its purpose was not confined to restoring the independence and sovereignty of Kuwait.\textsuperscript{120}

Again, the wording is very broad and a textual approach could indicate that the member states were authorized to use force to restore peace and security in the area - i.e. Iraq or even the entire Middle East - in the unlimited future. The word “and” could also indicate that the phrase was an additional ground to use force, independent of the purpose of driving Iraq out Kuwait. However, such an interpretation of Resolution 678 (1990) is incompatible with the purposive approach. Firstly, the authorization would be very extensive; it would give several member states a broad authorization to use force to restore peace and security. It seems unlikely this was what the Council intended. Secondly, from the perspective of Resolution 678 (1990), the authority would neither be linked to (material) breaches of adopted or future resolutions, but to a vague criterion of restoring peace and security.\textsuperscript{121} Moreover, “restore” indicates that it was the situation \textit{before} the attack on Kuwait that would be restored, and that this was the primary purpose of the resolution.\textsuperscript{122}

\begin{itemize}
\item\textsuperscript{116} Ulfstein (2003) p. 463.
\item\textsuperscript{117} Hoffmann (2002) p. 17.
\item\textsuperscript{118} Ulfstein (2003) p. 463.
\item\textsuperscript{119} Gray (2008) p. 361.
\item\textsuperscript{120} Australian Attorney-General (2003) at ‘Reasons’.
\item\textsuperscript{121} Ulfstein (2003) p. 463.
\end{itemize}
On the other hand, based on the textual approach, it has been objected that “restore” also could refer to the restoration of peace and security *after* the attack on Kuwait and in the future, since the restoration of peace before the attack already was covered by the first condition to use force in the authorization under Resolution 678 (1990), i.e. “to uphold and implement Resolution 660 (1990)”\(^{123}\). Resolution 660 decided that Iraq was to withdraw from Iraq, and thus the other condition in Resolution 678 (“to restore international peace and security in the area”) should be read as an independent additional ground to use force. It could thus be argued that it was a continuous situation from previous resolutions and onwards to Resolution 1441 (2002), and that the Council in the latter resolution determined that the purpose of Resolution 678 to “restore international peace and security in the area” was not fulfilled, i.e. the need to restore it remained.\(^{124}\) According to this view, it was the same Iraqi threat that still existed; Iraq’s behavior continued to pose a threat to international peace and security and force could now be used to enforce Iraqi material breaches of its disarmament obligations. Thus, the Coalition could invoke the mandate to use force in Resolution 678 (1990).

Nevertheless, still from a textual perspective, it could also be argued that if the Council intended that this phrase was an independent ground to use force also in the time *after* the attack on Kuwait, it would have used the word “maintain” or “secure” rather than “restore”. The words “in the area” taken together with “Member States co-operating with Kuwait” also imply that it was the restoration of peace in relation to Kuwait the Council intended, not Iraqi breaches of its disarmament obligations stipulated in a future resolution. This interpretation is also supported by the statements of the Council members at the time of adoption, in which many expressed they understood the authority to be confined to oust Iraq from Kuwait and nothing more.\(^{125}\) Furthermore, it seems implausible that the Council intended that an authority to use force, given in 1990 and before one could predict the factual and legal situation over twelve years later, could be invoked to restore the peace and security in the area in 2003. In any event the ambiguity of the meaning of the phrase in paragraph 2, implies that it should be interpreted narrowly in the least intrusive manner. Given that a Council authorization is an exception to the principle of the prohibition to use force and because of the *jus cogens* nature of this principle, it should be read in relation to the purpose of driving Iraq out of Kuwait.

The above-mentioned objection, based on the textual approach, is therefore unconvincing. As to the view on the implications of Resolution 1441 (2002), it has been argued in the previous that a revival of force under Resolution 678 (1990) would require a more explicit statement in the operative parts. A revival of force, based predominantly on the preambular reference to Resolution 678 (1990) and the preambular reference to the purpose of restoring peace should not be taken to imply revival of use of force without a clearer basis. Again, the exceptional nature of Council authorizations and the *jus cogens* nature of the prohibition of the use of force can be invoked as a ground for restraint.

Moreover, from a procedural perspective, the revival of the authorization to use force under Resolution 678 (1990) also would have to have been determined by the SC. As argued, the Council, however, under Resolution 1441 (2002) had decided only that Iraq was in material breach of its disarmament obligations. The legal consequence of revival of use of force under


\(^{125}\) Lobel and Ratner (1999) p. 140.
Resolution 678 (1990) could thus not unilaterally be invoked and enforced by the Coalition states.

