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## Legal Bases for Military Operations in Iraq

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### *Introduction*

On March 23, 2003 coalition forces invaded Iraq after it was found to be in material breach of its obligations under numerous UN Security Council resolutions. Less than two months later, on May 1, 2003, President Bush made his historic "mission accomplished" speech from the flight deck of the *USS Abraham Lincoln*, declaring that "major combat operations in Iraq have ended [and that] in the battle of Iraq, the United States and our allies have prevailed."<sup>1</sup> Six years later, US combat troops remain in Iraq fighting a violent insurgency. Although the situation has improved over the past year, President Obama has vowed to end US combat operations no later than August 31, 2010.<sup>2</sup> Even if the President does not live up to his campaign promise, all US forces must withdraw from Iraq no later than December 31, 2011, unless otherwise authorized by the Iraqi government.<sup>3</sup> This article will briefly discuss the legal bases for the invasion of Iraq in March 2003, the legal bases for follow-on operations after May 1, 2003 and the characterization of the conflict across the spectrum of operations.

### *Legal Bases for Launch of Operations*

#### **Justifications for Going to War**

On March 23, 2003 US, British and other coalition forces invaded Iraq. The military intervention was justified primarily along two lines: repeated Iraqi violations

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of a number of United Nations Security Council resolutions and the right of self-defense, and, to a lesser extent, humanitarian intervention.<sup>4</sup> While I tend to agree with the UK Attorney General that the right of self-defense and the principle of humanitarian intervention did not provide a sound legal basis for the invasion,<sup>5</sup> I do believe there was sufficient justification to attack Iraq based on its continuous and flagrant disregard of its disarmament and other obligations under numerous Security Council resolutions. It is true that weapons inspectors failed to find large quantities of chemical and biological weapons following the invasion and that evidence relied on by the United States and the United Kingdom to justify the invasion—e.g., Iraqi ties to al-Qaeda, Iraq's pursuit of biological, chemical and nuclear weapons programs, etc.—was subsequently shown to be based on fraudulent documents or unsubstantiated assertions of Iraqi defectors.<sup>6</sup> However, the fact remains that, at the time of the invasion, Iraq was in breach of all fourteen of its weapons of mass destruction (WMD) obligations set out in numerous Security Council resolutions, as well as its obligations under Resolution 687 (1991)<sup>7</sup> to renounce terrorism; under Resolution 688 (1991)<sup>8</sup> to cease internal oppression of its civilian population; under Resolutions 686 (1991),<sup>9</sup> 687 and 1284 (1999)<sup>10</sup> to account for Kuwaiti and third-country nationals wrongfully detained by Iraq; and Resolutions 686 and 687 to return all Kuwaiti property it had seized.<sup>11</sup>

### **Iraq's Violations of Its Obligations under UN Security Council Resolutions**

No one disagrees with the fact that Iraq flagrantly and repeatedly violated countless Security Council resolutions,<sup>12</sup> as well as its obligations under various international instruments,<sup>13</sup> and that it failed to cooperate with United Nations and International Atomic Energy Agency (IAEA) weapons inspectors for more than two decades. Four months after agreeing to the ceasefire terms in Resolution 687 that ended the first Gulf War, Iraq commenced its pattern of noncompliance with the ceasefire agreement and failure to fully cooperate with UN and IAEA weapons inspectors.<sup>14</sup> This pattern continued throughout the remainder of the decade,<sup>15</sup> culminating in US and UK airstrikes against military targets in Iraq in December 1998 after the UN Special Commission (UNSCOM) submitted a report to the Security Council indicating that Iraq had failed to cooperate fully with its inspectors.<sup>16</sup> Iraqi officials did not allow weapons inspectors to return to Iraq until 2002.<sup>17</sup>

### **Adoption of UN Security Council Resolution 1441 (2002)**

In September 2002, Iraqi officials met with UN Monitoring, Verification and Inspection Commission (UNMOVIC)<sup>18</sup> and IAEA officials to discuss the resumption of weapons inspections in Iraq. During that meeting, Iraqi officials agreed to accept “all the rights of inspection provided for in all of the relevant Security Council

resolutions . . . [and that this] acceptance was stated to be without any conditions attached."<sup>19</sup> Specifically, Iraq agreed that UNMOVIC and the IAEA would be "granted immediate, unconditional and unrestricted access to sites" in Iraq.<sup>20</sup> On October 8, 2002, UNMOVIC and the IAEA sent a letter to the government of Iraq requesting that it confirm the terms of the inspection arrangements agreed to in September. Concerned by the continued failure by Iraq to provide the requested confirmation, the Security Council adopted Resolution 1441 on November 2, 2002 in order to afford Iraq "a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council."<sup>21</sup> Two months later, in its Twelfth Quarterly Report to the Security Council, UNMOVIC reported that Iraq had yet to comply as required with its disarmament obligations.<sup>22</sup>

### **The Need for Further Security Council Action?**

In Resolution 1441 the Security Council decided, *inter alia*,

- That Iraq was in "material breach of its obligations under relevant resolutions," including Resolution 687 (operative paragraph 1);
- To afford Iraq a "final opportunity to comply with its disarmament obligations" under previous resolutions and establish an enhanced inspection regime (operative paragraph 2);
- That "false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with and cooperate fully in the implementation of this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12" (operative paragraph 4);
- That "UNMOVIC and . . . IAEA . . . report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution" (operative paragraph 11);
- To "convene immediately upon receipt of a report in accordance with paragraph 4 or 11 . . . , in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security" (operative paragraph 12).

It is clear from the foregoing that even though Iraq was found to be in "material breach" of its obligations under Resolution 687 and other relevant resolutions, the Security Council did not intend that the use of force authorization in Resolution 678 should revive immediately, since Resolution 1441 afforded Iraq a "final opportunity to comply with its disarmament obligations."<sup>23</sup> What is less clear is

whether paragraph 12 of 1441 required the Council to adopt a second resolution before States could use force against Iraq. The US<sup>24</sup> and UK<sup>25</sup> ambassadors clearly believed that a second resolution was not necessary. France, Russia, China, Ireland, Mexico, Bulgaria, Colombia, Cameroon and Syria indicated that the use of force had to be authorized by the Security Council.<sup>26</sup> A close analysis of the language in the resolution, as well as that of previous resolutions, supports the US and British position.

