

FEATURE — LEGALITY OF THE USE OF FORCE AGAINST IRAQ

INTERNATIONAL LAW AND THE WAR WITH IRAQ

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[The United States-led invasion of Iraq prompted a widespread debate about the legitimacy and legality of the use of force without explicit United Nations authorisation. Some argued that the invasion enjoyed the implied authorisation of the Security Council, suggesting that Resolution 678, a remnant of the first Gulf War, continued to authorise the use of force to ensure Iraqi compliance with the Gulf War cease-fire. The US government further argued that Iraq posed an imminent threat to its neighbours, to the US and to international peace and security. On this basis, the US asserted a right to pre-emptive self-defence. This article evaluates these legal claims in depth. It explores the background to the war, and asks whether or not the Security Council did implicitly authorise the war. Having assessed the statements of Security Council members, it suggests that the resolutions passed at the time of the first Gulf War were not intended to authorise subsequent uses of force. Nor, it is argued, did Resolution 1441, passed in November 2002, provide implicit authorisation for the use of force. Given the substance of the reports of Hans Blix, Executive Chairman of the UN Monitoring, Verification and Inspection Commission, and the subsequent failure to discover weapons of mass destruction in Iraq, the self-defence argument is also untenable. Indeed, to accept either of the legal justifications proposed for the war in Iraq would stretch general legal principles to such an extent as to risk undermining the principles themselves.]

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I INTRODUCTION

On 20 March 2003, the United States and its allies, principally the United Kingdom and Australia (collectively referred to as the ‘Coalition’), began Operation Iraqi Freedom with a series of missile attacks on Baghdad, aimed at ‘decapitating’ the Iraqi leadership. Approximately three weeks later, American troops entered Baghdad, taking control of the city in the following two days. It was not until 2 May, however, that US President George W Bush formally

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announced the Coalition's victory aboard the *USS Abraham Lincoln*. According to the American President, 'the Battle of Iraq is one victory in a war on terror that began on 11 September 2001, and still goes on'.¹ As well as eliminating the 'threat' posed to the US and its allies by Iraq, the Coalition's leaders insisted that the war would also improve the lives of the Iraqi people.² They argued it would permit the delivery of humanitarian assistance, and create an environment where Iraqis could determine their own fate peacefully and democratically.³ At the time of writing, authoritative Western sources suggest that 7000–9000 civilians have been killed by Coalition forces.⁴ It is likely, however, that the actual number of civilian casualties is considerably higher than this.⁵

According to Greenpeace, as a result of the Iraq war, 'the framework of international law is currently under threat by the determination of the United States to redraw international law to allow its strategic imperatives'.⁶ It continues:

nations have a stark choice: they can choose multilateralism, the rule of law and respect for international law, treaties and institutions; or, they can choose a unilateralist approach in which states pursue their own interests, irrespective of the will of the world community.⁷

The invasion of Iraq therefore presents an important challenge to those who argue that legal rules constrain states from acting in ways that cannot be justified,⁸ for it suggests that realists are right to insist that states use the law as a purely instrumental or rhetorical device to validate their actions. According to realists, international law can be used to uphold any course of action.⁹

This article aims to investigate these claims by considering the debate about the legality of the war in Iraq. It argues that neither of the two key legal claims put forward by the US, the UK and Australia are tenable. Yet rather than proving realists right, the debate shows that international law acts as a powerful framework for meaningful discussion between states about the legitimacy of particular actions. Although the US and its allies attempted to manipulate the law

¹ George W Bush in Karen DeYoung, 'Bush Proclaims Victory in Iraq: Work on Terror is Ongoing, President Says', *The Washington Post* (Washington DC, US), 2 May 2003, A1.

² Tony Blair and George W Bush, 'Joint Statement by President Bush, Prime Minister Blair on Iraq's Future' (Hillsborough Castle, Northern Ireland, UK, 8 April 2003) <<http://www.usembassy.org.uk/potus03/potus03c.html>> at 1 October 2003.

³ Ibid.

⁴ The most comprehensive civilian casualty monitor can be found at <<http://www.iraqbodycount.org>>. It uses open source media to tabulate a 'minimum' and 'maximum' civilian casualty figure, based on at least two corroborating reports from a list of 'approved' international media. The website contains a detailed methodology and list of sources. On 1 October 2003, the 'minimum' number stood at 7352 and the 'maximum' at 9152.

⁵ The numbers cited are likely to be significantly lower than actual casualties because the website relies on media reporting. In both urban and rural Iraq, numerous incidents involving Coalition forces and Iraqi civilians went and continue to go unreported.

⁶ Duncan Currie, Greenpeace International, *Preventive War and International Law after Iraq* (22 May 2003) 13.

⁷ Ibid 14.

⁸ This is the central argument in Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000).

⁹ This argument is put forward most powerfully in Stephen Krasner, *Sovereignty: Organized Hypocrisy* (1999).

for their own strategic benefits, they failed to persuade the vast majority of the international community to accept their arguments. This is significant, it is argued, because to accept the legal case for war would be to stretch general principles of law to such an extent that they would cease to have meaning. To argue that the war was authorised by the Security Council strains the interpretation of its resolutions to the point that the Security Council's intent is lost altogether. Similarly, justifying the war in terms of self-defence stretches the term so far that self-defence and aggression become indistinguishable. Although international law does not carry the punitive power of domestic law, the argument follows that the failure to legally justify the war damaged, or at least ought to damage, the legitimacy of the campaign, incurring a variety of costs for the war's instigators. The question of whether the invasion was illegal is therefore vital for evaluating both the legitimacy of the war and its likely impact on the future direction of the international community.

In the US, UK and Australia, opinion on the legality question was split between three broad positions. First, many prominent experts, including the Attorneys-General of the UK and Australia, argued that the war was legal, insisting that one or both of the legal exceptions to the prohibition on the use of force — action authorised by the Security Council, or self-defence — could be cited as justification.¹⁰ In Australia, commentators who supported the war tended to focus on the claim that Iraq's failure to comply with the terms of the 1991 Gulf War cease-fire — set out in *Resolution 687*,¹¹ passed on 3 April 1991 — revoked that cease-fire and reactivated the authorisation to use force contained in *Resolution 678*,¹² passed on 29 November 1990. Michael Costello, former Secretary of the Department of Foreign Affairs and Trade under the Keating Labor government, argued that there was no need for a further resolution expressly authorising force, insisting that 'this is the simplest international law legal issue I have ever seen. It is clear, uncomplicated, straightforward, the legal authority is there'.¹³ One of the most prominent public defences of the legality of the war by non-governmental legal commentators, however, focused not on *Resolution 678*, but *Resolution 1441*,¹⁴ passed on 8 November 2002. The commentators wrote that 'the "serious consequences" [referred to in *Resolution 1441*]¹⁵ which ... [Saddam Hussein] must thus face were understood to include the possibility of military force'.¹⁶

A second group rejected these claims, arguing that the Security Council had not authorised the use of force and that the invasion did not constitute a

¹⁰ See, eg, Greg Hunt, 'Yes, This War is Legal', *The Australian* (Sydney, Australia), 19 March 2003, 17; Michael Detmold, 'The Legality of the War' (Unpublished paper, 2003) (copy on file with author).

¹¹ *Resolution 687*, SC Res 687, UN SCOR, 46th sess, 2981st mtg, UN Doc S/RES/687 (1991).

¹² *Resolution 678*, SC Res 678, UN SCOR, 45th sess, 2963rd mtg, UN Doc S/RES/678 (1990).

¹³ ABC Radio Sydney, 'Michael Costello: The Case for Australian Involvement in War', *Mornings with Sally Loane*, 14 March 2003.

¹⁴ *Resolution 1441*, SC Res 1441, UN SCOR, 57th sess, 4644th mtg, UN Doc S/RES/1441 (2002).

¹⁵ Ibid [13].

