International Law and the 2003 Invasion of Iraq Revisited

Donald K. Anton
Associate Professor of Law
The Australian National University College of Law

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INTRODUCTION

Good morning. Thank you to the organizers for inviting me to participate today in this retrospective on the 2003 invasion of Iraq. My role this morning, as I understand it, is to parse the international legal arguments surrounding the invasion and to reconsider them in the fullness of time that has elapsed. It is a role I agreed to take on with hesitation because it is difficult to add much that is new. I suppose I can take comfort in saying what I’ve already said, and saying it again today, because of how I view my obligations as an international lawyer. I believe we lawyers have a duty to stand up and insist that our leaders adhere to the rule of law in international relations and to help ensure that they are held accountable for the failure to do so.

As I am sure you are all aware, much remains to be done in terms of accountability, especially in the United States, and it is disappointing that the Obama Administration has so far refused to prosecute what seem to be clear violations of the Torture Convention, including all the way up the chain of command if necessary. Today, however, my talk is confined to the legal arguments about the use of force in Iraq and an analysis of their persuasiveness.

CONTEXT

Now, many of you may have noticed the reports of former Prime Minister John Howard speaking about the political or ethical justification of his government’s participation in the 2003 invasion recently at the Lowey Institute. International law was only incidental in this talk – a brief reference to the purported legal use of force under Security Council

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1 I am grateful for the observations, comments, and questions of Ramesh Thakur and Bill Maley following the delivery of this paper, some of which have found their way into this revised version of May 1, 2013.

Resolution 678 adopted on 29 November 1990, over 12 years prior to the invasion, which we will return to.

For now, though, I want to consider how Prime Minister Howard’s defense was structured. It is striking, at least to me, how he seemed to go out of his way to make his defense relative. He strongly emphasized right at the outset that “context … is everything” when considering the 2003 invasion. He went on to locate his defense within what may be said to be the “known knows” and “unknown unknowns” – remember Donald Rumsfeld – about Iraq’s possession of weapons of mass destruction and the consequences for Australia. For Howard, the key context of the 2003 invasion is what he called “fear” and “dread”. Howard talked about the perceived “profound vulnerability”, the “preoccupation” with the next attack, the “unnerved Americans”, and so on.3

Now as every first year law student learns, law is context dependent; law ordinarily follows facts so long as those facts are not themselves illegal. The international law debate about the facts surrounding the 2003 invasion has centered squarely on whether they, indeed, made it legal. Surely the burden of proof was and is on Australia, the US, and the UK to demonstrate that the war in Iraq fell within an exception to the prohibition to the use of force. As Hersch Lauterpacht wrote in connection with recognition, when alleged illegality raised by facts “consists in acts of aggression against … other members of the [international] community in deliberate disregard of fundamental legal obligations of conduct, a heavy … burden of proof falls upon those embarking on [their] legalization …”.4 As I will explain, I do not believe that the so-called “coalition of the willing” met this burden, nor have subsequent developments legitimized the invasion.

And so, context – the factual context – is important in the legal analysis of Iraq. John Howard’s fear and dread of terrorism, however, provide an incorrect legal frame within which to examine the 2003 invasion. Rather, from an international legal point of view, two questions need to be considered. The first is whether the so-called “war on terror” following the 9/11 attacks worked any change in the international law limiting the use of force. The second question is more doctrinaire and relates to arguments about legal interpretation and implicit Security Council authorization (or not) prior to the 2003 invasion.

3 Id.

4 Hersch Lauterpacht, Recognition in International Law (1947), p 430.
INTERNATIONAL LAW AND THE USE OF FORCE

Let’s then set the stage by considering international law and the use of force. Article 2, paragraph 4 of the UN charter creates a peremptory norm of international law we are told by the International Court of Justice in the Nicaragua case that makes it illegal to use force against the territorial integrity or political independence of other states; and the preamble of the Charter seeks the elimination of the scourge of war altogether. Despite periodic claims about lawful intervention for various benign purposes, there are only two legal justifications for the use of force in international relations that are generally accepted to exist in international law.

First, there is an inherent right to use force in self-defense. States and international lawyers continue to argue about the trigger for self-defense, but the right itself is universally accepted. Some adhere strictly to the predicate of an armed attack written into Article 51 of the U.N. Charter. Others, relying on the 19th Century dispute over the destruction of the U.S. merchant ship The Caroline by Great Britain for aiding Canadian rebels, claim that anticipatory self-defense remains available under customary international law (even in the absence of an armed attack) if the use of counterforce is necessary to repel an imminent attack and the force used is proportionate. Argument continues to this day about what imminence legally requires.