Resolution 687 “suspended, but did not terminate,” the authority to use force in Resolution 678.<sup>27</sup> Moreover, the ceasefire was conditioned on Iraqi compliance with the obligations imposed by 687 and subsequent relevant resolutions.<sup>28</sup> In this regard, the Security Council decided in Resolution 1441 that Iraq “has been and remains in material breach of its obligations under relevant resolutions,” including 687, and indicated that Iraq had “been warned repeatedly that ‘serious consequences’” would result from continued violations of its obligations.<sup>29</sup> Resolution 1441 also makes clear that compliance with its terms was Iraq’s last chance before the ceasefire resolution would be enforced should Iraq fail to comply with the enhanced inspection regime established by paragraphs 3 and 4.<sup>30</sup>

Pursuant to paragraph 11 of 1441, UNMOVIC reported to the Security Council in its Twelfth Quarterly Report in January 2003 that Iraq was not in compliance with the disarmament obligations established in paragraphs 3 and 4 and other relevant resolutions.<sup>31</sup> The Council then convened “in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.”<sup>32</sup> But does paragraph 12 require a further Security Council resolution authorizing the use of force? I would suggest that the answer to that question is “no.”

Resolution 1441 does not indicate that the Security Council must “decide” what action to take based on a report from UNMOVIC that Iraq is not in compliance with its disarmament obligations. It simply requires that the Council “consider the situation.” There is a clear distinction between the meaning of “consider” and “decide” in resolutions.<sup>33</sup> Note, for example, the language used in paragraph 33 of Resolution 1874 (2009), condemning North Korea’s nuclear test of May 25, 2009, in which the Council specifically states “that further decisions will be required, should additional measures be necessary.”<sup>34</sup> Moreover, during the drafting of 1441 France and Russia proposed language that would have required the Security Council to “decide” that subsequent Iraqi conduct amounted to a “material breach”; however, the proposal was rejected by the US and UK representatives precisely to avoid the need for a second resolution.<sup>35</sup> The US delegation clearly indicated throughout the debate “that they would not accept a text which subjected the use of force to a further Council decision,” arguing that the determination of “material

breach" in paragraphs 1 and 4 of 1441 remained valid regardless of further Security Council action.<sup>36</sup> Therefore, the French and other members of the Council knew what they were voting for when they chose to use the word "consider" rather than "decide" in paragraph 12. Additionally, the Security Council determination in Resolution 1137 (1997) that the situation in Iraq "continues to constitute a threat to international peace and security" remained in effect.<sup>37</sup> Under these circumstances, Iraq's failure to comply with the enhanced inspection regime established in 1441, as reported by UNMOVIC, revived the use of force authorization contained in Resolution 678.<sup>38</sup>

### **Operation Desert Fox (1998)**

It is also important to note that the United States and United Kingdom had taken a similar position in 1998, when US and British forces conducted a series of airstrikes against Iraqi military targets after an UNSCOM report clearly indicated that Iraq had failed to keep its promises to cooperate fully with UNSCOM.<sup>39</sup> They justified their action on Iraq's failure to cooperate fully with UNSCOM, arguing that Resolution 687 (or any subsequent resolution) did not terminate the authority to use force in Resolution 678, but, rather, only suspended that authority.<sup>40</sup> It was further argued that a serious violation of Iraq's obligations under 687 that undermined the basis of the ceasefire would revive the use of force authorization in 678.<sup>41</sup> Portugal<sup>42</sup> and Japan<sup>43</sup> supported the US and UK position. Russia, China, France, Brazil, Costa Rica, Kenya and Sweden disagreed, however, indicating that Security Council action was necessary before military strikes could be conducted to enforce Resolution 687.<sup>44</sup> Slovenia, Gambia and Gabon voiced neither opposition to nor support for the operation.<sup>45</sup> Under these circumstances, it should have come as no surprise that the United States and United Kingdom would take military action independent of further Security Council action if Iraq did not comply with the terms of Resolution 1441.

### **Effect of Ceasefire Violations?**

One additional point regarding whether a second resolution was required to authorize the use of force against Iraq to implement Resolution 1441 also merits discussion. The ceasefire agreement established in Resolution 687 was between the coalition forces and Iraq, not the United Nations and Iraq. In accordance with the agreement and long-standing principles of international law reflected in the 1907 Hague Regulations,<sup>46</sup> the coalition agreed to suspend offensive military operations against Iraq in exchange for Iraq's full compliance with the terms of the ceasefire and its disarmament obligations under previous Security Council resolutions. Once Iraq was found to be in material breach of the conditions of the ceasefire,

beginning with Resolution 707 in 1991 and culminating with Resolution 1441 in 2002, the coalition partners were free to nullify the ceasefire and rely on the use of force authorization in Resolution 678 to resume hostilities against Iraq to enforce Resolution 687 and restore international peace and security to the area.<sup>47</sup>

### *Legal Bases for Follow-On Operations*

#### **Occupation and the Coalition Provisional Authority**

President Bush declared an end to major combat operations on May 1, 2003.<sup>48</sup> One week later, while avoiding the use of the term “occupying power,” the member States of the coalition created the Coalition Provisional Authority (CPA) on May 8, 2003 “to exercise powers of government temporarily, and, as necessary, . . . to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.”<sup>49</sup> Specifically, the coalition partners, working through the CPA, were to provide for security in Iraq, eliminate Iraq’s WMD program, facilitate the return of refugees and displaced persons, maintain civil law and order, eliminate all terrorist infrastructure and resources within Iraq and work to ensure terrorists were denied safe haven, coordinate demining operations, promote accountability for crimes and atrocities committed by the previous regime and assume control of the institutions responsible for military and security matters.<sup>50</sup> The statuses of CPA, Multi-National Forces (MNF), foreign liaison missions, diplomatic and consular missions and contractor personnel were governed by CPA Order No. 17 (Revised).<sup>51</sup> Specifically, section 2 of the Order provided that the MNF, CPA and foreign liaison mission personnel, as well as international consultants, were “immune from Iraqi legal process” and were “subject to the exclusive jurisdiction of their Sending State.” Similarly, section 3 granted contractors immunity, albeit more limited, for acts performed pursuant to the terms and conditions of their contracts. Additionally, section 14 authorized the MNF and private security company personnel to “possess and carry arms while on official duty in accordance with their orders or under the terms and conditions of their contracts.” Similarly, diplomatic and consular personnel could carry arms while on official duty if authorized by the ambassador or chargé d’affaires of a sending State.

Consistent with the 1907 Hague Regulations,<sup>52</sup> 1949 Geneva Convention Relative to the Protection of Civilian Persons<sup>53</sup> and 1977 Geneva Protocol I,<sup>54</sup> CPA Regulation No. 1 provided that the CPA would “exercise powers of government temporarily in order to provide for the effective administration of Iraq . . . , to restore conditions of security and stability, [and] to create conditions in which the Iraqi people can freely determine their own political future . . . .” Regulation 1 also vested the CPA “with all executive, legislative and judicial authority necessary to

achieve its objectives” and provided that Commander, US Central Command, as the commander of coalition forces, would “directly support the CPA by deterring hostilities; maintaining Iraq’s territorial integrity and security; . . . destroying weapons of mass destruction; and assisting in carrying out Coalition policy . . . .”<sup>55</sup>

Security Council Resolution 1483 recognized the “special authorities, responsibilities, and obligations under applicable international law of these states [the United States and United Kingdom] as occupying powers” and called on the CPA “to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.”<sup>56</sup> Resolution 1483 also supported “the formation . . . of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.”