Accordingly, the authorization to use force under Resolution 678 (1990) could not be applied to enforce material breaches of Resolution 687 (1991). Thus, Resolution 678 (1990) could not authorize the Coalition use of force against Iraq in 2003. An exceptional SC mandate to use force should not, in principle, reach indefinitely in time and space in a system based on the fundamental principle of state sovereignty embodied in Article 2(4) of the UN Charter.

3.2.4.4 Back to the Future III: The Subsequent Practice of the SC and Its Effect on the Authorization to Use Force Against Iraq in 2003

The next issue is whether the SC, under its previous practice, had accepted that material breaches of the ceasefire resolution revived the authorization to use force under Resolution 678 (1990), and thus that this acceptance and understanding of the resolutions also should apply to the use of force in 2003.

Under an analogy of VCLT (1969) Article 31(3), the subsequent practice of the SC can establish an agreement on the interpretation or application of a resolution, and may shed some light on the intentions of the SC.

Thus, the question is whether the SC, under its practice after the adoption of Resolution 678 (1990), had approved or expressed agreement that a finding of a material breach of Resolution 687 (1991) authorized the member states to use force under Resolution 678.

Neither the Presidential Statements of the SC of January 1993, which stated that Iraq was in “material breach” of its disarmament obligations and warned Iraq of “serious consequences” if this continued, or the statements made by the UN Secretary-General on the legality of the military action in Iraq in 1993, should be viewed as a SC approval of or SC agreement on the revival of force. Firstly, it is questionable that the Council through these Presidential Statements intended to authorize use of force, and the President of the Council under the UN Charter Article 42 does not have the competence to authorize use of force. Secondly, the Secretary-General under the UN Charter has no authority to interpret the decisions of the Council with legal binding effect.

In Resolution 1154 (1998), however, the SC warned Iraq that any violation of the ceasefire regime would have the “severest consequences”, and in Resolution 1205 (1998) condemned the Iraqi non-compliance as a “flagrant violation”. Yet, it is also doubtful that these resolutions expressed an agreement of the Council on the revival of force under Resolution 678. The military actions during the 1990s were also controversial among Council members. The use of force in 1993 was criticized by Russia, and France expressed doubts about the legality. The US-UK use of force in Operation Desert Fox (1998), was not supported by the majority in the

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129 Gray (1994) p. 154
SC, and was condemned by certain members.\textsuperscript{130} Thus, these operations should not be viewed as precedents of a Council-approved revival of force under Resolution 678.

Neither the practice after the Coalition invasion of 2003 suggested that there was an understanding in the SC that a material breach of Resolution 687 revived the authority to use force under Resolution 678. The invasion was opposed both legally and politically by other members of the Council, and the opposition continued during the conflict.\textsuperscript{131} Nor did the end of the conflict bring acquiescence by the Council members which had denied the legality. The Council’s adoption of Resolution 1483 (2003) cannot be viewed as a subsequent endorsement of the use of force, and thereby justify the invasion retrospectively, as it has been implied by one commentator.\textsuperscript{132} The resolution only recognized the US-led occupation force as a provisional authority, stipulated the need to reconstruct Iraq and gave the UN a material role to this end. Resolution 1483 and subsequent resolutions on Iraq, however, made no pronouncement on the legality of the invasion; the SC was simply accepting the status quo\textsuperscript{133}, and performing its function of maintaining international peace and security in post-conflict Iraq.

Accordingly, the SC under its practice subsequent to Resolution 678 (1990) had not accepted that material breaches of Resolution 687 authorized the member states to use force under Resolution 678. Thus, such an understanding of the resolutions could neither apply to the situation in 2003.

Consequently, even when considering the subsequent practice of the SC, the combined effect of Resolutions 1441 (2002), 687 (1991) and 678 (1990) could not authorize the Coalition use of force in 2003.

\textbf{3.2.5 Conclusion}

The conclusion is that Resolution 1441 (2002), 687 (1991) and 678 (1990) did not authorize the Coalition use of force against Iraq in 2003, neither separately or combined. On the interpretation, the authorization to use force was not revived by the SC. In any event the authorization to use force in Resolution 678 (1990) was related to another purpose than the situation in 2003. In principle, allowing the individual UN member states to invoke implied or revived authorizations to use force in SC resolutions would erode the principle of the prohibition of the use force under UN Charter Article 2(4).\textsuperscript{134}

Consequently, the Coalition invasion of Iraq was not justified in a SC authorization exceptionally allowing the use force under UN Charter Chapter VII (Article 42).