¹⁶ Darin Bartram et al, *It Is Perfectly Legal for the US-Led Coalition to Enforce Resolution 1441* (2003) <<http://www.onlineopinion.com.au/view.asp?article=242>> at 1 October 2003.

legitimate act of self-defence.¹⁷ In Australia, most prominent amongst this group were Andrew Byrnes and Hilary Charlesworth. According to Byrnes and Charlesworth, the legal arguments put forward by advocates of the war ‘depend[ed] on a distorted reading of the language of the relevant Security Council resolutions and of the context in which they were adopted’.¹⁸

A third group maintained that the legality of the war was difficult to determine. Nicholas Wheeler, for example, argued that the legal debate demonstrated the ‘indeterminacy’ of law; in the absence of authoritative and definitive judgments, different actors offered competing interpretations to validate their actions.¹⁹ Such indeterminacy could be seen in the shifting position of prominent British lawyer Christopher Greenwood. In 2002, Greenwood argued that ‘regime change wouldn’t in itself and by itself be a lawful reason for attack’.²⁰ Thus he suggested that the use of force had to be explicitly mandated by the Security Council or be an act of self-defence to be legal. Immediately before the invasion, however, Greenwood argued that enough authority for the use of force already existed in adopted Security Council resolutions. Yet he qualified this by noting that ‘it would be highly desirable to have a second UN resolution because that puts the matter beyond serious question’.²¹

This article evaluates these competing claims in order to assess firstly whether or not the invasion was legal, and secondly what impact this might have on the rule of law in the international community. Specifically, it asks whether the Iraq case suggests that realists are right to view the law as an instrumental and enabling tool for powerful states, rather than a constraint on state power.²² It identifies two legal justifications for war — the authority contained in Security Council resolutions, and the right of self-defence — and asks whether these can be sustained. On both counts, it finds that the legal case for war is not compelling. In doing so it suggests that, far from being indeterminate, customary international law and *Charter of the United Nations* law are relatively clear in this case: neither of the two exceptions to the ban on the use of force have been satisfied and therefore it should be recognised that the invasion of Iraq was

¹⁷ See, eg, Hilary Charlesworth and Andrew Byrnes, ‘No, This War Is Illegal’, *The Australian* (Sydney, Australia), 19 March 2003, 17.

¹⁸ Andrew Byrnes and Hilary Charlesworth, ‘The Illegality of the War against Iraq’ (2003) 22(1) *Dialogue* 4, 4. For a more detailed rejection of the case for war, see Rabinder Singh and Alison Macdonald, *Legality of the Use of Force against Iraq* (2002) <http://www.publicinterestlawyers.co.uk/iraq_legality_war.htm> at 1 October 2003. On the issue of *Resolution 1441*, it is interesting to note that the High Court of Justice for England and Wales was asked by the Campaign for Nuclear Disarmament to judge whether the resolution authorises the use of force in the event of Iraqi non-compliance with its terms. Whilst rejecting the Campaign for Nuclear Disarmament’s case against the British government on the basis of preliminary matters, the judges did comment that ‘non-compliance with *Resolution 1441* would not of itself provide such authorisation’: *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Unreported, Brown LJ, Kay and Richards JJ, 17 December 2002) [17].

¹⁹ See, eg, email from Nicholas Wheeler to Alex Bellamy, 18 March 2003.

²⁰ Clare Dyer, ‘Ousting Saddam Illegal, PM Told’, *The Guardian* (London, UK), 8 October 2002, 12.

²¹ Frances Gibb, ‘Breach of International Law Feared if War Starts’, *The Times* (London, UK), 14 March 2003, 18.

²² I am indebted to Hilary Charlesworth and Nicholas Wheeler for these ideas about the enabling and constraining functions of international law.

illegal and illegitimate. It follows from this that whilst the ‘power of rules’²³ may not prevent the world’s superpower from acting in pursuit of its own interests, it does provide a common framework for others to evaluate the legitimacy of that state’s behaviour and revise their actions accordingly.

II THE LIMITS ON THE USE OF FORCE IN THE INTERNATIONAL COMMUNITY: BASIC PRINCIPLES

International law on the use of force is framed by, but not limited to, the *UN Charter*.²⁴ *UN Charter* law on the use of force is predicated on art 2(4), which is also widely considered to have the status of *jus cogens* in customary international law.²⁵ Article 2(4) calls upon states to refrain from the threat or use of force against the ‘territorial integrity or political independence’ of other states. This principle was intended to be generally applicable and broadly interpreted.²⁶ The *UN Charter* contains two exceptions to this general ban. First, under art 42 — set out in Chapter VII of the *UN Charter* which delineates Security Council measures that are binding on all states — the Security Council is empowered to authorise the use of military force to protect and restore international peace and security. Second, under art 51, all states are afforded an ‘inherent right’ to use force in self-defence.

Although the law governing recourse to force in the international community is complex, state practice and *opinio juris* suggest that the *UN Charter*’s basic rules constitute customary international law. As Christine Gray has pointed out, ‘states almost always agree on the content of the applicable law; it is on the application of the law to the particular facts or on the facts themselves that the states disagree’.²⁷ These basic rules shaped the debate about the legality of using force against Iraq, which focused on the two exceptions to art 2(4). Contrary to what some of its critics may suggest, the US did not disregard international legal principles, nor did it attempt to rewrite legal rules unilaterally. Instead, it offered an interpretation of the application of the law to the facts of the case that was implausible and at odds with the interpretations of most other states and international lawyers.

III THE LEGAL CASE FOR WAR

The US, UK and Australia each suggested that there was sufficient authority in existing Security Council resolutions to justify the use of force against Iraq. On 10 November 2002, US Secretary of State Colin Powell insisted that ‘the United States believes that because of past material breaches, current material breaches and new material breaches there is more than enough authority for it to

²³ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999).

²⁴ As Christine Gray argues, the *UN Charter* provides ‘the first expression of the basic rules’, but these ‘are brief and cannot constitute a comprehensive code’: Christine Gray, *International Law and the Use of Force* (2000) 2–3.

²⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, [190] (‘Nicaragua’).

²⁶ See Benedetto Conforti, *The Law and Practice of the United Nations* (2000) 11; Brian Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (2002) 343–8.

²⁷ Gray, *International Law and the Use of Force*, above n 24, 6.

act'.²⁸ As Adam Roberts put it, 'in the case of Iraq, the core rationale for military action is Iraq's consistent violation of UN Security Council resolutions, particularly as regards disarmament and inspection'.²⁹ This, Roberts argued, was the strongest legal case for war, and formed the basis of the case put forward by the Attorneys-General of the UK and Australia.³⁰

The case of the Attorneys-General rested principally on interpretations of *Resolution 678*, *Resolution 687* and *Resolution 1441*. Their starting point was the observation that *Resolution 678* authorised the use of force not only to eject Iraqi forces from Kuwait but also 'to restore international peace and security in the area'.³¹ After the liberation of Kuwait, *Resolution 687* outlined the terms that Iraq would have to accept for a cease-fire to come into effect. It insisted that Iraq 'unconditionally accept the destruction, removal, or rendering harmless, under international supervision' of all chemical and biological weapons, including all related subsystems and research facilities, and all ballistic missiles with a range greater than 150 kilometres.³² Disarmament was only one part of a broader cease-fire package that included the deployment of UN peacekeepers along the Iraq–Kuwait border (under the auspices of the United Nations Iraq–Kuwait Observation Mission), the return of Kuwaiti property pillaged during the Iraqi occupation and the payment of reparations to foreign nationals and corporations that had suffered financial loss as a result of the war. Thus, *Resolution 687* can be seen as laying down criteria for judging whether or not regional peace and security has been restored. As the British Attorney-General Lord Goldsmith put it, 'a material breach of *Resolution 687* revives the authority to use force under *Resolution 678*'.³³

All subsequent resolutions on Iraqi disarmament (for instance *Resolution 1154*³⁴ and *Resolution 1158*³⁵) were passed under Chapter VII of the *UN Charter* and identified Iraqi non-compliance as a threat to international peace and security.³⁶ *Resolution 1441* found Iraq to be in material breach of *Resolution 687* and warned of 'serious consequences' if it did not comply.³⁷ Interestingly, although there was significant public debate about the meaning of 'serious consequences', neither the British nor Australian Attorneys-General attached great significance to this phrase. Instead, the key point they both emphasised was that *Resolution 1441* identified Iraq to be in material breach of its obligations and

²⁸ Toby Harden and Andrew Sparrow, 'We Are Ready to Attack, US Warns Saddam', *Daily Telegraph* (London, UK), 11 November 2002, 1.

²⁹ Adam Roberts, 'The Case for War', *The Guardian* (London, UK), 17 September 2002, 16.

³⁰ UK, *Parliamentary Debates*, House of Lords, 17 March 2003, vol 646, pt 308, columns WA2–3 (Lord Goldsmith, Attorney-General); Bill Campbell and Chris Moraitis, 'Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq' (2003) 4 *Melbourne Journal of International Law* 178. Their case is paraphrased below.