On July 13, 2003, consistent with Resolution 1483, the CPA “recognized the formation of the Governing Council as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq.”<sup>57</sup> Section 2 of CPA Regulation No. 6 provided that “the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq . . . .” The Security Council welcomed the establishment of the Governing Council on August 14, 2003.<sup>58</sup> On June 1, 2004, the Governing Council was dissolved following the establishment of a sovereign Interim Government of Iraq.<sup>59</sup> The CPA officially ceased to exist, and the occupation phase ended on June 30, 2004 when the Interim Government of Iraq assumed full responsibility and authority for governing Iraq until an elected transitional government of Iraq could assume office.<sup>60</sup>

### **United Nations Mandate**

In view of the increasingly unstable security conditions in Iraq, the Security Council authorized a multinational force “to take all necessary measures to contribute to the maintenance of security and stability in Iraq” and urged “Member States to contribute . . . military forces to the multinational force . . . .”<sup>61</sup> This mandate was reaffirmed by the Security Council on June 8, 2004 at the request of the Interim Government of Iraq.<sup>62</sup> However, the Iraqi request did impose some conditions on the MNF, to include

- The MNF and Iraqi security forces (ISF) would coordinate “on all security policy and operations issues in order to achieve unity of command of military operations” in which the ISF were engaged with the MNF.

- The MNF and Iraqi government leaders would “keep each other informed of their activities, consult regularly to ensure effective allocation and use of personnel, resources and facilities, [would] share intelligence, and [would] refer issues up the respective chains of command where necessary.”

- The ISF would progressively assume greater responsibility.

- The MNF would work with the Ministerial Committee for National Security to “reach agreement on the full range of fundamental security and policy issues, including policy on sensitive offensive operations, and . . . ensure full partnership between MNF and Iraqi forces, through close coordination and consultation.”<sup>63</sup>

Operative paragraph 13 of Resolution 1546 also established a new mission for the MNF, the establishment of a separate organization under unified command of the MNF with a dedicated mission to provide security for the United Nations Assistance Mission for Iraq, and paragraph 14 recognized that the MNF would also assist in building the capacity of the ISF and institutions through a program of “recruitment, training, equipping, mentoring and monitoring.”

The Transitional National Assembly was elected on January 30, 2005 and the draft constitution was approved by the Iraqi people on October 15, 2005.<sup>64</sup> Notwithstanding these positive political developments, the Iraqi government recognized that the ISF was not prepared to assume full responsibility for the security of Iraq and requested that the UN extend the MNF mandate for another year in accordance with the tasks and arrangements outlined in Resolution 1546 (2004).<sup>65</sup> Accordingly, on November 8, 2005, the Security Council extended the mandate (including participation in the provision of humanitarian and reconstruction assistance) of the MNF until December 31, 2006.<sup>66</sup>

The following month elections for a new Iraqi National Assembly were held under the 2005 constitution and a new national unity government was formed in May 2006.<sup>67</sup> Again, despite progress on the political front and the turnover of security responsibilities to the ISF in Muthanna and Dhi Qar provinces, the Iraqi government renewed its request for military assistance on June 9, 2006<sup>68</sup> and November 11, 2006,<sup>69</sup> and the Security Council extended the MNF’s mandate for another year.<sup>70</sup>

UNMOVIC and IAEA mandates were terminated in June 2007 following a Security Council determination that Iraq was in compliance with its disarmament obligations under relevant resolutions.<sup>71</sup> Five months later, on November 26, 2007, the United States and Iraq issued a Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America.<sup>72</sup> The United States agreed to provide “security assurances and commitments to . . . Iraq to deter foreign aggression against Iraq” and



support Iraq "in its efforts to combat all terrorist groups."<sup>73</sup> Iraq agreed to request an extension of the MNF mandate "for a final time"<sup>74</sup> and on December 7, 2007 submitted a letter to the Security Council requesting an extension of the mandate "one last time," subject to the following conditions:

- "The functions of recruiting, training, arming and equipping of the Iraqi Army and . . . [ISF] are the responsibility of the Government of Iraq."
- "The Government of Iraq will assume responsibility for command and control of all Iraqi forces, and MNF, in coordination with the Government of Iraq, will provide support and backing to those forces."
- "The Government of Iraq will be responsible for arrest, detention and imprisonment tasks. When those tasks are carried out by MNF-I, there will be maximum levels of coordination, cooperation and understanding with the Government of Iraq."
- "The Government of Iraq considers this to be its final request" for the extension of the MNF mandate.<sup>75</sup>

Following the signing of the Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq (hereinafter US-Iraq security agreement),<sup>76</sup> the Prime Minister of Iraq informed the Security Council on December 7, 2008 that the MNF mandate would terminate on December 31, 2008.<sup>77</sup>

### **US-Iraq Security Agreement**

The US military presence and activities in Iraq are currently authorized by the US-Iraq security agreement, which entered into force on January 1, 2009. Pursuant to Article 24, all US forces shall be withdrawn from Iraq no later than December 31, 2011. Article 24 also provides that all US combat forces were to be withdrawn from Iraqi cities and villages when the ISF assumed full responsibility for security in an Iraqi province or by June 30, 2009, whichever occurred first, and would be stationed in agreed facilities and areas designated by the Joint Military Operations Coordination Committee (JMOCC). In addition, the government of Iraq will assume full responsibility for the Green Zone, although it may request "limited and temporary support" from the US forces to secure the zone.<sup>78</sup>

While US forces may continue to engage in offensive military operations within Iraq, their freedom to do so is limited by the security agreement. Article 4 authorizes US forces to support Iraq "in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime." Article 4 further specifies that all "military operations that are carried out pursuant to

this Agreement shall be conducted with the agreement of the Government of Iraq” and “shall be fully coordinated with Iraqi authorities.” Any disagreement regarding a proposed military operation that cannot be resolved by the JMOCC shall be forwarded to the Joint Ministerial Committee for resolution.<sup>79</sup> US forces are also prohibited from conducting a detention or arrest unless authorized or requested by Iraqi officials, provided that any person detained or arrested by US forces must be handed over to competent Iraqi authorities within twenty-four hours of the arrest or detention.<sup>80</sup> Additionally, Article 22 prohibits US forces from searching a house or other property “except by order of an Iraqi judicial warrant and in full coordination with the Government of Iraq,” except in the case of combat operations authorized by Article 4 of the security agreement.