\textsuperscript{131} S/PV.4726 (2003).
\textsuperscript{132} Wedgwood (2003) p. 582.
\textsuperscript{133} Gray (2008) p. 365.
\textsuperscript{134} Since the 2003 invasion the SC has made greater attempts to avoid ambiguity by setting a fixed period for the mandate to use force and by referring expressly to which UN Charter Article within chapter VII the resolutions concerns (Gray, 2014 pp. 636-638).
3.3 The Rule of Self-Defense

3.3.1 Introduction

The next issue is whether the invasion of 2003 was lawful under the rule of self-defense, as invoked by the USA. This could be justified either as a defensive response to a prior armed attack carried out by Iraq or terrorists attributable to Iraq, a preemptive self-defense against the threat of Iraq’s weapons of mass destruction, or possibly as use of force in self-defense with implied SC authorization.

3.3.2 UN Charter Article 51 and Customary Law Limits

The legal basis for the use of force in self-defense is UN Charter Article 51, which stipulates that a member state has “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”.

The provision itself provides limited guidance as regard to which situations fall under the scope of the right of self-defense, i.e. its material content and limits, and must therefore be supplemented by customary law, and construed in consideration of state practice and the jurisprudence of the ICJ. Yet, an explicit limit under Article 51 is that the right of self-defense only lasts “until the Security Council has taken measures necessary to maintain international peace and security”. This also entails that a state’s right to self-defense is intact until the Council has taken effective measures. Under customary law, and reaffirmed in the jurisprudence of the ICJ, the right of self-defense is also limited to action which is necessary to repel the prior attack and which is proportionate to that end. Consequently, states cannot expand their defensive action to reach other aims under the pretext of self-defense, and the action taken must be an immediate (direct) response to the prior attack, i.e. taken within reasonable time after the attack started. Thus, the response must not appear to be a new military action which is taken long after the original attack was carried out. These requirements can also be deduced from customary law established before the adoption of the UN Charter, cf. the famous Caroline Case, where it was also held that the state that seeks to exercise self-defense has the burden of proof as to whether the requirements of self-defense are met.

The issue then under UN Charter Article 51 and the customary law limits, is whether the US-led invasion of Iraq was a necessary and proportional response to an “armed attack” which had occurred against a UN member state.

3.3.3 Use of Force Against Iraq as Self-Defense Against the 9/11 Attacks

The first question is whether the 2003 invasion of Iraq was justified as a defensive measure against the 9/11 terrorist attacks (2001) on the USA.

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138 Cf. the communications in the case between the American and the British authorities, particularly US State Secretary Webster’s note of 1841, cited in Moore (1906) pp. 411-412.
The classic situations included in the notion of an “armed attack” under UN Charter Article 51, are cases where a state defends itself against a military attack carried out by another state, i.e. an attack on a certain scale and with major effect, e.g. an invasion.\textsuperscript{139} It was, however, plain that a UN member state had not been the victim of an attack carried out by Iraq itself in the period leading up to the Coalition invasion of 2003. The text of Article 51, however, does not require that the attack must have been carried out by a state itself in order to amount to an “armed attack”.\textsuperscript{140} Under the precedent of Afghanistan - supported by Resolution 1368 (2001) which was adopted as a response to the terrorist attacks of 9/11 on the USA - and presumed in legal theory, a terrorist attack of a sufficient gravity which is attributable to a state may also amount to an “armed attack” within the meaning of Article 51, and thus justify a right of self-defense for the member states.\textsuperscript{141, 142} Terrorists acts committed by private persons may also be attributable to a state if the state has encouraged or directly supported them, planned or prepared them within its territory, was unwilling to take steps to prevent the acts upon receiving substantiated information or shelters a terrorist after the committal of such acts.\textsuperscript{143} However, it is unclear where the line should be drawn and what specific degree of state involvement is required. In the \textit{Nicaragua} Case the ICJ did not consider an “armed attack” stretched as far as assistance to rebels in the form of the provision of weapons or logistical or other support, implying a significant degree of government involvement.\textsuperscript{144}

The question, then, is whether the 9/11 terrorist attacks on the USA of 2001 could be regarded as an “armed attack” attributable not only to Afghanistan, but also Iraq, and thus bring the invasion of Iraq in 2003 under the scope of UN Charter Article 51.

As accounted for, the US administration claimed that there were ties between the Iraqi regime and Al Qaida\textsuperscript{145}, indicating that Iraq was complicit in the attack. However, on the facts, intelligence agencies in the USA and the UK at the time were not willing to assert any significant link between Al Qaida and the Iraqi regime. While there was evidence that there had been contacts between Iraq and Al Qaida in the 1990s and Al Qaida operatives or associates were present in Baghdad and in Northeastern Iraq, it was acknowledged that this did not add up to an established formal relationship.\textsuperscript{146} It is questionable that these contacts and incidents of providing safe-havens by themselves would suffice to attribute the attack to Iraq within the meaning of Article 51. Additionally, it was acknowledged that there was no evidence proving Iraqi complicity or assistance in the attacks of 9/11.\textsuperscript{147} Thus, the USA could not prove any Iraqi involvement in the attacks at the time of invasion, and it has neither been proven later.