³¹ *Resolution 678*, above n 12, [2].

³² *Resolution 687*, above n 11, [8].

³³ UK, *Parliamentary Debates*, House of Lords, 17 March 2003, vol 646, pt 308, columns WA2–3, [3] (Lord Goldsmith, Attorney-General).

³⁴ *Resolution 1154*, SC Res 1154, UN SCOR, 53rd sess, 3858th mtg, UN Doc S/RES/1154 (1998).

³⁵ *Resolution 1158*, SC Res 1158, UN SCOR, 53rd sess, 3865th mtg, UN Doc S/RES/1158 (1998).

³⁶ Roberts, above n 29.

³⁷ *Resolution 1441*, above n 14, [16].

therefore ‘the authority to use force under *Resolution 678* has revived and so continues today’.³⁸ Finally, the British Attorney-General argued that, had the Security Council disagreed with this interpretation,

Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required ... Thus, all that *Resolution 1441* requires is reporting to and discussion by the Security Council of Iraq’s failures, but not an express further decision to authorise force.³⁹

Therefore, the British and Australian governments argued, the war with Iraq was legal because it was authorised by the Security Council.

By contrast, the US administration never explicitly outlined its legal case for war. US Secretary of State Colin Powell argued that ‘many of us believe, the United States certainly believes, that there is probably enough authority in *Resolution 1441* to take action if Iraq does not comply and does not cooperate’.⁴⁰ However, the US did not formally make this argument, as Powell’s suggestion that there was only ‘probably enough’ authority indicates. Tellingly, in his message informing the Speaker of the House of Representatives and the President *pro tempore* of the Senate of his decision to order the invasion, President Bush made only passing reference to Security Council resolutions as the legal basis for war. While he insisted that US actions were intended to enforce all relevant Security Council resolutions,⁴¹ the central thrust of his argument was directed elsewhere. The President insisted:

I have reluctantly concluded, along with other coalition leaders, that only the use of force will accomplish these objectives [the disarmament of Iraq] and restore international peace and security in the area. I have also determined that the use of armed force against Iraq is consistent with the United States and other countries continuing to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.⁴²

The US President therefore implicitly developed two legal arguments to justify the war. First, he agreed with the British and Australian argument that a revived *Resolution 678* provided enough authorisation for war. The opening sentence of the above statement uses language identical to that resolution.⁴³ However, Bush’s letter emphasised the administration’s belief that the war with Iraq was a continuation of the ‘war against terror’. Therefore it implicitly suggested that a legal argument based on self-defence, which was used with some success to justify Operation Enduring Freedom in Afghanistan, provided enough

³⁸ UK, *Parliamentary Debates*, House of Lords, 17 March 2003, vol 646, pt 308, column WA2–3, [8] (Lord Goldsmith, Attorney-General).

³⁹ Ibid [9].

⁴⁰ Radio France, *Secretary of State Colin Powell: Interview with Radio France* (19 February 2003) <<http://usinfo.state.gov/regional/nea/iraq/text2003/0219radio.htm>> at 1 October 2003.

⁴¹ Letter from the President of the United States of America to the Speaker of the House of Representatives and the President *pro tempore* of the Senate, 21 March 2003.

⁴² Ibid.

⁴³ The resolution uses the phrase ‘restore international peace and security in the area’: *Resolution 678*, above n 12, [2].

justification for the use of force against Iraq under the doctrine outlined in *The National Security Strategy of the United States of America*.⁴⁴

Thus, there were two types of legal justification for war. The first — the sole legal argument put forward by the UK and Australia — was that existing Security Council resolutions provided enough legal authority for war.⁴⁵ The second, favoured by the US, was that the war represented a continuation of the war against terror and was therefore legal because it constituted a legitimate act of self-defence.

IV RESOLUTION 678, RESOLUTION 687 AND OPERATION DESERT FOX

The argument that a breach of *Resolution 687* would revive the authority to use force in *Resolution 678* is not a novel one.⁴⁶ The British government attempted to justify Operation Desert Fox in 1998 by making precisely this argument.⁴⁷ At that time, UK Secretary of State for Foreign and Commonwealth Affairs Robin Cook insisted that 'the history and the statute book of the Security Council is full of resolutions which clearly set out what Saddam Hussein has to do ... he is clearly not doing it, so the authority is there'.⁴⁸ The British government argued that although a further Security Council resolution identifying Iraq to be in material breach of *Resolution 687* would have been advantageous, it was not necessary. The British Ambassador to the UN insisted

⁴⁴ National Security Council (US), *The National Security Strategy of the United States of America* (2002) <<http://www.whitehouse.gov/nsc/nss.html>> at 1 October 2003 ('National Security Strategy').

⁴⁵ Given that much of the following discussion is based on an interpretation of Security Council resolutions, it is important to note that in 1971 the International Court of Justice ('ICJ') provided guidance as to how resolutions should be interpreted. It held that:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25 [of the *UN Charter*], the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the *Charter* provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 53, 161. Given that many other advocates of the war challenged the validity of *Resolution 1441* in particular (arguing that 'serious consequences' authorised war and that the Security Council was failing in its obligations by not enforcing its decisions), it is also worth noting that in the same ruling the ICJ insisted, at 185, that:

To challenge the validity of a resolution, it is not sufficient merely to allege that it is possible to find a better interpretation; a resolution can only be criticized if it is demonstrably absolutely impossible to find any reason whatsoever, even a debateable one, upon which an interpretation favourable to the validity of the resolution may be based.

⁴⁶ See Christine Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force' (1994) 65 *British Yearbook of International Law* 135.

⁴⁷ For more detail on the background to the legal debate over Operation Desert Fox and a broader discussion of the political debate, see Christine Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq' (2002) 13 *European Journal of International Law* 1.

⁴⁸ Laura Silber, 'UN Deeply Divided over Use of Force', *Financial Times* (London, UK), 6 February 1998, 4.

that *Resolution 1154* and *Resolution 1205*⁴⁹ ‘implicitly revived the authorisation to use force given in *Resolution 678*’.⁵⁰ *Resolution 1154* had reaffirmed the Security Council’s ‘intention to act in accordance with the provisions of *Resolution 687*’ and warned Iraq of the ‘severest consequences’ if it failed to comply,⁵¹ whilst *Resolution 1205* condemned Iraq for breaching *Resolution 687*.⁵²

The 1998 British argument in relation to the use of force in Operation Desert Fox was only supported in the Security Council by the US, Japan and Portugal.⁵³ The representative of Portugal on the Security Council noted that

the United States and United Kingdom ... made it perfectly clear last month that, in the absence of full cooperation by Iraq, they would act without returning to the Security Council. It is not, therefore, a surprise, that a decision has been taken to act militarily.⁵⁴

Clearly, if it could be shown that the Security Council adopted *Resolution 1154* and *Resolution 1205* in the knowledge that non-compliance would trigger the use of force under *Resolution 678*, this argument would be well-founded. Then it could certainly form the basis for a legal justification for the 2003 war. Following the adoption of *Resolution 1205* (though importantly, not before), the British Ambassador argued that:

it is well established that the authorization to use force given by the Security Council in 1990 [*Resolution 678*] may be revived if the Council decides that there has been a sufficiently serious breach of the conditions laid down by the Council for the ceasefire. ... This Resolution sends a clear message to Iraq.⁵⁵

Similarly, the representative of the US on the Security Council insisted that the Iraqi decision to cease cooperation with the UN Special Commission (‘UNSCOM’) was

a flagrant violation of *Resolution 687* and other relevant resolutions. I would also recall that both President Clinton and Secretary of State Albright have emphasized that all options are on the table, and the United States has the authority to act.⁵⁶

Although this argument was a powerful one, it proved not to be compelling in the Security Council. The legal case was greatly enhanced by the earlier British and American statements, but they were not indicative of the will of the Security Council. There is evidence to suggest that, on the one hand, the reference to ‘severe consequences’ in *Resolution 1154* was not intended to authorise the use of force, and more specifically the force employed in Operation Desert Fox. On the other hand, evidence suggests that *Resolution 678* could not so easily be revived to sanction subsequent military action. When Operation Desert Fox was

⁴⁹ *Resolution 1205*, SC Res 1205, UN SCOR, 53rd sess, 3939th mtg, UN Doc S/RES/1205 (1998).

⁵⁰ UN SCOR, 53rd sess, 3955th mtg, UN Doc S/PV.3955 (1998) 6.