Notwithstanding these provisions, US forces retain the right of self-defense<sup>81</sup> and are authorized to carry weapons owned by the United States “according to the authority granted to them under orders and according to their requirements and duties.”<sup>82</sup> The United States retains the primary right to exercise criminal jurisdiction over US forces, including the civilian component, for “matters arising inside agreed facilities and areas; during duty status outside agreed facilities and areas.” Iraq has primary jurisdiction over “grave premeditated felonies . . . when such crimes are committed outside agreed facilities and areas outside duty status.”<sup>83</sup> With that exception, the United States has primary jurisdiction over members of the force even for crimes committed outside agreed facilities and areas and even if the member is not in a duty status. Iraq does have the primary right to exercise jurisdiction over US contractors and their employees.<sup>84</sup>

In addition to authorizing US military operations in Iraq, the US-Iraq security agreement provides for more traditional security assistance activities. In this regard, Article 4 provides that US forces shall continue to “cooperate to strengthen Iraq’s security capabilities including, as may be mutually agreed, on training, equipping, supporting, supplying, and establishing and upgrading logistical systems, including transportation, housing and supplies” for the ISF. Similarly, Article 27 provides that the parties “agree to continue close cooperation in strengthening and maintaining military and security institutions . . . in Iraq, including, as may be mutually agreed, cooperation in training, equipping, and arming . . .” the ISF upon the request by the Iraqi government. Article 27 also provides that, in the event of an external or internal threat or aggression against Iraq and upon the request of the Iraqi government, the “Parties shall immediately initiate strategic deliberations and, as may be mutually agreed, the United States shall take appropriate measures, including diplomatic, economic, or military measures, or any other measure, to deter such a threat.”

It has been argued by some that the US-Iraq security agreement is invalid because the domestic legal authority to engage in military operations in Iraq expired on December 31, 2008.<sup>85</sup> Section 3 of Congress's 2002 Joint Resolution to Authorize the Use of Military Force Against Iraq<sup>86</sup> authorizes the President to use the US armed forces to (1) defend US national security against the continuing threat posed by Iraq and (2) enforce all relevant Security Council resolutions regarding Iraq. However, in November 2008 the United States agreed that Iraq's designation as a threat to international peace and security would end on December 31, 2008,<sup>87</sup> contemporaneously with the expiration of the MNF mandate. Consequently, the authority to use force under the 2002 Joint Resolution has expired. Of course, this argument has merit only if you subscribe to the position that the President does not have the constitutional authority to deploy US forces abroad without the concurrence of Congress.

It should also be noted that a bill was introduced in the US House of Representatives on January 8, 2009 that would invalidate the US-Iraq security agreement.<sup>88</sup> H.R. 335, which is currently in committee, provides in section 3 that any agreement that sets out broad parameters for the overall bilateral relationship between the United States and Iraq should "involve a joint decision by the executive and legislative branches." Section 6 goes on to prohibit the entry into force of any agreement between the United States and Iraq that contains a security commitment or security arrangement, as well as the obligation or expenditure of funds to implement such an agreement, unless the agreement has been authorized by a subsequent law or has the advice and consent of the Senate. The proposed legislation is based on a faulty premise that the President cannot enter into a bilateral agreement without the advice and consent of the Senate. Clearly, executive agreements have the same legal effect under US law as a treaty that has received Senate advice and consent.<sup>89</sup> However, should such a law be enacted in conjunction with legislation that restricts the expenditure of Department of Defense appropriations to fund military activities under the security agreement, the status of US personnel in Iraq would be in question.

### *Characterization of the Conflict*

Without question, the invasion of Iraq by coalition forces in March 2003 was an international armed conflict, which quickly transitioned into a period of belligerent occupation in May 2003.<sup>90</sup> With the disestablishment of the CPA in June 2004, the occupation period ended; however, a violent insurgency quickly evolved. As a result, coalition forces remained in Iraq at the request of the Iraqi government to help suppress the insurgency and restore international peace and security.<sup>91</sup> During this

period was the coalition engaged in a non-international armed conflict or an international armed conflict? There was significant international involvement in the insurgency, but coalition forces were not fighting against the government of Iraq. From a US perspective, does it really matter? US policy applies the laws of war to all armed conflicts, regardless of how they are characterized, and to all other military operations.<sup>92</sup> From a practicable point of view, the real question is: does human rights law applicable during a non-international armed conflict provide greater protection to combatants and noncombatants than is afforded to these individuals under international humanitarian law applicable during an international armed conflict? I would suggest that the answer to that question is “no.” The protections afforded to combatants and noncombatants under both bodies of law are qualitatively and quantitatively alike.

### *Conclusion*

The invasion of Iraq on March 20, 2003 clearly constituted a short-lived international armed conflict between the States of the Multi-National Forces and Iraq. Whether the United States can justify the military intervention on the grounds of self-defense and/or humanitarian intervention is questionable; however, there is no doubt that Iraq failed to fully cooperate with the United Nations and International Atomic Energy Agency, and was in material breach of its obligations under at least twenty-five Security Council resolutions covering two decades. Although Resolution 1441 could have been clearer, it did not specifically indicate that a further decision would be required should additional measures be necessary if Iraq failed to comply with its terms. In fact, efforts by France and Russia to include such a requirement failed in the Security Council. Additionally, traditional armistice law would support the resumption of hostilities by coalition forces. Under these circumstances, Iraq’s violation of its obligations under Resolution 1441 and the Resolution 687 ceasefire agreement revived the use of force authorization contained in Resolution 678 and provided a sufficient legal basis for coalition forces to conduct offensive military operations against Iraq.

The international armed conflict quickly transformed into a period of belligerent occupation that began on May 8, 2003 with the establishment of the CPA. Although the occupation phase ended on June 30, 2004 when the CPA was disestablished and the Interim Government of Iraq assumed full authority for governing Iraq, coalition forces and the ISF remained engaged in an armed conflict with the insurgents. Whether that conflict should be characterized as non-international or international is a matter of academic debate, but has little practical effect on the way US forces conduct themselves on the battlefield.

The continued presence of the MNF during this phase of the conflict was at the request of the government of Iraq and was authorized by Security Council Resolutions 1511, 1546, 1637, 1723 and 1790. Each of these resolutions incrementally reduced the authority of the MNF to engage in offensive military operations without coordination with the government of Iraq. With the expiration of the UN mandate on December 31, 2008 and the entry into force of the US-Iraq security agreement on January 1, 2009, US military activities have been further limited. It will be interesting to see if the security agreement stands the test of time and survives US congressional scrutiny, and whether the President vetoes any legislation that would purport to invalidate it.

### Notes

1. David Sanger, *Bush calls military phase over; He says defeat of Saddam has removed "ally of Al Qaeda,"* INTERNATIONAL HERALD TRIBUNE, May 3, 2003, at 3.