The second justification for the legal use of force requires prior authorization by the UN Security Council acting under Chapter VII, Article 42 of the Charter. As mentioned already, it is this second justification that was officially relied on by the Howard government (which was careful to request and receive legal advice from the Attorney-General’s Office of International Law before the invasion). However, at least for the United States, both justifications – self-defense and Security Council authorization – were in play at the time of the invasion and we will examine both.

Post hoc claims of humanitarian intervention were asserted after hostilities started and I do not consider them today for two reasons. First, like my international law teacher and mentor, Lou Henkin, I do not consider humanitarian intervention to be a legal exception to the prohibition on the use of force. There are two exceptions, and only two exceptions, for me – those already mentioned, self-defense and Security Council authorization. And,

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second, even if I did view humanitarian intervention as an exception, it is certain that it does not have application, on its own terms, to the invasion in 2003.

**Preemption and the Iraq War**

I want to return now to the question about whether the so-called “war on terror” following the 9/11 attacks worked any change in international law’s prohibition on the use of force.

The US position was that terror attacks like those of 9/11 were a fundamental change in circumstances – What President George W. Bush called “a different kind of war against a different kind of enemy” – justifying new and responsive law. This view of changed factual circumstances was echoed by John Howard in a press conference immediately prior to the war on the 18th of March. He said:

This, of course, is not just a question of legality, it is also a question of what is right in the international interest and what is right in Australia’s interests. We do live in a different world now, a world made more menacing in a quite frightening way by terrorism in a borderless world …

The US argued that the fundamental change in the use of force in the international system represented by terrorism legitimized what became known as the Bush Doctrine of pre-emptive self-defense embodied in the September 2002 *National Security Strategy of the United States*. The doctrine is expressed in the part V of the Strategy as follows:

Given … rogue states and terrorists, the US can no longer rely on a reactive posture as we have in the past. … We cannot let our enemies strike first … We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction … The doctrine of self-defense needs to be revised in the light of modern conditions. In particular, the requirement that a threat be imminent needs to be revisited.

Australia was the most outspoken supporter of the US pre-emption doctrine under the Howard government; in the aftermath of the Bali bombing in December 2002, John

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Howard asserted on the now defunct channel 9 program, Sunday, that Australia had a right of pre-emptive self-defense against terrorists in neighboring states.\(^8\) Indignation by Indonesia, Malaysia, the Philippines and Thailand followed and was increased by later suspicion that Australia was really trying to justify future action against Iraq.

In fact Australia did not use this justification for its participation in Operation Iraqi Freedom in 2003. The U.S., however, did argue that it was possible to extend the war against terrorism in Afghanistan to cover action in Iraq on the basis of self-defense. For the US, the use of force in Iraq epitomized a lawful use of pre-emptive self-defense against terrorism. This was reflected in October 2002 US Congressional Resolution, the Authorizing the Use of Military Force Against Iraq Resolution 2002,\(^9\) which was based on a combination of pre-emptive self-defense and prior Security Council authorization. This combination of legal justifications was also included in the US letter of 20 March 2003, addressed to the Security Council.\(^10\)

The self-defense justification, however, was immediately challenged. First of all, China, France, Germany, and Russia insisted that a threat be imminent for self-defense to be lawful and did not accept the legality of any threat was not imminent. If that was to be the case, then even within the US and UK there were reports that intelligence services did not accept that Iraq posed an imminent threat.\(^11\) Moreover, the states resistant to claims of self-defense all sought to continue UN weapons inspections regime established under Security Council Resolution 687 and extended in November 2002 under Security Council Resolution 1441 unless an imminent threat could be show.

In the absence of any sort of imminent threat, the U.S. case for self-defense had to rest on some sort of more distant, yet compelling, threat tied to Iraq’s possession or

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\(^9\) Available at: [http://thomas.loc.gov/cgi-bin/query/z?q=H.J.RES.114](http://thomas.loc.gov/cgi-bin/query/z?q=H.J.RES.114).


development of weapons of mass destruction. It thus claimed in the changed, fearful world that pre-emption was available and attempted to make the case – recall, for instance, Colin Powell at the Security Council and US National Security Advisor Condoleezza Rice’s statement in September 2002: “we don’t want the smoking gun [in Iraq] to be a mushroom cloud”.