⁵¹ *Resolution 1154*, above n 34, [3].

⁵² *Resolution 1205*, above n 49, [1].

⁵³ UN SCOR, 53rd sess, 3955th mtg, UN Doc S/PV.3955 (1998).

⁵⁴ *Ibid* 8.

⁵⁵ UN SCOR, 53rd sess, 3939th mtg, UN Doc S/PV.3939 (1998) 10.

⁵⁶ *Ibid* 11.

discussed in the Security Council, it received little support (from only four states, as mentioned above). China described it as a ‘groundless’ and ‘unprovoked military attack’,⁵⁷ whilst Russia insisted that ‘the resolutions of the Security Council provide no grounds whatsoever for such actions’.⁵⁸ Costa Rica, Brazil and Kenya endorsed this position.⁵⁹ Slovenia and Gambia expressed neither support for nor unease with the military action.⁶⁰ This suggests that the majority of members of the Security Council did not accept the argument that Operation Desert Fox was tacitly approved by *Resolution 1154* and *Resolution 1205*. At most, six of the 15 members may have supported this proposition. However, it is worth noting that all but one of those states (Gambia) was either an actual or aspiring member of the North Atlantic Treaty Organisation (‘NATO’), which may have influenced their stance on the issue.

The argument about the reactivation of *Resolution 678* is simpler to unravel. As previously noted, the British Ambassador claimed that the authorisation may only be revived ‘if the Council decides’ there has been a ‘sufficiently serious’ breach.⁶¹ It is quite clear that in the case of Operation Desert Fox, whilst the Security Council did agree that Iraq was in breach of its obligations, it did not conclude that this breach was sufficiently serious to warrant the use of force against Iraq. Significantly, it is important to recall that the British Ambassador expressly noted that it was for the Security Council (not individual states) to decide whether there had been a ‘sufficiently serious’ breach.

In 2003, the US, UK and Australian governments pointed directly to *Resolution 678* to justify their use of force in Iraq. Based on the experience with Operation Desert Fox, there are two principal reasons to suggest that such an argument should not be considered valid. First, there are no prior examples of states successfully drawing a link between *Resolution 678*, a subsequent resolution that does not expressly authorise force, and the actual use of force against Iraq. Although the UK alluded to such an argument at the time of Operation Desert Fox, it had also (paradoxically perhaps) publicly accepted the widely held view that only the Security Council could revive the authorisation. Second, there are valid reasons to suggest that *Resolution 687* superseded *Resolution 678*, precluding any scope for its revival. Indeed, Brazil made this very point to the Security Council in March 1998.⁶²

There are two key phrases in *Resolution 687* that strongly suggest that it supersedes *Resolution 678*. Paragraph 33 declares that ‘upon official notification by Iraq ... of its acceptance of the [relevant] provisions, a formal ceasefire is effective’.⁶³ The representative of Brazil on the Security Council pointed out that this paragraph referred explicitly to a ‘formal ceasefire’ rather than ‘cessation of hostilities’.⁶⁴ The importance of this distinction was recognised at the time by Sir David Hannay, British Ambassador to the UN, who argued that the formal

⁵⁷ UN SCOR, 53rd sess, 3955th mtg, UN Doc S/PV.3955 (1998) 5.

⁵⁸ Ibid 4.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ UN SCOR, 53rd sess, 3939th mtg, UN Doc S/PV.3939 (1998) 10.

⁶² UN SCOR, 53rd sess, 3858th mtg, UN Doc S/PV.3858 (1998) 7.

⁶³ *Resolution 687*, above n 11, [33].

⁶⁴ UN SCOR, 53rd sess, 3858th mtg, UN Doc S/PV.3858 (1998) 7.

acceptance of the resolution by Iraq was essential to permit ‘the definitive end to the hostilities’.⁶⁵ Iraq complied with this demand by formally accepting the cease-fire terms in a letter to the Security Council.⁶⁶ Secondly, in *Resolution 687*, the Security Council expressly stated that it would decide whether Iraq was in compliance and what measures should be taken if it was deemed not to be.⁶⁷

Recourse to *Resolution 678* and *Resolution 687* may be the most compelling legal argument in support of the war, but it has not been widely accepted by the international community. Operation Desert Fox allowed the US and UK to test the argument in order to set a precedent, but this line of legal reasoning failed to convince a majority of states on the Security Council. This was despite the fact that both intervening states indicated to the Security Council their belief that they had sufficient authority to use force. In 1998, the US and the UK were clearly restrained by their inability to justify their actions in terms of international law. Military action was restricted to air strikes that were limited in scope and duration. Moreover, when the US and the UK concluded the campaign, Saddam Hussein had still not agreed to UNSCOM’s return, and it was nearly four years before weapons inspectors would return to Iraq. In 2002, mindful of the weakness of a legal case based on *Resolution 678* and *Resolution 687*, which had been exposed by international responses to Operation Desert Fox, the US and UK proposed a new Security Council resolution that would provide authority for the use of force if Iraq refused to comply.

V *RESOLUTION 1441*

After much deliberation, the Security Council voted unanimously to adopt *Resolution 1441* on 8 November 2002. The resolution comprised three central components. First, it found that Iraq’s failure to provide accurate, full, final and complete disclosure of its weapons of mass destruction and ballistic missile capabilities, and its obstruction of UNSCOM and International Atomic Energy Agency (‘IAEA’) inspectors constituted a ‘material breach’ of its obligations laid out in *Resolution 687*.⁶⁸ Second, it decided to afford Iraq ‘a final opportunity to comply with its disarmament obligations’ and to set up an enhanced inspection regime that would bring the disarmament process to completion.⁶⁹ Finally, it warned Iraq that it would face ‘serious consequences’ if it continued to neglect its obligations.⁷⁰ In subsequent debates about the use of force against Iraq, a number of questions were posed with regard to *Resolution 1441*. In particular, what would constitute a violation or material breach; who had the authority to declare Iraq to be in material breach; and would a second resolution be needed to authorise the use of force against Iraq if it were found to be in material breach?

⁶⁵ UN SCOR, 46th sess, 2978th mtg, UN Doc S/PV.2978 (1991) 71.

⁶⁶ *Identical Letters Dated 6 April 1991 from the Minister for Foreign Affairs of the Republic of Iraq Addressed Respectively to the Secretary-General and the President of the Security Council*, UN Doc S/22456 (1991).

⁶⁷ The resolution states that ‘the Council decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present Resolution’: *Resolution 687*, above n 11, [34].

⁶⁸ *Resolution 1441*, above n 14, [1].

⁶⁹ *Ibid* [2].

⁷⁰ *Ibid* [13].

Resolution 1441 is quite clear about what constitutes a material breach of its demands.⁷¹ Within 30 days of the resolution's passage, Iraq was expected to deliver an 'accurate, full, and complete' declaration of all aspects of its programs to develop weapons of mass destruction and ballistic missile capabilities.⁷² The resolution also declared that Iraq should provide the UN Monitoring, Verification and Inspection Commission ('UNMOVIC') and the IAEA with 'immediate, unimpeded, unconditional and unrestricted access' to all buildings and facilities (including presidential palaces), and unfettered access to any scientific or government personnel as seen fit by UNMOVIC.⁷³ The resolution demanded that such people be allowed to leave Iraq to be interviewed by UNMOVIC and IAEA.⁷⁴ It stated that 'false statements or omissions in the declaration submitted by Iraq ... and failure by Iraq at any time to comply with, and cooperate fully in the implementation of this Resolution shall constitute a further material breach'.⁷⁵

The question concerning who had competence to declare Iraq to be in material breach of *Resolution 1441* was more problematic. The US and UK initially sought a resolution that permitted member states to declare Iraq in material breach and bring the matter back before the Security Council. France and Russia, however, argued that only the weapons inspectors should have the right to report breaches to the Security Council and that member states had a responsibility to assist the inspectors. However, the final version of the resolution is ambiguous on this question. Paragraph 11 directs the head of UNMOVIC to report breaches immediately to the Security Council, but the resolution does not prohibit member states from also reporting breaches. According to the US Ambassador, UNMOVIC, the IAEA and individual member states each had a right to report breaches to the Security Council.⁷⁶ Other delegations disagreed. Sir Jeremy Greenstock, the British Ambassador to the UN, who co-sponsored the resolution, argued that an immediate Security Council meeting would be convened only if the head of UNMOVIC or IAEA reported Iraq to be in material breach of the resolution.⁷⁷ Sergei Lavrov, the Russian Ambassador to the UN, put the matter more bluntly. He argued that *Resolution 1441* clearly stated that 'it is the heads of UNMOVIC and of the IAEA who will report ... [breaches] to the Security Council, and ... it is the Council that will consider the situation that has developed'.⁷⁸

The question of competence to declare Iraq to be in material breach was intimately related to the question of 'automaticity' of the use of force. If member states were able to find Iraq to be in material breach, with *Resolution 1441*

⁷¹ *Resolution 1441* recognises that Iraq was in material breach of *Resolution 687*. This debate centres on the criteria that should be used to find Iraq in material breach of *Resolution 1441*, and who had the authority to do so: *ibid* [3].