2. Christina Bellantoni, *Obama outlines withdrawal from Iraq: Most troops will be out by August 2010,* WASHINGTON TIMES, Feb. 28, 2009, at AO1, available at <http://www.washingtontimes.com/news/2009/feb/28/obama-outlines-withdrawal-from-iraq/>.

3. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq art. 24(1), Nov. 17, 2008, available at [http://graphics8.nytimes.com/packages/pdf/world/20081119\\_SOFA\\_FINAL\\_AGREED\\_TEXT.pdf](http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf) [hereinafter US-Iraq Security Agreement].

4. The legal justification for the invasion is discussed in recently released documents from the US Department of Justice, including two opinions from the Office of Legal Counsel. See Jay S. Bybee, Memorandum Opinion for the Counsel to the President, Authority of the President Under Domestic and International Law to Use Military Force Against Iraq (Oct. 23, 2002), <http://www.usdoj.gov/olc/2002/iraq-opinion-final.pdf> [hereinafter Authority of the President]; John C. Yoo, Memorandum Opinion for the Counsel to the President, Effect of a Recent United Nations Security Council Resolution on the Authority of the President Under International Law to Use Military Force Against Iraq (Nov. 8, 2002), <http://www.usdoj.gov/olc/2002/iraq-unscr-final.pdf>. See also Letter dated March 20, 2003 from the Permanent Representative of the United States of America to the President of the United Nations Security Council, U.N. SCOR, 58th Sess., U.N. Doc. S/2003/351 (2003).

Reasons enumerated by Congress in the legislation that authorized the use of force against Iraq can be found in Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002), reprinted in 41 INTERNATIONAL LEGAL MATERIALS 1440 (2002) [hereinafter Authorization for Use of Military Force], and include

- Iraq posed a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region.
- Iraq remained in material breach and unacceptable breach of its international obligations by continuing to possess and develop a WMD capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations.

## *Legal Bases for Military Operations in Iraq*

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- Iraq persisted in violating Security Council resolutions by continuing to engage in brutal repression of its civilian population; by refusing to release, repatriate or account for non-Iraqi citizens wrongfully detained by Iraq; and by failing to return property wrongfully seized by Iraq from Kuwait.
- The Iraqi regime had demonstrated its capability and willingness to use WMD against other nations and its own people.
- The Iraqi regime had demonstrated its continuing hostility toward, and willingness to attack, the United States, including by attempting in 1993 to assassinate former President Bush and by firing on thousands of occasions on US and coalition forces engaged in enforcing Security Council resolutions.
- Members of al-Qaeda were known to be in Iraq.
- Iraq continued to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of US citizens.
- The September 11, 2001 attacks on the United States underscored the gravity of the threat posed by the acquisition of WMD by international terrorist organizations.
- Iraq had demonstrated the capability and willingness to use WMD and there was a risk Iraq would either employ those weapons against the United States or its armed forces, or provide them to international terrorists who would do so.
- Security Council Resolution 678 authorized the use of all necessary means to enforce Resolution 660 and subsequent relevant resolutions and to compel Iraq to cease certain activities that threatened international peace and security, including the development of WMD, refusal or obstruction of UN weapons inspections in violation of Resolution 687, repression of its civilian population in violation of Resolution 688, and threatening its neighbors or UN operations in Iraq in violation of Resolution 949.

Reasons articulated by the UK government can be found at Foreign and Commonwealth Office, Iraq, <http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/servlet/Front%3Fpagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1068716801627> (last visited Aug. 3, 2009) [hereinafter Iraq Military Action]. These include

- During the four months following the adoption of Resolution 1441, Iraq “failed to answer a single outstanding question about its WMD programmes, or resolve any outstanding issues as requested by the UN.”
- Iraq failed to account for thousands of tons of chemical and biological weapons materials left unaccounted for when UN weapons inspectors were forced to leave in 1998.
- Iraq’s refusal to cooperate with the UN left the United Kingdom no option but “to take military action to enforce Iraq’s disarmament obligations” pursuant to the relevant Security Council resolutions.
- “Authority to use force against Iraq derived from the combined effect of” Resolutions 678, 687 and 1441 without the need for another resolution.

5. Attorney General Note to the Prime Minister (Mar. 7, 2003), <http://collections.europarchive.org/tna/20080205132101/number-10.gov.uk/output/Page7445.asp>.

6. See, e.g., Select Committee on Intelligence, Postwar Findings about Iraq’s WMD Programs and Links to Terrorism and How They Compare with Prewar Assessments, S. Rep. No. 109-331 (2006); INSTITUTE FOR DEFENSE ANALYSES, IRAQI PERSPECTIVES PROJECT, SADDAM AND TERRORISM: EMERGING INSIGHTS FROM CAPTURED IRAQI DOCUMENTS (2007), available at <http://www.fas.org/irp/eprint/iraqi/index.html>; CHARLES DUELFER, COMPREHENSIVE REPORT

OF THE SPECIAL ADVISOR TO THE DIRECTOR OF CENTRAL INTELLIGENCE ON IRAQ'S WMD (2004), available at [https://www.cia.gov/library/reports/general-reports-1/iraq\\_wmd\\_2004/index.html](https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/index.html).

7. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).
8. S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991).
9. S.C. Res. 686, U.N. Doc. S/RES/686 (Mar. 2, 1991).
10. S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999).
11. See, e.g., Iraq Military Action, *supra* note 4; S.C. Res. 1284, *supra* note 10, paras. 7 & 8; S.C. Res. 1441, para. 8, U.N. Doc. S/RES/1441 (Nov. 8, 2002).
12. Iraqi violations included:
  - Security Council Resolution 660 (Aug. 2, 1990) demands Iraq's withdrawal from Kuwait.
  - Security Council Resolution 661 (Aug. 6, 1990) imposes economic sanctions on Iraq for its failure to comply with Resolution 660.
  - Security Council Resolution 662 (Aug. 9, 1990) demands once again that Iraq withdraw from Kuwait.
  - Security Council Resolution 664 (Aug. 18, 1990) demands Iraq take no action to harm third-State nationals in Kuwait.
  - Security Council Resolution 665 (Aug. 25, 1990) imposes a maritime blockade of Iraq for its failure to comply with Resolutions 660, 661, 662 and 664.
  - Security Council Resolution 666 (Sept. 13, 1990) reaffirms Iraq's obligations under Resolution 664 with regard to third-State nationals.
  - Security Council Resolution 667 (Sept. 16, 1990) condemns aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nationals, and demands their immediate release.
  - Security Council Resolution 670 (Sept. 25, 1990) condemns Iraq for its continued violation of Resolutions 660, 662, 664 and 667 and the treatment of Kuwaiti nationals by Iraqi forces, and enhances economic sanctions imposed by Resolution 661.
  - Security Council Resolution 674 (Oct. 29, 1990) demands Iraq cease and desist from taking third-State nationals hostage, and mistreating and oppressing Kuwaiti and third-State nationals, and comply with its obligations under various international agreements regarding third-State nationals and diplomatic and consular missions.
  - Security Council Resolution 677 (Nov. 28, 1990) condemns attempts by Iraq to alter the demographic composition of Kuwait and to destroy civil records maintained by the government.
  - Security Council Resolution 678 (Nov. 29, 1990) affords Iraq one last opportunity to comply fully with Security Council Resolution 660 and all subsequent relevant resolutions, and authorizes member States to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area.
  - Security Council Resolution 687 (Apr. 3, 1991) suspends Resolution 678 by declaring a formal ceasefire between Iraq and Kuwait and the member States cooperating with Kuwait; decides that Iraq shall unconditionally accept the destruction, removal or rendering harmless, under international supervision, of all chemical and biological weapons and all stocks of agents and related