This U.S. attempt to extend the war against terrorism to cover purely preemptive action provoked significant opposition and controversy. No other state that offered military or political support for Operation Iraqi Freedom put forward a justification based on preemption. The vast majority of states, moreover, warned against this sort of extension of the right of self-defense as a danger to international peace and security because of the potential for easy manipulation and abuse. Over the last ten year, there has been little sign that states, outside of the United States, are willing to abandon the requirement that for self-defense to be permissible a terrorist attack should have already happened or be underway; or at the very least, be imminent. Even the United States appears to have been reticent to push preemption, at least in name, since Iraq, even though with Iran and North Korea it would seem likely to be in mind.

Without a widespread and nearly uniform change in the practice and attitude by states the preemptive self-defense will remain lex lata – that is, aspirational, non-law. There are, of course, good reasons why it should not be law. In my view, preemption remains a troubling doctrine per se and ought to be rejected first and foremost because of its ease of manipulation. Because it is inherently uncertain it can easily be used as a pretext for a use of force that serves non-defensive purposes. The uncertainty arises because the doctrine, it is unclear what can legitimately trigger pre-emptive action. Moreover, it does not tell us what legal forms pre-emptive action can take. And, finally, it does not envisage a role for collective security by the United Nations.

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PRIOR SECURITY COUNCIL AUTHORIZATION

I want to turn now to the second legal justification that was advanced to support the 2003 invasion – namely, the prior authorization by the Security Council to use force. States were bitterly divided as to the legality of any use of force against Iraq. Many argued that no use of force was permitted without Security Council authorization. This, in effect, is precisely what Australia, the UK and the US (as one alternative) argued they had, at least on an implicit basis.

Their argument had its foundation in a Security Council Resolution more than twelve years old at the time -- Resolution 678. Resolution 678 authorized states to “use all necessary means” to eject Iraq from Kuwait following its 1990 invasion. After the success of Operation Desert Storm and the capitulation by Iraq following its withdrawal from Kuwait, a cease-fire was declared in March 1991 by a wide-ranging omnibus SC Resolution -- Resolution 687 (the joke at the time of its adoption was that just as Saddam Hussein had declared the war in Kuwait to be the “mother of all battles”, Resolution 687 was referred to as the “mother of all resolutions”). In addition to imposing obligations concerning the demarcation and respect for the boundary with Kuwait, Resolution 687 imposed obligations of disarmament in a bid to rid Iraq of weapons of mass destruction. The Resolution empowered UN weapons inspectors to monitor the disarmament, but the inspectors met with continuing resistance. The inspectors were withdrawn in December 1998 prior to the start of the unilateral US Operation Desert Fox to try to compel Iraq to cooperate with the inspectors.

Operation Desert Fox did not have the desired effect and Iraq refused to allow the weapons inspectors back in the country. In the lead up to the 2003 invasion, the US and the UK claimed that without inspectors it was probable that Iraq was developing weapons of mass destruction (WMD) and might supply WMD to terrorists. In an apparent final attempt to secure a solution without the use of force, the Security Council passed Resolution 1441.

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14 UN SCOR, 45th sess, 2963rd mtg, UN Doc S/RES/678 (29 November 1990).
16 UN SCOR, 57th sess, 4644th mtg, UN Doc S/RES/1441 (8 November 2002).
unanimously in November 2002 requiring Iraq to allow the UN weapons inspections to resume their work. Iraq accepted the demands of the Resolution.

Resolution 1441 recalled Resolution 678 and Resolution 687. The Resolution went on to state that the Council, acting under Chapter VII of the Charter, had decided that Iraq “has been and remains in material breach of its obligations under relevant resolutions, including Resolution 687”. The Council said was affording Iraq “a final opportunity to comply” with its disarmament obligations. It also set up an enhanced inspection regime and additional reporting obligations for Iraq, the non-observance of which would also be a further material breach. The Resolution provided that Security Council was to reconvene immediately upon receipt notice of Iraq’s failure to comply “in order to consider the situation and the need for full compliance with all of the relevant Security Council resolutions …”. The Resolution concluded by recalling that the Council had repeatedly warned Iraq that it would face “serious consequences” as a result of its continued violations.