Accordingly, the 9/11 attacks could not be attributed to Iraq, and thus not justify the Coalition invasion as self-defense against Iraq under UN Charter Article 51 in response to an attack.

\textsuperscript{140} Ruud and Ulfstein (2006) p. 198.
\textsuperscript{141} Resolution 1368 (2001) recognized in its preamble the right to self-defense, and can thus be argued to represent an implicit acceptance that the terrorist attacks were “armed attacks” under Article 51, cf. Gray (2014) p. 629.
\textsuperscript{142} Simma (2012) pp. 1417-1418.
\textsuperscript{143} Simma (2012) p. 1418.
\textsuperscript{144} \textit{Nicaragua} (1986) para. 195.
\textsuperscript{145} Keesings (2002) p. 45004.
In any event, the invasion of Iraq would not have met the customary law requirement of *necessity*; it was not a necessary and immediate response to repel the 9/11 attacks. These attacks were not ongoing at the time of invasion of Iraq, but had ended. Thus, use of force against Iraq as part of the so-called ‘ongoing war on terror’ would have to have been justified under a rule of preemptive self-defense.

### 3.3.4 Continued Right of Self-Defense due to the Iraqi Attack on Kuwait (1990)?

However, it could be argued that there already existed a right to self-defense for the Coalition to use following Iraq’s invasion of Kuwait in 1990, and that it had been suspended upon the ceasefire established under Resolution 687 (1991), but was then revived upon the Iraqi breaches of the ceasefire obligations under this resolution. Under such a perspective, one could assert that the measures of the SC had proven to be ineffective within the meaning of Article 51, since Iraq did not comply with its obligations, and that the same Iraqi threat still existed.

Yet this would be subject to the same objections as already accounted for. It was in fact not the same situation in 2003. It would be incompatible with the prohibition of the use of force that such an intrusive right as forcible self-defense, which arose in relation to the invasion of Kuwait in 1990, still should apply to the situation which arose *over a decade later* based on *new and other circumstances*, i.e. breaches of Iraq’s disarmament obligations. Furthermore, the parties were not the same. Thus, the right of self-defense following Iraq’s invasion of 1990 should be viewed as exhausted and lapsed upon the responsive measure already taken in 1991, and the subsequent ceasefire that was established by the SC and which still was in force at the time of invasion.

### 3.3.5 Preemptive Self-Defense Against the Threat of Iraq's WMD

The issue is whether preemptive (or anticipatory) self-defense could justify the 2003 invasion of Iraq. This entails a right to self-defense where a state has substantiated reasons to believe that another state is about to attack it militarily, but where a prior military attack in fact has not occurred.

The first question is whether such preemptive action is lawful under UN Charter Article 51 or customary law, and if so what the conditions of this rule are. Was there an even wider right of ‘preemptive’ self-defense applicable where there is no imminence, as the USA had indicated?

As a matter of treaty law, the starting point is that preemptive attacks are not permissible, cf. the principle of sovereignty and the prohibition of the use of force under UN Charter Article 2(4). Article 51 is also restrictive, and seems to presume that a prior attack must have taken place, cf. the word “occurs”. The French version of the article is, however, less restrictive and leaves somewhat more the position open as to the possibility that a state can be the target of a defensive measure before it in fact has initialized an attack. The wording “inherent right”,

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which can be interpreted as preserving the wider customary law right to self-defense in existence before the adoption of the UN Charter (1945)\textsuperscript{151}, could also imply that the condition of an occurred attack ("occurs") is not absolute. The content of this customary rule was in fact not limited to situations where an actual attack had occurred, but also included instances where a forthcoming attack was credible, imminent and inevitable, cf. the Caroline Case, in the context of which it was held that there existed an exceptional rule of preemptive self-defense confined to instances in which the necessity of it was "instant, overwhelming, and leaving no choice of means, and no moment for deliberation".\textsuperscript{152}

However, one can object that the adoption of UN Charter Article 51 superseded the pre-existing customary law right of preemptive self-defense, and that "inherent" simply means that the right of self-defense is also vested in non-UN members.\textsuperscript{153} In general, those opposing the existence of a rule of preemptive defense under Article 51 also argue that since Article 51 imposes restrictions on the right of self-defense, it is illogical that there exists a wider rule going beyond these restrictions.\textsuperscript{154} Further, since Article 51 is an exception to the prohibition of use of force, it should be narrowly construed.\textsuperscript{155} They also argue that the purpose of the UN Charter and Article 51, above all, is to restrict as far as possible the use of force by individual states, i.e. to protect peace as a supreme value of the Charter.\textsuperscript{156} Accordingly, a rule of preemptive self-defense could easily be abused as excuses to carry out military actions before all attempts of peaceful measures are exhausted.