subsystems and components and all research, development, support and manufacturing facilities, and all ballistic missiles with a range greater than 150 kilometers and related major parts and repair and production facilities; decides that Iraq shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components of any research, development, support or manufacturing facilities; and requires Iraq to inform the Security Council that it will not commit or support any act of international terrorism or allow any terrorist organization to operate within its territory.

- Security Council Resolution 688 (Apr. 5, 1991) condemns, and demands that Iraq end, the repression of the Iraqi civilian population, including the Kurds.
- Security Council Resolution 707 (Aug. 15, 1991) affirms Iraq is in material breach of Resolution 687; condemns Iraq for failing to comply with the terms of the ceasefire agreement and cooperate with the UN Special Commission and IAEA inspectors; and requires Iraq to comply fully and without delay with all its obligations, including Resolution 687.
- Security Council Resolution 715 (Oct. 11, 1991) demands that Iraq meet unconditionally all its obligations under the plans approved in the resolution and cooperate fully with the UN Special Commission and the IAEA.
- Security Council Resolution 949 (Oct. 15, 1994) condemns Iraq's military deployment in the direction of the border with Kuwait, and demands the immediate withdrawal of all forces and that Iraq not take any other action to enhance its military capacity in southern Iraq.
- Security Council Resolution 1060 (June 12, 1996) deplores the refusal by Iraq to allow access to sites designated by the UN Special Commission and in violation of Resolutions 687, 707 and 715, and demands Iraq cooperate fully with the UN Special Commission and allow inspection teams immediate, unconditional and unrestricted access to anything they wish to inspect.
- Security Council Resolution 1115 (June 21, 1997) condemns the repeated refusal of Iraq to allow access to sites designated by the UN Special Commission, in violation of Resolutions 687, 707, 715 and 1060, and demands that Iraq cooperate fully with the UN Special Commission and allow inspection teams immediate, unconditional and unrestricted access to anything they wish to inspect.
- Security Council Resolution 1134 (Oct. 23, 1997) condemns the repeated refusal of Iraq to allow access to sites designated by the UN Special Commission, actions by Iraq endangering the safety, and interfering with the freedom of movement, of UN Special Commission personnel and the removal and destruction of documents of interest to the UN Special Commission; decides Iraq is in flagrant violation of Resolutions 687, 707, 715 and 1060; and demands that Iraq fully cooperate with the UN Special Commission and allow the inspection teams immediate, unconditional and unrestricted access to anything they wish to inspect and personnel they wish to interview.
- Statement by the President of the Security Council (Oct. 29, 1997) condemns the October 29 decision of Iraq to try to dictate the terms of its compliance with its obligations to cooperate with the UN Special Commission, demands that Iraq cooperate fully without conditions or restrictions with the UN Special



Commission, and reminds Iraq of its responsibility for the safety and security of the personnel of the UN Special Commission.

- Security Council Resolution 1137 (Nov. 12, 1997) determines that the situation continues to constitute a threat to international peace and stability; condemns the continued violations by Iraq of its obligations to cooperate fully and unconditionally with the UN Special Commission, including Iraq's October 29 decision to seek to impose conditions on cooperation with the UN Special Commission, its refusal on October 30 and November 2 to allow entry to two officials of the UN Special Commission, its denial of entry to inspectors on November 3–7 to sites designated by the UN Special Commission for inspection, its implicit threat to the safety of surveillance aircraft operating on behalf of the UN Special Commission, its removal of significant pieces of dual-use equipment from their previous sites, and its tampering with monitoring cameras of the UN Special Commission; demands that Iraq rescind immediately its October 29 decision; demands that Iraq cooperate fully and immediately and without condition or restrictions with the UN Special Commission; imposes travel restrictions on Iraqi officials responsible for these violations; and reaffirms Iraq's responsibility to ensure the safety and security of the personnel and equipment of the UN Special Commission.

- Statement of the President of the Security Council (Nov. 13, 1997) condemns the unacceptable decision of Iraq to expel personnel of the UN Special Commission, demands the immediate and unequivocal revocation of this action and demands that Iraq comply immediately and fully with its obligations under the relevant resolutions.

- Statement of the President of the Security Council (Jan. 14, 1998) deplores Iraq's statement of January 12 and its subsequent failure to fulfill its obligations to provide the UN Special Commission full, unconditional and immediate access to all sites, which is a clear violation of relevant resolutions, and reiterates the demand that Iraq cooperate fully and immediately and without conditions or restrictions with the UN Special Commission.

- Security Council Resolution 1154 (Mar. 2, 1998) endorses the February 23, 1998 memorandum of understanding between the Deputy Prime Minister of Iraq and the Secretary-General and looks forward to its early and full implementation.

- Security Council Resolution 1194 (Sept. 9, 1998) condemns the decision of Iraq of August 5, 1998 to suspend cooperation with the UN Special Commission and the IAEA, which constitutes a totally unacceptable contravention of its obligations under Resolutions 687, 707, 715, 1060, 1115 and 1154 and the Memorandum of Understanding signed by the Deputy Prime Minister of Iraq and the Secretary-General on February 23, 1998.

- Security Council Resolution 1205 (Nov. 5, 1998) condemns the decision by Iraq of October 31, 1998 to cease cooperation with the UN Special Commission as a flagrant violation of Resolution 687 and other relevant resolutions; demands that Iraq rescind immediately and unconditionally the decision of October 31, as well as the decision of August 5, 1998, to suspend cooperation with the UN Special Commission and to maintain restrictions on the work of the IAEA; and demands that Iraq provide immediate, complete and unconditional cooperation with the UN Special Commission and the IAEA.