⁷² *Ibid* [3].

⁷³ *Ibid* [5]. UNMOVIC was established as a subsidiary body of the UN Security Council to replace UNSCOM: *Resolution 1284*, SC Res 1284, UN SCOR, 54th sess, 4084th mtg, UN Doc S/RES/1284 (1999) [1].

⁷⁴ *Ibid*.

⁷⁵ *Ibid* [4].

⁷⁶ UN SCOR, 57th sess, 4644th mtg, UN Doc S/PV.4644 (2002) 3.

⁷⁷ *Ibid* 5.

⁷⁸ *Ibid* 8.

warning Iraq that it would face ‘serious consequences’ if this happened, was it the case that *Resolution 1441* authorised the use of force? After the event, American, British and Australian leaders have all implied that *Resolution 1441* did authorise the use of force. Australia’s Prime Minister John Howard, for instance, argued that *Resolution 1441*’s threat of ‘serious consequences’ self-evidently meant the use of military force and therefore the resolution’s unanimous adoption equated to a tacit authorisation.⁷⁹ UK Foreign Secretary Jack Straw took a slightly more cautious line, telling Parliament that

the preference of the British government, in the event of a material breach is that there should be a second resolution authorising military action ... but we must reserve our position in the event that ... [the Security Council] does not [pass a second resolution].⁸⁰

It is true, as Straw and others such as Lawrence Freedman have pointed out,⁸¹ that *Resolution 1441* did not demand that a second resolution be passed before member states used force. It only required that Iraqi non-compliance be reported to the Security Council. Therefore, all the US and UK were obliged to do before resorting to force was confer with the Security Council. This, however, is a specious argument. The *UN Charter* contains in art 2(4) a *jus cogens* rule prohibiting the use or threat of force. The *UN Charter* allows only two exceptions to this rule: collective enforcement action authorised by the Security Council and the inherent right to self-defence.⁸² In the absence of Security Council authorisation to use force or good grounds for claiming a right of self-defence (discussed below), a refusal to specifically repudiate force in a particular case does not constitute a decision to waive art 2(4).

To understand *Resolution 1441*, we need to consider both the context in which it emerged and the way that the Security Council members themselves interpreted it at the time. The push for re-invigorated activism towards Iraq began immediately after the 11 September 2001 terrorist attacks.⁸³ Throughout 2002, the US pressed for a UN resolution authorising the use of force if Iraq continued to breach *Resolution 687*. During these negotiations, Iraq indicated to Hans Blix, Executive Chairman of UNMOVIC, that it would accept a renewed round of inspections. China, Russia, France and most of the non-permanent members of the Security Council rejected the idea that force should be authorised and instead argued that Iraq should be given ‘one last chance’ to cooperate with UNMOVIC. These three permanent members also insisted that any new resolution contain a ‘two-stage’ process. According to this process, the Security Council would decide whether or not Iraq continued to be in material breach on the basis of the reports of UNMOVIC and the IAEA, and would then decide on

⁷⁹ Press conference with Prime Minister John Howard (Parliament House, Canberra, Australia, 25 February 2003) <<http://www.pm.gov.au/news/interviews/Interview252.html>> at 1 October 2003.

⁸⁰ UK, *Parliamentary Debates*, House of Commons, 25 November 2002, vol 395, pt 65, column 47 (Jack Straw, Secretary of State for Foreign and Commonwealth Affairs).

⁸¹ Lawrence Freedman, ‘The New Wars Debate’ (Debate Chair, British International Studies Association Annual Conference, London, 16–18 December 2002).

⁸² Some writers argue that there is a third exception in customary international law: a right to use force in a supreme humanitarian emergency.

⁸³ See Bob Woodward, *Bush at War* (2002).

any further action.⁸⁴ Although a French draft spelling out this two-stage process was not adopted, paragraph 11 of *Resolution 1441* clearly suggests such an approach be taken. The UK and US had also argued that UNMOVIC inspectors should be accompanied by blue-helmeted UN peacekeepers for their protection.⁸⁵ This provision was dropped in favour of the deployment of UN security personnel as part of the inspection team.

What is evident from our knowledge of the diplomatic debate between September and November 2002 is that the US and UK proposed a resolution that authorised the use of force, contained a degree of ‘automaticity’ between Iraqi breaches and Coalition intervention, and gave individual states the right to broach the subject of Iraqi non-compliance in the Security Council. It is clear that *Resolution 1441* does not specifically do any of these things. The closest that the US and UK were able to get to the authorisation of force was a warning that Iraq would face ‘serious consequences’ if it did not comply with the resolution. Did this warning constitute a tacit ‘nod of approval’ for the use of force?

From the statements made in the Security Council immediately after the passage of *Resolution 1441*, it is clear that there was general consensus that the resolution did not constitute implied authorisation for the use of force. The US Ambassador explained that ‘as we have said on numerous occasions to Council members, this resolution contains no “hidden triggers” or “automaticity” with respect to the use of force’.⁸⁶ Similarly, the British Ambassador insisted that ‘there is no “automaticity” in this resolution’.⁸⁷ The other members of the Security Council were also clear on this point. Of the remaining permanent members, Russia pointed out that ‘the resolution just adopted contains no provisions for the automatic use of force’.⁸⁸ China insisted that ‘the text no longer includes automaticity for authorizing the use of force’,⁸⁹ and France welcomed the fact that ‘all ambiguity on ... all elements of automaticity have disappeared from the resolution’.⁹⁰

The non-permanent members were equally clear in their interpretation of the meaning of *Resolution 1441* in relation to the use of force. Mexico stated that ‘we reiterate the belief reflected in the agreed text that the possibility of the use of force is valid only as a last resort, with prior explicit authorization required from the Security Council’.⁹¹ Ireland insisted that ‘this resolution was [meant] to achieve disarmament through inspections, and not to establish a basis for the use of military force ... [a]s far as Ireland is concerned, it is for the Council to decide on any ensuing action’.⁹² The representatives of Bulgaria, Syria, Norway, Colombia, Cameroon and Mauritius all made very similar statements, referring to the fact that *Resolution 1441* did not give a tacit ‘nod of approval’ to the use

⁸⁴ Tim Youngs and Paul Bowers, *Iraq and UN Security Council Resolution 1441*, House of Commons Paper No 02/64, Session 2002–03 (2002) 12.

⁸⁵ Ibid 19.

⁸⁶ UN SCOR, 57th sess, 4644th mtg, UN Doc S/PV.4644 (2002) 3.

⁸⁷ Ibid 5.

⁸⁸ Ibid 8.

⁸⁹ Ibid 13.

⁹⁰ Ibid 5. It is worth noting that both the statements of China and France point to the fact that the original draft presented by the UK and US provide for ‘automaticity’: *ibid* 5, 8–9.

⁹¹ Ibid 6.

⁹² Ibid 7.

of force.⁹³ The remaining two members of the Security Council, Singapore and Guinea, did not address the question of the use of force in their statements.⁹⁴

It is evident from these statements that the question of whether or not the resolution authorised the use of force was the focus for the debate that preceded it. It is also clear that the idea that *Resolution 1441* constituted a tacit ‘nod of approval’ for military action was rejected by the Security Council. Eleven members chose to state categorically that nothing in the resolution should be read as constituting such approval — a point that the resolution’s co-sponsors were forced to concede in their own statements to the Security Council. Any use of force against Iraq cannot, therefore, be legitimately justified by recourse to *Resolution 1441* alone. Even a ‘purposive’ interpretation of the resolution that focuses on the Security Council’s expressed aim (that is, Iraqi disarmament), rather than its precise wording, would lack substance in this case because of the clear expression of the will of the Security Council in the statements outlined above.