The ICJ in the Nicaragua Case also proceeded from the assumption that the existence of an armed attack is a prerequisite for the exercise of any self-defense.\textsuperscript{157} While the Court did hold that there was a parallel existence of a customary rule of self-defense not necessarily of the same content as the treaty rule, it deliberately left the controversial matter of preemptive self-defense unresolved.\textsuperscript{158}

The question then is whether state practice after 1945 supports the existence of a wider customary law rule of preemptive self-defense, i.e. whether Art. 51 should be interpreted as to include a wider right in light of subsequent state and UN practice, cf. VCLT (1969) Article 31(3)(b).

It can be argued that the SC with Resolution 1368 (2001) did not accept the Court’s assumption in Nicaragua of the need of an occurred armed attack, upon the Council’s implicit acceptance of the self-defense against Afghanistan, which in fact could be viewed as preemptive since the original attack had ended.\textsuperscript{159} The US response also received massive support among

\textsuperscript{151} cf. e.g. Bowett (1958) pp. 188-189.

\textsuperscript{152} *Destruction of the ‘Caroline’,* cited in Moore (1906) p. 412. These requirements for preemptive action were also reaffirmed by the Nuremberg Tribunal, when it ruled that Germany’s invasion of Norway and Denmark in 1940 was not defensive, cf. the *Nuremberg Trial* (1947) p. 207.


\textsuperscript{154} Gray (2014) p. 628.

\textsuperscript{155} Brownlie (1963) p. 251.


\textsuperscript{157} *Nicaragua* (1986) paras. 237, 195 and 211.


states. Yet, it is not clear that the universal acceptance by states of the legality of the US action can be regarded as a general acceptance of preemptive use of force outside the context of Afghanistan and terrorism.\(^{160}\) As to terrorism, the SC in Resolution 1368 (2001) neither explicitly stated that the terrorists attacks were armed attacks within the meaning of Article 51, but preferred in the operative parts to characterize the attack as a “threat to the peace”, implying that preemptive self-defense against terrorism is only permissible if the Council clearly has recognized the threat.\(^{161,162}\)

Besides the unique case of Afghanistan (2001), different states have on some occasions carried out preemptive action, but without formally invoking preemptive self-defense.\(^{163}\) This could indicate that states do not believe that there exists such a right. An example to that end is the US forcible naval quarantine outside of Cuba in 1962 to intercept ships carrying missiles that could be used by the Soviet Union in an attack from Cuba. On the other hand, Israel’s strike on Egypt in 1967, which was initialized after Egypt’s mobilization and blockade of the Akaba Bay - was not condemned by the SC.\(^{164}\) The same applies to Iraq’s attack on Iran in 1980 to preempt an Iranian attack following Iran’s preparation for war. The lack of condemnation by the Council is not necessarily conclusive evidence that these actions were lawful and thus of an opinio juris, given the variety of motives influencing states, i.e. political rather than legal motives. Yet, these instances, where the anticipated attack was imminent, seemed to be accepted as lawful by most states. In other instances where a state has invoked preemptive self-defense, however, the view on the legality has been more unanimous. States seemed to agree that Israel’s bombing of the Iraqi nuclear reactor Osirak in 1981 - which within 3-5 years was asserted by Israel to be capable of producing a nuclear bomb which could be used against it - was illegal; the strike was condemned unanimously by the SC and by the General Assembly.\(^{165}\)

Consequently, state practice implies that there exists a right of preemptive self-defense under customary law in the case of an imminent attack, but not in cases where the attack only can be anticipated further ahead in the future, i.e. preventative self-defense. Thus, the ‘Bush doctrine’ - indicating an expansion of the time requirement (imminence) to instances were there in fact was no imminent threat\(^{166}\) - had little support in the opinio juris of states before the 2003 invasion. Such an extended right of ‘preemptive’ self-defense has also been rejected by most states and commentators, and raises concerns as to issues of scope and evidence.\(^{167}\) What would be sufficient to trigger the preventative action and what action is necessary and proportionate to the threat? The danger is that states would abuse such a ‘preemptive’ right whenever they subjectively perceive that there is a threat, e.g. in the relations between North-Korea

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\(^{162}\) At the time of the 2003 invasion, there were no universal agreement among states that there existed a right of preemptive self-defense against terrorism, but neither a universal agreement that it was unlawful. Many important states, hereunder the USA, had expressed that it was be permissible in some circumstances (Cassese, 2005 p. 476).