There are several things to observe about Resolution 1441. First of all, nowhere does it expressly authorize the use of force against Iraq. The debates leading up to the resolution made it clear that Russia, China, Germany and France were not willing to expressly authorize force in 1441 and thought they were establishing a two-stage process. This would have required second resolution be a reconvened Security Council to expressly authorize force against Iraq in the event of continued Iraqi non-compliance and further material breach.17

Debate initially focused on whether Resolution 1441 alone was enough to authorize force without a second resolution. The Security Council records make it clear that this was not the understanding of member states at the time. China, Russia and France would have vetoed the resolution if it had contained any immediate authorization (explicit or implicit) of military action. Even the US and the UK were in agreement that there was no, what was called “automaticity,” in the resolution and they did not rely on Resolution 1441 alone as the basis for military action.18

However, they maintained, along with Australia, that no second resolution was necessary. This argument was significantly undermined by the fact that the US and UK

17 UN Press Releases SC/7534, SC/7536 (17 October 2002) and SC/7564 (8 November 2002).

made persistent, but unsuccessful, attempts to obtain a second resolution explicitly
authorizing the use of force. Despite the lack of a second resolution, Australia, the UK and
US argued that the essential feature of Resolution 1441 was that it not expressly stipulate
that another resolution was required. Nowhere did it say that the Security Council must
adopt a second Security Council resolution before military action would be authorized. The
key paragraph, Paragraph 12, required only that the Security Council meet to “consider the
situation” which, Australia, the US, and UK claimed, did not require a further Security
Council decision. Accordingly, their view was that states were free to unilaterally resort to
force against Iraq in the event of further material breaches of the cease-fire regime.

Ultimately, the “coalition” of the US, the UK and Australia, with the political and
other support of over 40 other states, went ahead with Operation Iraqi Freedom without a
second resolution. They based their action on a claim that the authority to use force in
Resolution 678 in 1990 had been revived. The Australian and UK governments set out the
legal case for military action against Iraq. In essence, it was argued that Authority to use
force against Iraq arose from the combined effects of resolutions 678, 687 and 1441 under
Chapter VII of the UN Charter. The argument essentially proceeded in nine steps as
follows:
1. Resolution 678 authorized force against Iraq to eject it from Kuwait and to restore peace
and security in the area.
2. Resolution 687, which set out the cease-fire conditions after Operation Desert Storm,
imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in
order to restore international peace and security in the area.
3. Resolution 687 suspended but did not terminate the authority to use force under
resolution 678.
4. A material breach of resolution 687 revives the authority to use force under resolution
678.
5. Resolution 1441 determined that Iraq was and remained in material breach of resolution
687, because it had not fully complied with its obligations to disarm.
6. Resolution 1441 gave Iraq “a final opportunity to comply with its disarmament
obligations” and warned Iraq of the “serious consequences” if it did not.
7. Resolution 1441 also said that if Iraq failed at any time to comply with and cooperate fully
in the implementation of resolution 1441, it would commit a further material breach.
8. It was plain, at least to the US, UK, and Australia, that Iraq had failed so to comply and was and continued to be in material breach.

9. Thus, the authority to use force under resolution 678 was said to have been revived.¹⁹

Ultimately, this justification and the claim of prior Security Council authorization failed to convince the vast majority of other states. While the argument has plausibility, it is far and away not the best reading of these resolutions. The context of the situation and better reasoning and reasons support a reading that a second Security Council resolution was required and that the US, UK, and Australia did not have the necessary authorization and acted unlawfully.

Let's consider the problems other states had with the justification given by Australia, the US, and UK. First, as already mentioned, the US and UK desperately, but unsuccessfully sought a second resolution. Had they truly believed in the force of their argument about revival then presumably they would not have strived so hard for the second resolution.

Second, the prior authorization argument assumes, without any explicit legal basis or authority, that Resolution 678 and its authorization to “use all necessary means” continues in perpetuity and that it could be invoked unilaterally despite the cease-fire declared in Resolution 678. The better way to look at things under the Charter, of course, is that once a cease-fire is established then fresh authority to use force is required. Unlike the law pre-Charter, the use of force is outlawed and the breach of a treaty (even a cease-fire treaty) cannot be used to justify the use forcible measures to compel compliance. This narrow view of permissible violence post-Charter is confirmed by the strong and universally accepted jus cogens prohibition on the use of force.