The British and Australian legal arguments were not, therefore, compelling. The fact that *Resolution 1441* cannot be read as authorising the use of force places the burden on the reactivation of *Resolution 678*. Given that there is no precedent in the post-1945 legal order for the reactivation of Security Council resolutions, advocates of this position need to demonstrate either that the wording of the resolutions provides continuing authority for the use of force or that it was the intended will of the Security Council that the resolutions be so interpreted. Neither case can be convincingly put. *Resolution 687* does not authorise member states to use force to implement it, nor does it suggest that *Resolution 678* remains in force. Moreover, when *Resolution 687* was passed no Security Council member implied this to be the case. In 1998, the US and UK failed to persuade the Security Council to accept this understanding and a majority of Security Council members explicitly rejected it.

The US, however, did not base its legal justification for war solely on Security Council resolutions. On the day that *Resolution 1441* was passed, US Ambassador John Negroponte pointedly told the Security Council:

If the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security.⁹⁵

Thus, although the US recognised that *Resolution 1441* did not provide enough authority for the use of force against Iraq, two alternative means of legitimising military action within *UN Charter* law remained. The first potential source was the legal argument put forward by the UK and Australia discussed above. The second potential legal justification was based on the American understanding of the inherent right of all states to use force in self-defence, which it adapted to provide itself with an exceptional right of pre-emptive self-defence.

⁹³ Ibid 9–12.

⁹⁴ Ibid 10–11.

⁹⁵ Ibid 3.

VI SELF-DEFENCE

Ambassador Negroponte's reference to self-defence in his speech after the adoption of *Resolution 1441* alluded to the new US doctrine of pre-emptive self-defence.⁹⁶ Indeed, the idea that a right of pre-emptive self-defence might be used to legitimise an invasion of Iraq had been floated as early as June 2002. At that time, senior US Defense Department officials were quoted as saying that 'Iraq has given the United States every reason [to invoke its right to self-defence] under the *UN Charter*, which allows pre-emptive action by nations facing an imminent threat, which Saddam clearly [represents].'⁹⁷ According to this formulation, the right of self-defence that would be exercised by the US against Iraq was embedded in art 51 of the *UN Charter*. In the aftermath of the 11 September 2001 attacks, the US had successfully made a self-defence argument to justify its intervention in Afghanistan in Operation Enduring Freedom. In that case, the Security Council had passed two resolutions that explicitly recognised the right of self-defence in response to the attacks.⁹⁸ Moreover, NATO's North Atlantic Council agreed that the terrorist attacks triggered the alliance's collective defence mechanisms.⁹⁹ The success of the self-defence argument in the case of Operation Enduring Freedom seems to have persuaded the US administration that the provisions in the *UN Charter* on self-defence would legitimise the use of force against Iraq and other 'rogue' states.

Between June and September 2002, the US changed its position and instead attempted to award itself an exceptional right of pre-emptive self-defence that substantially widened the scope for the legitimate use of force contained in art 51 of the *UN Charter* and customary international law. Article 51 declares that:

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

Operation Enduring Freedom was successfully justified as an act of self-defence in these terms for four key reasons. First, on 11 September 2001 the US was subject to an armed attack. Second, the US was able to demonstrate that this armed attack was part of a more protracted campaign orchestrated by al-Qaeda, which included the 1993 attack on the World Trade Centre, the 1998 embassy bombings in Nairobi and Dar es Salaam, and the 2001 attack on the

⁹⁶ Although the US also referred to the argument that existing Security Council resolutions authorised the use of force, the burden of the American legal argument fell on the idea of pre-emptive self-defence: *ibid* 3.

⁹⁷ Jason Burke and Ed Vulliamy, 'War Clouds Gather as Hawks Lay Their Plans', *The Observer* (London, UK), 14 July 2002, 14–15.

⁹⁸ *Resolution 1368*, SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (2001); *Resolution 1373*, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (2001).

⁹⁹ Christopher Bennett, 'Combating Terrorism' [2003] 1 *NATO Review* [5] <<http://www.nato.int/docu/review/2003/issue1/english/art2.html>> at 1 October 2003.

USS Cole in Yemen.¹⁰⁰ Third, there was convincing evidence that, through its bases in Afghanistan, al-Qaeda was planning more attacks against the US.¹⁰¹ Finally, the US had not used its inherent right of self-defence in a manner that could impede the Security Council's authority. It kept the Security Council informed and the legitimacy of Operation Enduring Freedom was implicitly recognised in *Resolution 1368* and *Resolution 1373*.

Although senior officials in the US Defense Department contemplated the use of art 51 to justify the invasion of Iraq, they recognised that it was unlikely that such an argument would be accepted by the international community. The key difficulty was that art 51 expressly rules out pre-emptive self-defence by insisting that each state has a right to use force in self-defence only after an armed attack has occurred. This interpretation of art 51 was affirmed by the ICJ in *Nicaragua* in 1986.¹⁰² The Court's judgment in this case drew on customary international law rather than art 51, but nevertheless the court found that the rules contained in this provision 'correspond, in essentials, to those found in customary international law'.¹⁰³ The ICJ ruled that

for one state to use force against another ... is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. ... In the view of the Court, under international law in force today — whether customary international law or that of the United Nations system — states do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'.¹⁰⁴

In the case of Operation Enduring Freedom, the US government made a compelling argument that it had been the victim of an armed attack. However, no such argument could be asserted in the case of Iraq.

In the absence of a compelling case for war under art 51, the US administration developed the concept of pre-emptive self-defence, which was aimed at overcoming the rule that a state must be subjected to armed attack before it may use force in self-defence. There is some evidence to support the idea that customary international law does not limit the right of self-defence to responses to prior armed attacks. In opposition to the ICJ, Sir Humphrey Waldoock has insisted that

it would be a travesty of the purposes of the *Charter* [the preservation of international peace and security] to compel a defending state to allow its assailant to deliver the first, and perhaps fatal blow ... to read Article 51 literally is to protect the aggressor's right to the first strike.¹⁰⁵

¹⁰⁰ Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense* (American Society of International Law Presidential Task Force on Terrorism Paper, August 2002) 10 <<http://www.asil.org/taskforce/oconnell.pdf>> at 1 October 2003.

¹⁰¹ See, eg, Marie Colvin and Tom Walker, 'Bin Laden's Wives Open Door to Clues', *The Sunday Times* (London, UK), 3 November 2002, 23.

¹⁰² *Nicaragua* [1986] ICJ Rep 14, [188].

¹⁰³ *Ibid* [211].

¹⁰⁴ *Ibid* [188].

¹⁰⁵ Sir Humphrey Waldoock in Guy Roberts, 'The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction' (1999) 27 *Denver Journal of International Law and Policy* 483, 513.

Similarly, other commentators have argued that art 51 merely outlines one situation in which the inherent right of self-defence might be used.¹⁰⁶ Yet this interpretation is too broad, since art 51 clearly suggests that the ‘inherent’ right of self-defence derives from a prior armed attack. However, there is a tradition of customary international law based on *The Caroline (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America)*, which suggests that a limited right of anticipatory self-defence may be permissible, whilst forbidding a broader right of pre-emptive self-defence.¹⁰⁷

The Caroline continues to inform customary international law on self-defence.¹⁰⁸ The material facts of the incident were as follows. In 1837, the UK and US were in a state of peace. However, in the course of an armed insurrection (the ‘Mackenzie rebellion’) against British rule in Canada, Britain claimed that an American owned ship, *The Caroline*, was providing assistance to the rebels. On 29 December 1837, Canadian troops loyal to Britain boarded the ship, killed several Americans and set it alight. At that time the ship was docked on the US side of the Niagara River. The US protested against the attack, claiming that it violated US sovereignty, but Britain claimed to be acting lawfully and invoked a right of self-defence. Britain later apologised for the attack. In his correspondence on the matter to British envoys in 1841–42, US Secretary of State Daniel Webster explained that for the claim of self-defence to be justifiable, Britain was required to ‘show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.¹⁰⁹ The action taken must also involve ‘nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it’.¹¹⁰

Although some writers have argued that Webster’s formula was superseded by the *UN Charter*, ‘there is no corroboration of this view in the text of the Charter’.¹¹¹ This formula helps to overcome the political problem caused by the insistence of art 51 that a right of self-defence can only be claimed after an armed attack has taken place. However, in light of art 51, state practice since 1945 and *opinio juris*, the three cornerstones of the Webster formula — necessity, immediacy and proportionality — constitute, at best, a

¹⁰⁶ Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (1995) 666.