and South-Korea/the US, the US and Iran, India and Pakistan, China and Taiwan or Israel and Palestine.\textsuperscript{168}

Based on the notion that it seems unreasonable that a state cannot defend itself against an attack if it sees the attack coming, it also seems the prevailing view among scholars is that there exists a restricted right of preemptive self-defense along the lines of the \textit{Caroline} formula\textsuperscript{169}, i.e. only in those cases where the anticipated attack is \textit{credible, imminent and inevitable}.\textsuperscript{170} The latter entails that all possibilities of peace are exhausted, but has not succeeded. The argument for such a rule is especially convincing as regard an imminent threat of an attack with WMD, since the effects of such an attack would be irreversible and leave a state virtually incapable of a response.\textsuperscript{171} However, the attack should be at the verge of initialization, i.e. be a real risk \textit{now}, and the response a mere emergency reaction, since the admittance of such a right expands the exceptional provision of Article 51.\textsuperscript{172} The exception must not be given such a wide scope that it erodes the prohibition of the use of force, and thus justifies military action at a too early stage. A heavy burden of proof should apply, especially as regard an imminent terrorist threat attributable to a state, and the evidence that the requirements are met should be presented to a competent international body, primarily the SC or the General Assembly.\textsuperscript{173}

Accordingly, there exists a customary law rule going beyond Article 51, but of a very restrictive character.

Finally, the question then under the restrictive customary law rule is whether the USA had proven that Iraq or Iraqi-affiliated terrorists were planning an attack with WMD, and that such an attack was \textit{imminent} and \textit{inevitable}. It is plain this was not the case. The situation was still under consideration or was implied to be considered further by the SC. On the facts, and in line with the heavy burden of proof demanded for preemptive action, the USA could neither prove that Iraq or Iraqi-affiliated terrorist were preparing and about to launch an attack on a UN member state with WMD; France, Russia, China and Germany were not willing to accept that there was an imminent threat, and even within the USA and the UK there were reports that the intelligence agencies did not accept this.\textsuperscript{174} Several of US Secretary of State Powell’s claims in his address to the Council before the invasion on Iraq’s efforts to evade its disarmament obligations, were also challenged by the head of the weapons inspectors, who had not found any WMD in Iraq.

Accordingly, the situation before the 2003 US attack, could not be regarded as falling under the scope of the very narrow right of preemptive self-defense. Thus, preemptive self-defense could not justify the invasion.

\textsuperscript{170} The report of the UN \textit{High-Level Panel on Threats, Challenges and Change} (2004) also confirmed the existence of such a customary law rule, provided “the threatened attack \textit{is imminent}, no other means would deflect it and the action is proportionate”. It rejected a right to preemptive self-defense beyond those requirements (UN Doc A/59/565, p. 63).
\textsuperscript{172} Simma (2012) p. 1423.
\textsuperscript{173} Simma (2012) p. 1424
3.3.6 Self-Defense, Implied SC Authorization and an ‘Unjustified Veto’ Situation

The next issue is whether a combination of preemptive self-defense and an implied authorization to use force by the SC in its resolutions on Iraqi disarmament, could justify the invasion.

Some international lawyers argued that the US attack was a lawful exercise of preemptive self-defense since it represented “an episode in an ongoing broader conflict initiated” by Iraq and was “consistent with the resolutions of the Security Council”. Under such a view of implied SC authorization to use force in self-defense, it could be argued that the prohibition of the use of force is not absolute, and that there may be recourse to force beyond the explicit text of the exceptions. This, it could be argued, is presumed by the very existence of the exceptions to the prohibition in UN Charter Chapter VII and by Article 24(1). In that case, one could argue that when the Council under Resolution 1441 (2002) had indicated that there was a situation which came within the scope of Chapter VII (“a threat to the peace”), it could open the possibility to use force in self-defense. While Resolution 1441 warned Iraq of “serious consequences”, the Council had not adopted a decision on the forcible measures due to the prospects of a French or Russian veto. Since further SC decision-making was obstructed, it could be argued that the Coalition was authorized to act in self-defense against the Iraqi threat. This line of arguments of the ‘unjustified’ or ‘unreasonable veto’ was used in relation to the measures taken by NATO against Yugoslavia in the Kosovo-conflict.

Nonetheless, as already pointed out in the previous, Resolution 1441 (2002) should not be taken to imply use of force. Although, the arbitrariness of use of self-defense in such cases, would - to a certain degree - decrease upon the Council’s indication of a threat to the peace, to allow self-defense would represent an erosion of the prohibition to refrain from force, undermine the authority of the Council and could justify use of force before all peaceful measures are exhausted. As to the ‘unreasonable veto’ argument, what gives a state the authority to unilaterally categorize a possible veto as unreasonable? As a legal argument, such a condition of reasonableness is not a condition of the power of the veto under UN Charter Article 27, a rule which seeks to prevent action that does not have sufficient support within the Council.