Third, how could it be that Resolution 678 was designed to provide authority to use force in circumstances that were much different than were present in 1990. Resolution 678 was addressing a specific problem. It was passed in response to the invasion of Kuwait by Iraq; it authorized member states “acting in cooperation with government of Kuwait” to use all necessary means to drive Iraq out of Kuwait and to restore international peace and security in the area. This was a vastly different context in 2003 and it mattered to other

¹⁹ For the Australian case see Bill Campbell, First Assistant Secretary, Office of International Law, Attorney-General’s Department, and Chris Moraitis, Senior Legal Adviser, Department of Foreign Affairs and Trade, ‘Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq, reprinted in (2003) 4 MJIL 178. For the UK case, see (2003) 52 ICLQ 811, infra n. 16.
states. Resolution 1441 was not tied in any way to meeting an illegal use of force by Iraq which had breached international peace and security. This was the central purpose of Resolution 678.

Even states in the region strongly objected to the revival of 678 in such different circumstances. Following the overthrow of the Iraqi government in 2003, the League of Arab States wrote to the Security Council to condemn “the American/British aggression against Iraq” and record their view that the aggression was “a violation of the Charter of the United Nations and the principles of international law, … a threat to international peace and security and an act of defiance against the international community.”

The way most states saw it was that under Resolution 678, Iraq had been driven from Kuwait and international peace and security had been restored in that context. Hence, new authority for a new use of force was required.

Australia attempted to directly address this problem of the revival in the Memorandum of Advice on the Use of Force against Iraq. Australia argued that no time limit on its duration had been established in the operative part of Resolution. Just as equally, though, there was nothing in the operative part of Resolution 678 that said the authorization to use force was perpetual and it is unreasonable, in my view, to assume that it would be. Australia also asserted that Resolution 678 was not confined to the restoration of the sovereignty and independence of Kuwait; the authority to use force also extended to the restoration of international peace and security in the region. A cease-fire, however, lays the ground for the restoration of peace and security. After a certain period without active hostility, it must be said that peace and security has, in fact, been restored. One may debate how long that period might be, but it is certain that it is not over twelve years long. Just as certain, peace and security had obviously been restored in relation to the fighting that ended when Iraq was ejected from Kuwait. Moreover, to read the resolution as broadly as Australia asserted -- to restore international peace and security in the region -- would seemingly provide authority to intervene in states other than Iraq “in the region” and for reasons other than the Resolution was first passed.

Another problem with the case of pre-existing Security Council authorization is its essentially unilateral nature. In Security Council debates during the conflict, China, France,
Germany, and Russia all were unsatisfied that the US and UK allegations about Iraq's weapons of mass destruction and support for terrorism had been substantiated. There was also significant uncertainty about two of the central questions arising out of Resolution 1441: what is a material breach and who is to make that determination? The US, UK and Australia asserted a right to determine for themselves whether there was a further material breach by Iraq and also a right to decide whether to resort to force. Many other states did not accept this interpretation of the relevant resolutions. These states instead insisted that the decisions on material breach and on the use of force were for the Security Council. These states argued that only the Security Council could determine the cease-fire was over. For them, a Security Council finding was a necessary to determining that Iraq was in material breach of the cease-fire, that the cease-fire was at an end, and that a either new authority to use force against Iraq should be give or existing authority under Resolution 678 had been revived. In Resolution 1441 all the Security Council had found was that Iraq “has been and remains in material breach” of its obligations under the relevant Security Council resolutions. It did not terminate the cease-fire or authorize force because of the opposition of France, Russia, and China.

**CONCLUSION**

*Operation Iraqi Freedom* had removed the government of Iraq by 9 April 2003. Many states continued to argue that the use of force was not legal. In addition to the Arab League, the Non-Aligned Movement of 116 and several other states wrote to the Security Council to put on record their view that the use of force in Iraq by the “coalition of the willing” was in violation of the UN Charter. The debates about the future of Iraq after the fall of Saddam Hussein made it clear that many states who had opposed military action in Iraq were keen to ensure that it would not be legitimize with the passage of time, as some claim had happened with Kosovo. Many states are still critical given the uncertain future of Iraq and continue to assert the illegality of the invasion. Certainly states in the Security Council and elsewhere have become much more careful with the language, especially the language of consequential Resolutions. Indeed, they appear to exhibit and cautious unwillingness to approve seemingly necessary measures. The way in which the US, UK and Australia mounted their revival argument has, no doubt, hampered the ability to reach agreement in the Security Council on urgent humanitarian disasters like Syria and elsewhere. One hopes that in the future the long
work on cooperative action in the Security Council will be preferred to plausible, but
unpersuasive, legal interpretation.

Thank you.