¹⁰⁷ *The Caroline (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America)*, Letter from Mr Webster to Mr Fox (24 April 1841) (1841–42) 29 *British and Foreign State Papers* 1129, 1138; Letter from Lord Ashburton to Mr Webster (28 July 1842) (1841–42) 30 *British Foreign and State Papers* 195, 196 (*'The Caroline'*). *The Caroline* is not important as a ‘stand alone’ case, but is important as it sets out existing customary practice relating to self-defence. Webster’s formula, outlined below, was very similar to the formulas proposed by jurists such as Vattel and Gentili.

¹⁰⁸ It was cited, for example, in the Nuremberg trials to reject German claims that the invasion of Norway constituted a legitimate act of self-defence: ‘Judgment of International Military Tribunal (Nuremberg)’ (1947) 41 *American Journal of International Law* 172, 205.

¹⁰⁹ *The Caroline*, Letter from Mr Webster to Mr Fox (24 April 1841) 29 *British and Foreign State Papers* 1129, 1138.

¹¹⁰ Ibid.

¹¹¹ Yoram Dinstein, *War, Aggression, and Self-Defence* (3rd ed, 2001) 219.

limited right of anticipatory self-defence rather than a broad right of pre-emptive self-defence.

There is widespread agreement that a right of anticipatory self-defence, if one exists, should be interpreted narrowly — an interpretation reinforced by the ICJ's ruling in *Nicaragua* discussed earlier. Ingrid Detter, for instance, argues that 'it must be emphasised that anticipatory force falls under the prohibition of force in Article 2(4) ... A mere threat of attack thus does not warrant military action'.¹¹² However, former ICJ and ICTY judge Antonio Cassese insists that:

In the case of anticipatory self-defence, it is more judicious to consider such action as *legally prohibited* while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds.¹¹³

Oppenheim's International Law goes one step further, however, and suggests that *The Caroline* and state practice since the incident indicate the existence of a customary right of anticipatory self-defence. It is worth quoting Oppenheim at length on this point:

The development of the law, particularly in the light of more recent state practice, in the 150 years since the *Caroline* incident, suggests that action, even if it involves the use of armed force and the violation of another state's territory, can be justified as self-defence under international law where: (a) an armed attack is launched, or is immediately threatened, against a state's territory or forces (and probably its nationals); (b) there is an urgent necessity for defensive action against that attack; (c) there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect; (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, ie to the needs of defence.¹¹⁴

There is therefore a potential avenue for a legal case for war with Iraq to be developed in terms of a limited anticipatory right of self-defence. This right extends beyond art 51 but is nevertheless covered by customary international law owing to *The Caroline* and state practice since.

In 2002, the US administration placed great weight on the argument that art 51 was flawed and should be interpreted more broadly to permit the potential victims of attack to strike first against potential aggressors. The Bush administration's doctrine of pre-emptive self-defence made precisely this argument as a prelude for justifying a war against Iraq. This doctrine, a response to the 11 September 2001 attacks, was formally announced in the new *National Security Strategy* unveiled in September 2002. The *Strategy* insists that

given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threat, and the magnitude of potential

¹¹² Ingrid Detter, *The Law of War* (2000) 86.

¹¹³ Antonio Cassese, *International Law* (2001) 310–11 (emphasis in original).

¹¹⁴ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 1992) vol 1, 422.

harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.¹¹⁵

The document argues that such a strategy is founded on international law. It maintains that, 'for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves'.¹¹⁶

The *National Security Strategy* argued that the US had a right to pre-emptive self-defence in relation to rogue states by attempting to prove the existence of an imminent threat. It did so by linking the 'war against terrorism' with the so-called 'axis of evil' states of Iraq, Iran and North Korea. This was an argument replicated in President Bush's letter to Congress.¹¹⁷ In order to justify the broadening of the right of anticipatory self-defence, the *National Security Strategy* argued that the threat posed by terrorism could not be as readily identified beforehand as the threat of conventional attacks by states. This is because many of the precursors to attack (such as the build-up of arms) are not employed by or necessary to terrorists.¹¹⁸ Writers such as Michael Glennon and Ivo Daalder have both argued that the threat of terrorism, evidenced by the 11 September 2001 terrorist attacks, justifies a broader understanding of self-defence because the threat of terror may be imminent, though not always evident.¹¹⁹

This is certainly a compelling argument when it comes to terrorism. Many states may even have taken this into consideration when evaluating the legality of Operation Enduring Freedom. Indeed, this operation could have been classified as a form of self-defence against a rogue state (Afghanistan) with terrorist links, rather than a response to an armed attack. However, this argument is much less compelling when applied to states such as Iraq, because the US administration has failed to demonstrate that such states do in fact present a new form of threat to international security. Such states may be 'rogues', but they are still states, and there is no evidence to suggest that they pose a threat that is uniquely different to threats posed by other states that hold nuclear, chemical and biological weapons capabilities. In order to apply this argument to Iraq, the US would need to demonstrate a clear and on-going link between the Iraqi regime and al-Qaeda or other terrorist organisations.

The *National Security Strategy* therefore fails to identify the new type of threat posed by 'rogue states'. As a result, the argument that the US holds a right of pre-emptive self-defence in relation to such states is not compelling. Moreover, on closer inspection, the doctrine of pre-emptive self-defence does not propose a substantive alternative to the Oppenheim formulation's judicious interpretation of the status of customary international law on anticipatory self-defence. Nor, indeed, does it offer grounds for reform of customary international law. Thus, it is difficult for states and lawyers to pass judgment on

¹¹⁵ National Security Council, above n 44, 15.

¹¹⁶ Ibid.

¹¹⁷ See above n 41 and accompanying text.

¹¹⁸ Ibid.

¹¹⁹ Michael Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the *United Nations Charter*' (2002) 25 *Harvard Journal of Law and Public Policy* 539; Ivo Daalder, *The Use of Force in a Changing World: US and European Perspectives* (2002) 11–12 <<http://www.unausa.org/pdf/idaalder.pdf>> at 1 October 2003.

the legality of the doctrine, because it is conceivable that — as in the case of Operation Enduring Freedom — the use of force by the US in pre-emptive self-defence may be cognisant with customary international law if the criteria stipulated by Oppenheim are met. Nevertheless, the doctrine has been heavily criticised in the US and internationally. Henry Kissinger, for example, observed that ‘it cannot be either the American national interest or the world’s interest to develop principles that grant every nation an unfettered right of pre-emption against its own definition of threats to its security’.¹²⁰

On closer inspection, the US administration was not primarily concerned with altering the content of the self-defence rule. Instead, the new Bush doctrine made three key claims. First, the US claimed an exclusive right to determine when a state or terrorist organisation poses an imminent threat to international peace and security. Second, the Bush doctrine insists that this right can be executed regardless of commonly recognised international legal opinion. In other words, if the US deems a state to pose an imminent threat, it is not incumbent on it to persuade the international community of the salience or imminence of this threat. Hence, the US insisted that the fact that a great majority of states did not share its belief that Iraq constituted an imminent threat did not mean that the use of force was illegitimate. As President Bush has put it,

not only will the United States impose pre-emptive, unilateral military force when and where it chooses, but the nation will also punish those who engage in terror and aggression and will work to impose a universal moral clarity between good and evil.¹²¹

Third, this right can be exercised by the US without creating a precedent in customary international law that other states may follow. Responding directly to Henry Kissinger’s criticisms, the *National Security Strategy* warns other states not to ‘use pre-emption as a pretext for aggression’.¹²² In trying to avoid setting a precedent, therefore, the US administration reserved for itself the right to judge whether a particular action constitutes legitimate ‘defence’ or illegitimate ‘aggression’.

Herein lies the problem that the US faces in its attempt to persuade the international community that the war against Iraq is legal under the doctrine of pre-emptive self-defence. On the one hand, it is unwilling to argue for a substantive rule change for fear of setting a precedent that could be used by others. On the other hand, in the absence of a new rule, there is no reason to believe that the Oppenheim criteria no longer reflect the status of customary international law. The problem here is that the US has failed to persuade the international community that Iraq posed an imminent threat and that the use of force was necessary and proportionate. Nevertheless, the US has consistently argued that such a threat did exist and continues to hold to this argument despite mounting evidence to the contrary.