Thus, the ‘combination argument’ could not justify the invasion.

3.3.7 Conclusion

Accordingly, the invasion of 2003 was not lawful under the rule of self-defense, neither as a response to a prior armed attack, as preemptive self-defense against the threat of Iraq’s WMD or as preemptive self-defense combined with implied SC authorization to use force in Resolution 1441.

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175 Taft IV and Buchwald (2003) p. 563. Both authors were legal advisers at the US State Department at the time of invasion.
3.4 Humanitarian Intervention

3.4.1 Introduction

If formally invoked, a possible legal basis for force against Iraq could have been a right to forcibly intervene for humanitarian purposes. Such interventions represent both an exception to the prohibition of the use of force and the principle of non-intervention. In the case of a SC authorization for forcible humanitarian action, the legal basis is the exception to the use of force in UN Charter Article 42.

In the Iraq case, Resolution 688 (1991) was passed with a humanitarian end. However, the resolution - which condemned Iraq’s repression of the Iraqi civilian population and linked it to a threat to international peace and security - did not authorize the use of force to protect the Iraqi civilian population, and the Resolution was not passed under Chapter VII of the Charter. Thus, the resolution could not authorize force against Iraq, neither the US-UK imposing of the no-fly zones in Iraq which followed the resolution or the later 2003 invasion of Iraq.

The question then is whether the 2003 invasion could have been justified under a right of a unilateral humanitarian intervention, i.e. a forcible intervention in a foreign state without its consent or authorization of the SC in order to prevent or stop massive violations of human rights.180

3.4.2 A Rule of Humanitarian Intervention under Customary Law?

The first question is whether there exists a rule of unilateral humanitarian interventions, and if so what the conditions of the rule are.

Under a strict textual reading of the prohibition of the use of force under UN Charter Article 2(4), unilateral humanitarian interventions are prohibited. That such an interpretation of the prohibition is the right one is borne out by the holding of the ICJ in the Corfu Channel Case, in which a narrow interpretation of the prohibition was rejected181, as was reaffirmed in the Nicaragua Case.182 The Charter neither contains an express exception authorizing unilateral humanitarian interventions. Thus, although respect for human rights constitutes one of the main purposes of the UN, unilateral interventions for the protection of human rights are not authorized by the Charter.183 The right must therefore derive from customary law.

The question then is whether a rule of unilateral humanitarian intervention has crystallized after the adoption of the Charter, i.e. whether there is a “general practice” of unilateral humanitarian interventions, which is followed in the belief that it is a binding rule, cf. ICJ Statute (1945) Article 38(1)(b).

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181 Corfu Channel (1949) pp. 34-35.
There are several instances where a state has intervened in another state with a view to the human rights situation\textsuperscript{184}, but in these instances the intervening states did not invoke a doctrine of humanitarian intervention.\textsuperscript{185} In any event these instances do not meet the conditions of generality and non-opposition required.\textsuperscript{186} Besides the instance of the no-fly zones imposed over Iraq from 1991, however, many states argued that NATO’s military intervention in Kosovo (1999), in response to Yugoslavia’s repression and displacement of ethnic Albanians, was in accordance with international law; they relied on a combination of humanitarian intervention and implied authorization by the SC.\textsuperscript{187} Particularly the UK invoked its doctrine of humanitarian intervention to avert an overwhelming humanitarian catastrophe requiring urgent relief.\textsuperscript{188} It could thus be argued that Kosovo represented a development in state practice towards an emerging restrictive right to forcibly intervene in another state with a view to stopping atrocities, since customary law can arise without the passage of considerable time. Yet, many states argued that the NATO action was illegal, since it was not authorized by the Council.\textsuperscript{189} Thus a uniform \textit{opinio juris} was not established.

It also seems the prevailing view among scholars is that there is no legal right to humanitarian intervention\textsuperscript{190}, except in those cases the actions are authorized by the SC. As Cassese put it:

“It is apparent from the text and context of the UN Charter that, although respect for human rights constitutes one of the main goals of the Organization, together with peace and self-determination, the Charter privileges peace to such an extent as to prohibit breaches of peace and security needed for ensuring observance of human rights”.\textsuperscript{191}