¹²⁰ James Harding, ‘Albright Laments “Rash Exuberance” over Iraq’, *Financial Times* (London, UK), 27 September 2002, 2.

¹²¹ Mike Allen and Karen DeYoung, ‘Bush: US Will Strike First at Enemies — In West Point Speech, President Lays Out Broader US Policy’, *The Washington Post* (Washington DC, US), 2 June 2002, A1.

¹²² National Security Council, above n 44, 15.

VII RETURN TO THE SECURITY COUNCIL

Having failed to convincingly demonstrate that the use of force was legal under either or both of the exceptions to art 2(4), the US and UK returned to the Security Council immediately before the invasion of Iraq. They were determined to accomplish one or both of two objectives that would increase the legitimacy and legality of the war. First, they wanted to demonstrate that, taken together, the two sets of legal argument constituted a compelling case for war. Second, they wanted to secure as much legitimacy as possible from the Security Council for their actions.

The first strategy depended on the success of two interrelated arguments: that Iraq remained in breach of its obligations to the Security Council; and that it posed an imminent threat to international peace and security. Less than two months after *Resolution 1441* was passed, the US, UK and Bulgaria proposed a draft resolution declaring Iraq to be in material breach. The resolution was not formally tabled, because it enjoyed little support in the Security Council. On 5 February 2003, Colin Powell presented a substantive case to the Security Council for Iraq to be declared in material breach and for the Security Council to take appropriate action. Powell argued that Iraq was deliberately concealing its weapons of mass destruction and missile technologies in violation of its obligations.¹²³ Moreover, he insisted that there was evidence of links between al-Qaeda and Iraq. He argued that since 1996, the Iraqi regime had expressed an interest in supporting al-Qaeda and therefore the regime constituted a direct threat to international peace and security.¹²⁴ He concluded that the only way to meet this double threat was to endorse the use of force, since 'the United States will not and cannot run that risk to the American people'.¹²⁵

Although the marriage of these two sets of legal argument bolstered their overall case, other states were not persuaded. Russia argued that far from being a case for war, the Powell presentation 'convincingly indicates that the activities of the international inspectors in Iraq must be continued'.¹²⁶ This position was endorsed by China, France, Mexico and Pakistan. The US case was further weakened by the 14 February 2003 report of Executive Chairman of UNMOVIC Hans Blix, which identified a heightened level of Iraqi cooperation with the inspections and openly contradicted some of Powell's earlier claims.¹²⁷ Meanwhile, France¹²⁸ and Germany¹²⁹ presented an alternative proposal for the strengthening of the inspections regime. Powell rejected the proposal, insisting that continued inspections would not bring about disarmament.¹³⁰ However, the increasingly positive tone of Blix's reports, and the existence of a seemingly viable alternative path to disarmament, made the legal arguments of the US appear increasingly disingenuous. On 18–19 February 2003, the Security Council held an open meeting and invited all members of the General Assembly

¹²³ UN SCOR, 58th sess, 4701st mtg, UN Doc S/PV.4701 (2003) 3.

¹²⁴ Ibid 17.

¹²⁵ Ibid.

¹²⁶ Ibid 21.

¹²⁷ UN SCOR, 58th sess, 4707th mtg, UN Doc S/PV.4707 (2003) 2–6.

¹²⁸ Ibid 24–5.

¹²⁹ Ibid 36–7.

¹³⁰ Ibid 20.

who wished to make a statement to do so. Of the nearly 60 members who took up this opportunity to speak, only eight spoke in favour of the US-UK position.¹³¹ Five remained non-committed, and the rest (approximately 40) rejected the use of force at this stage and spoke in favour of continuing or strengthening the inspection regime.¹³² An overwhelming majority of states therefore rejected both the idea that the Security Council had authorised or should authorise the use of force and the notion that Iraq posed an imminent threat to international peace and security.

VIII CONCLUSION

From this discussion it appears that the war against Iraq was illegal. Arguing that the war was authorised by the Security Council runs contrary to the ICJ's suggestion that the wording, context and intent of the Security Council be carefully examined when interpreting resolutions. If we instead follow the ICJ's approach, it is clear that the Security Council never intended to mandate the use of force to ensure compliance with *Resolution 687*. Moreover, it is increasingly evident that Iraq was not committing gross material breaches of *Resolution 1441* immediately prior to the invasion.¹³³ The argument that the war was legal because it was a legitimate act of self-defence is also becoming more problematic. Even if weapons had been discovered in large quantities, this would still not have given the Coalition a legal basis for war.¹³⁴ On the other hand, it could be argued that the Coalition was using legal arguments instrumentally to suit its own purposes. This raises the problem of abuse: the idea that states may use tenuous legal arguments to justify actions that are motivated by narrow self-interests. The danger here is that the invasion of Iraq may set the very sort of precedent that Henry Kissinger worried was being set by the *National Security Strategy*: if it is acceptable for the world's only superpower to use spurious legal arguments to justify the use of force, why should other states be deterred from doing likewise? The problem, as Simon Chesterman has noted, is that states have always used spurious legal arguments to justify the use of force and that the incidence of force increases when those arguments go unchallenged.¹³⁵

Other states have already used the legal arguments of the US to justify their activities. Shortly after the doctrine of pre-emptive self-defence was unveiled in Washington, John Howard argued that

it stands to reason that if you believed that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind, and you had a capacity to stop it and there was no alternative other than to use that capacity, then of course you would have to use it.¹³⁶

¹³¹ Albania, Australia, Georgia, Japan, Latvia, Macedonia, Nicaragua and Uzbekistan.

¹³² UN SCOR, 58th sess, 4709th mtg, UN Doc S/PV.4709 (2003).

¹³³ See, eg, Paul Reynolds, *A Retreat on Iraqi Weapons?* (10 July 2003) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/3056071.stm> at 1 October 2003.

¹³⁴ It may, however, have given them a stronger moral basis for the war.

¹³⁵ Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001) ch 6.

¹³⁶ ABC Radio National, 'Australia: Howard Warns of Possible Pre-Emptive Anti-Terror Strikes', *Asia Pacific Program*, 2 December 2002.

Whereas the US had argued that the right of pre-emptive self-defence already existed in customary international law, Prime Minister Howard went further, insisting that the law 'catch-up' with the political realities of the post-September 11 era. He argued that

when the *United Nations Charter* was written, the idea of attack was defined by the history that had gone before and that is idea of an army rolling across the border of a neighbouring country, or in the case of the Japanese in Pearl Harbour, bombing a base. Now that's different. ... What you're getting is this non-state terrorism which is just as devastating and potentially even more so and all I'm saying, I think many people are saying, is that maybe the body of international law has to catch up with that new reality.¹³⁷

Australia's Asian neighbours were quick to condemn this argument. Indonesia, the Philippines, Thailand and Malaysia united in insisting on the primacy of the ban on the use of force and the rule of law.¹³⁸ This, and pressure from the US, persuaded the Howard government to de-emphasise this new doctrine. Despite this, it is clear that if further exceptions to the general ban on the use of force are created (even if they are justified in terms of American exceptionalism), other states will seek to use them for their own ends.

Does the Iraq case show, therefore, that realists are right to view international law as a purely instrumental resource deployed by the powerful to justify their actions? If realists are correct, there would be no need for legal argument at all. The US would have simply invaded Iraq, arguing that 'the strong do what they can and the weak suffer what they must'.¹³⁹ Not only did the US not do this, it invested considerable time and effort in trying to persuade others of the legality of its cause in ways that made sense to other members of the international community. The key problem, however, is that the US proceeded to invade despite having failed to persuade others of its legal case. Nevertheless, this does not mean that realists are right. Breaches of the law do not negate the law's existence. Indeed, in the Iraq case, the fact that international debates about the legitimacy of the war were framed in legal terms demonstrates the continuing power of legal rules in the international community. However, if those rules are to continue constraining rather than enabling state power, it is important that the court of world opinion recognises breaches of the law and cast a veil of doubt on the legitimacy of actions justified on dubious legal grounds. The cost of not doing so will be a further erosion of the ban on the use of force and a more violent world.

¹³⁷ Ibid.

¹³⁸ Mark Metherell and Cosima Marriner, 'PM's Invasion Threat Angers Asia', *Sydney Morning Herald* (Sydney, Australia), 2 December 2002, 2.

¹³⁹ This is a famous passage from the 'Melian Dialogue': Thucydides, *The Peloponnesian War* (Richard Crawley trans, 1982 ed) 124.