One could object that certain human rights has achieved the status of \textit{jus cogens}, and that the Charter needs to be interpreted dynamically to absorb development over time.\textsuperscript{192} But the problem is, as pointed out, that the development of state practice does not actually support a change in the law. Since the prohibition of the use of force also has \textit{jus cogens} status, it is also unclear on what basis the protection of human rights could override the prohibition.\textsuperscript{193} The risk of allowing a right of humanitarian intervention is also that it could erode the prohibition, since states with suspicious motives could invoke the right as a pretext for acts of aggression, which in turn even could result in violations of human rights. Although humanitarian reasons could indicate that such interventions should be permitted, it would be a dangerous concept to allow states themselves to determine the use of force in the pursuit of a UN purpose. Presumably, the controversy over the doctrine was also the reasons why the Coalition did not formally invoke it as a legal basis, together with the limited applicability of the doctrine to the factu-

\textsuperscript{184} e.g. India in Bangladesh (1971), Vietnam in Cambodia (1978), Tanzania in Uganda (1979).
\textsuperscript{185} Gray (2014) p. 624.
\textsuperscript{186} Cassese (2005) p. 374.
\textsuperscript{189} Gray (2014) p. 624.
\textsuperscript{190} Simma (2012) p. 222.
\textsuperscript{191} Cassese (2005) p. 373.
\textsuperscript{192} Gray (2008) p. 47.
al situation in Iraq in 2003. Instead humanitarian reasons were relied on as a moral justifi-
cation.

What was on the verge of emerging within the UN framework at the time, however, was the
responsibility of the international community to protect against atrocities. However, the use
of force under this concept appears to be based on the competence of the SC; it does not in-
clude an autonomous right of unilateral humanitarian interventions.

Accordingly, a customary law rule of a right of unilateral humanitarian interventions has not
crystallized in international law, and could thus not have justified the 2003 invasion if in-
voked.

3.4.3 A Doctrine of Humanitarian Intervention Applied to the Iraq Case

If one accepts the existence of a doctrine of humanitarian intervention, the question is whether
it could be applied in the circumstances of Iraq in 2003. The scope and conditions of the rule
would have to be based on the Kosovo ‘precedent’ and the UK doctrine.

Under such a consideration it could be pointed out that Saddam Hussein continuously had
violated human rights; the use of chemical weapons against his own population and an as-
sumed expertise and will to do it again, torture, repression and mass executions. It could
also be pointed out that the Council in Resolution 688 (1991) had condemned the regime’s
repression of its own population, and recognized the consequences of it as a threat to interna-
tional peace and security. However, there were no escalating violations of human rights or
fear of an imminent campaign of genocide (‘ethnic cleansing’) as in the case of Kosovo, but
chronic breaches; i.e. not a reason to act at that specific time to avert them. Moreover, the
violations were less severe at the time of the invasion than at other moments in Iraq’s histo-
ry. This would imply that there was no urgency to act, nor that there was an overwhelming
humanitarian emergency at the time of invasion. Additionally, the Iraq invasion was not a
collective action in the sense of an act by a regional organization.

Accordingly, a doctrine of humanitarian intervention could not be applied to the situation in
Iraq in 2003. Thus, it could not have justified the Coalition invasion of Iraq even if it existed.

4 Conclusion

The 2003 invasion of Iraq was neither lawful under SC authorization, the rule of self-defense,
or an exceptional and autonomous rule of humanitarian intervention.

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194 UK Attorney-General (2003a) para. 4.
While the justification based on the combined effects of Resolutions 1441 (2002), 687 (1991) and 678 (1990) was well argued, the argument of implied or revived authorization was a weak legal doctrine; it had never been accepted by most states and undermines the authority of the SC. On the interpretation, the Council in Resolution 1441 had not terminated the ceasefire with Iraq and revived the authority to use force under Resolution 678, a mandate which was given over a decade earlier and which was confined to the purpose of driving Iraq out of Kuwait.

In theory, a stronger case for use of force was self-defense against a state-attributable terrorist attack or preemptive self-defense against an imminent attack with WMD, but on the facts the conditions to trigger self-defense were not met in the Iraq case. Nor a unilateral humanitarian intervention was an established rule of international law applicable to the situation in Iraq. And many weak legal justifications combined, certainly, cannot amount to a legal basis for the use of force.

Accordingly, the 2003 invasion was illegal under the rules on the use of force. By invading Iraq, the Coalition states violated the principle of the prohibition of the use of force under UN Charter Article 2(4).

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## List of Acronyms and Abbreviations

### Acronyms

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<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>FCO</td>
<td>Foreign and Commonwealth Office (UK)</td>
</tr>
<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
</tr>
<tr>
<td>SC</td>
<td>Security Council</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>WMD</td>
<td>Weapons of Mass Destruction</td>
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### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>Adv.op.</td>
<td>Advisory Opinion</td>
</tr>
<tr>
<td>OP</td>
<td>Operative paragraph(s)</td>
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<tr>
<td>Para.</td>
<td>Paragraph</td>
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<tr>
<td>Paras.</td>
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