- Security Council Resolution 1284 (Dec. 17, 1999) recalls that Iraq has not yet complied with its obligations under Resolutions 686 and 687 to return all Kuwaiti and third-country nationals present in Iraq and to return all Kuwaiti property it had seized, and established the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) to replace the UN Special Commission.
  - Security Council Resolution 1441 (Nov. 8, 2002) deplores that Iraq failed to cooperate fully with UNSCOM and the IAEA; deplores that Iraq failed to comply with its commitments in Resolution 687 with regard to terrorism, Resolution 688 to end repression of its civilian population, and Resolutions 686, 687 and 1284 to account for Kuwaiti and third-country nationals; decides that Iraq remains in material breach of its obligations under relevant resolutions through its failure to cooperate with UNSCOM and IAEA inspectors and to complete actions required by Resolution 687; decides to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions; decides that Iraq shall provide UNMOVIC, the IAEA and the Security Council within thirty days a currently accurate, full and complete declaration of all aspects of its WMD and ballistic missile programs; decides that false statements or omissions in the declarations 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 of Iraq's obligations; decides that Iraq will provide UNMOVIC and the IAEA immediate, unimpeded, unconditional and unrestricted access to anything they wish to inspect or any persons they wish to interview; directs UNMOVIC and the IAEA to report immediately to the Council any interference with inspection activities or Iraq's failure to comply with its disarmament obligations; and decides to convene immediately upon receipt of a report of noncompliance in order to consider the situation.
13. *E.g.*, U.N. Charter; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (treatment of Kuwaiti nationals by Iraqi forces during its occupation in 1990) [hereinafter Geneva Convention IV]; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (Iraqi acts against diplomatic premises and personnel in Kuwait); Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (Iraqi acts against diplomatic and consular missions in Kuwait); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. 8061, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra*, at 158 (Iraq made statements threatening to use chemical and biological weapons and used chemical weapons on prior occasions); Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (Iraq made attempts to acquire materials for a nuclear weapons program).
14. S.C. Res. 707, U.N. Doc. S/RES/707 (Aug. 15, 1991).
15. Joint Resolution, Iraq Compliance with International Obligations, Pub. L. No. 105-235, 112 Stat. 1538 (1998); Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178 (1998); Authorization for Use of Military Force, *supra* note 4. Examples of Iraq's continuing material breach of its obligations under relevant Security Council resolutions include:
- August 1991—Iraq failed to comply with the terms of the ceasefire agreement and cooperate fully with UN and IAEA inspectors.
  - January/February 1992—Iraq rejected plans to install long-term monitoring equipment and cameras called for in Security Council resolutions.

- February 1992—Iraq continued to obstruct the installation of monitoring equipment and failed to comply with UNSCOM orders to allow destruction of missiles and other proscribed weapons.
- July 1992—Iraq denied UNSCOM inspectors access to the Iraqi Ministry of Agriculture.
- December 1992—Iraq violated the southern no-fly zone, raided a weapons depot in Kuwait and denied landing rights to a plane carrying UN weapons inspectors.
- April 1993—Iraq orchestrated a failed plot to assassinate former President George Bush during his visit to Kuwait.
- June 1993—Iraq prevented UNSCOM's installation of cameras and monitoring equipment.
- October 1994—Iraq threatened to end cooperation with weapons inspectors if sanctions were not ended and massed ten thousand troops along the border with Kuwait.
- April 1995—UNSCOM reported that Iraq had concealed its biological weapons program and had failed to account for seventeen tons of biological weapons material.
- April 1995—Iraq continued repression of its civilian population, including the Kurds.
- July 1995—Iraq threatened to end cooperation with UNSCOM.
- March 1996—Iraq barred UNSCOM inspectors from sites containing documents and weapons on four separate days.
- June 1996—Iraq repeatedly barred UNSCOM inspectors from military sites.
- August 1996—Iraqi troops overran Irbil in Iraqi Kurdistan.
- December 1996—Iraq prevented UNSCOM from removing 130 Scud missile engines from Iraq for analysis.
- April 1997—Iraq violated the southern no-fly zone.
- June 1997—Iraqi officials on board UNSCOM aircraft interfered with the controls and inspections, endangering inspectors and obstructing the UNSCOM mission.
- September 1997—an Iraqi official attacked UNSCOM officials engaged in photographing illegal Iraqi activities.
- October 1997—Iraq announced that it would no longer allow US inspectors working with UNSCOM to conduct inspections in Iraq, blocked UNSCOM teams containing US inspectors from conducting inspections and threatened to shoot down US U-2 surveillance flights in support of UNSCOM.
- November 1997—Iraq expelled US inspectors from Iraq, leading to UNSCOM's decision to pull out its remaining inspectors.
- January 1998—an UNSCOM team led by an American was barred from conducting inspections.
- June 1998—the UNSCOM director presented information to the Security Council indicating clearly that Iraq, in direct contradiction to information provided to UNSCOM, had a weaponized nerve agent.
- August 1998—Iraq ceased all cooperation with UNSCOM and threatened to end long-term monitoring activities by the IAEA and UNSCOM.
- October 1998—UN weapons inspectors were withdrawn from Iraq.

- December 1998—Iraq ceased all cooperation with UNSCOM and IAEA inspectors, and did not agree to allow inspectors to return until 2002.
  - November 2002—Iraq failed to provide complete disclosure of its WMD programs and to cooperate fully with weapons inspectors.
16. S.C. Res. 1441, *supra* note 11.
  17. *Id.*
  18. UNMOVIC was the successor organization to UNSCOM and was established pursuant to Security Council Resolution 1284 (1999).
  19. S.C. Res. 1441, *supra* note 11, Annex.
  20. *Id.*
  21. *Id.*, operative para. 2.
  22. Letter and enclosure from the Secretary of State for Foreign and Commonwealth Affairs to Donald Anderson MP, Chair, Foreign Affairs Committee: Iraq: Legal Position Concerning the Use of Force (Mar. 17, 2003), available at <http://collections.europarchive.org/tna/20080205132101/fco.gov.uk/Files/kfile/Iraq%20-%20use%20of%20force.pdf> [hereinafter Secretary of State letter].
  23. S.C. Res. 1441, *supra* note 11, operative paras. 1 & 2.
  24. The US ambassador to the United Nations indicated that if there is a further Iraqi breach, reported to the council by UNMOVIC, the IAEA, or a Member State, the matter will return to the council for discussion. . . . But 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 the relevant United Nations resolutions and protect world peace and security.
- WorldPress.org, The United Nations, International Law, and the War in Iraq, <http://www.worldpress.org/specials/iraq/> (last visited Aug. 3, 2009).
25. The UK government was of the opinion that, although a second resolution would have been desirable, it was not a legal prerequisite (“all that was required was reporting to and discussion by the Security Council of Iraq’s failures, but not an express further decision to authorize force”). Iraq Military Action, *supra* note 4.
  26. The French ambassador indicated that “a two-stage approach would ensure that the Security Council would maintain control of the process at each stage.” The Russian representative “made clear that the resolution just adopted contains no provisions for the automatic use of force. . . .” The Chinese delegate agreed with the French, indicating that “China supports the two-stage approach.” The Irish delegate stated that “it is for the Council to decide on any ensuring action.” The Mexican ambassador agreed, saying “that the use of force is valid only . . . with prior explicit authorization required from the Security Council.” The Bulgarian delegate said that the “resolution is not a pretext for automatic recourse to the use of force.” The Colombian representative agreed, indicating that the “resolution is not . . . a resolution to authorize the use of force.” The Cameroonian ambassador stated that the “resolution does not contain traps or automaticity.” The Syrian ambassador said that “the resolution should not be interpreted . . . as authorizing any State to use force . . . [and that] it reaffirms the central role of the Security Council.” The United Nations, International Law, and the War in Iraq, *supra* note 24.
  27. Attorney General Note to the Prime Minister, *supra* note 5, para. 7.
  28. S.C. Res. 1441, *supra* note 11, para. 12.
  29. According to the Attorney General:

The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase “material

breach" signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that "serious consequences" is accepted as indicating the use of force.

Attorney General Note to the Prime Minister, *supra* note 5, para. 10.

30. *Id.*, para. 12.

31. Secretary of State letter, *supra* note 22, para. 12.

32. Attorney General Note to the Prime Minister, *supra* note 5, para. 13.

33. *Id.*, para. 15.

34. S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009).

35. Attorney General Note to the Prime Minister, *supra* note 5, para. 20.

36. *Id.*, para. 22.

37. S.C. Res. 1137, para. 11, U.N. Doc. S/RES/1137 (Nov. 12, 1997).

38. If the United States and Great Britain made any diplomatic mistakes in the months leading up to the invasion, it was in introducing a draft resolution with Spain in February 2003 that proposed realizable "tests and a timetable for completion of those tests." The draft also "sought an understanding that, if Iraq failed those tests, it would not have taken the final opportunity" that had been afforded to it under Resolution 1441. The Security Council was unable, however, to reach consensus on the draft resolution, so it was tabled on February 24, 2003, with the United States, the United Kingdom and Spain reserving "the right to take their own steps to secure the disarmament of Iraq." Iraq Military Action, *supra* note 4.

In my opinion, these efforts weakened the US and UK position and bolstered the opposition's argument that a second resolution was necessary to authorize the use of force against Iraq for its failure to comply with Resolution 1441. The US and UK efforts beg the question: if they really felt that they had sufficient legal authority to conduct military operations against Iraq under 1441, why did they seek a second resolution?

39. Press Release SC/6611, UN Security Council, Security Council Meets to Discuss Military Strikes Against Iraq; Some Members Challenge Use of Force without Council Consent (Dec. 16, 1998), available at <http://www.un.org/News/Press/docs/1998/19981216.sc6611.html>.

40. The US representative stated that US and British forces "were acting under the authority provided by Council resolutions" and that the airstrikes were "undertaken only when it was evident that diplomacy had been exhausted." He further indicated that Iraq was aware of the Council's conditions requiring "full, final and complete disclosure of all aspects of Iraq's programmes to develop weapons of mass destruction," but that Iraq was repeatedly in flagrant material breach of Council resolutions. Specifically, "by refusing to make available documents and information requested by UNSCOM . . . , by imposing new restrictions on the weapons inspectors and by repeatedly denying access to facilities which UNSCOM wished to inspect, Iraq had acted in flagrant material breach of resolution 687 (1991)." *Id.*

The UK representative indicated that Resolution 687 "had made it a condition of ceasefire both that Iraq destroy its weapons of mass destruction and agree to the monitoring of its obligation to destroy such weapons." He further reiterated that Iraq had never cooperated with UNSCOM and had "concealed evidence, blocked inspections and failed to produce documents relevant to its programmes of mass destruction weapons which were known to exist." *Id.*

41. Attorney General Note to the Prime Minister, *supra* note 5.

42. The Portuguese representative supported the US and the UK position, arguing that the United States and the United Kingdom had made it clear in November that "in the absence of full cooperation by Iraq, they would act without returning to the Council." He also emphasized that the "main cause of the current crisis was the obstinate policy of Iraq's rulers in refusing to comply

with Council resolutions,” highlighting that the latest UNSCOM report stated that Iraq had “not lived up to its commitments.” Press Release SC/6611, *supra* note 39.

43. The Japanese representative also supported the use of force by the United States and the United Kingdom, emphasizing that “Iraq had failed to provide its full cooperation to UNSCOM” and that had led to the airstrikes. He also strongly urged Iraq “to comply immediately and unconditionally with all its obligations under Council resolutions.” *Id.*

44. The Russian representative, on the other hand, argued that the airstrikes “violated the principles of international law and the principle of the Charter,” arguing that “no one could act independently on behalf of the United Nations . . .” The Chinese representative agreed, indicating that the airstrikes were “completely groundless,” and the French representative “deplored the situation that had led to the airstrike.” Costa Rica supported the Russian Federation’s position indicating that the use of force “was the sole and exclusive faculty of the Council . . . [and that] only the United Nations could authorize such actions.” The Brazilian representative agreed, emphasizing that “the Council remained the sole body with legal authority to mandate actions aimed at reinforcing compliance with its own resolutions.” Kenya also supported the Russian position, indicating that “Kenya had repeatedly said any decision to take further action against Iraq remained the sole responsibility of the Security Council.” The Swedish representative, while recognizing that “Iraq had again and again refused to abide by the clear obligations decided by a unanimous Security Council, and it was clear Iraq had not fulfilled the promise given to the Secretary-General only a month ago that it would cooperate fully and without conditions with United Nations weapons inspectors,” indicated that he regretted that the attacks had occurred before the Council had “a chance to conclude its evaluation of the latest developments . . .” *Id.*

45. *Id.*

46. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 13, at 69 [hereinafter Hague IV].

47. Authority of the President, *supra* note 4; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 57–59, 298–299 (4th ed. 2005). *See also* Hague IV, *supra* note 46, arts. 36 & 40.

48. Sanger, *supra* note 1.

49. Letter from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the UN Security Council, U.N. Doc. S/2003/538 (May 8, 2003) [hereinafter United States/United Kingdom letter].

50. *Id.*

51. CPA Order No. 17 (Revised) (June 27, 2004), *available at* [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf).

52. *See* Hague IV, *supra* note 46, arts. 42–56.

53. Geneva Convention IV, *supra* note 13, arts. 47–78.

54. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 13, at 422.

55. CPA Regulation No. 1, sec. 1 (May 16, 2003), *available at* [http://www.cpa-iraq.org/regulations/20030516\\_CPAREG\\_1\\_The\\_Coalition\\_Provisional\\_Authority\\_.pdf](http://www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf).

56. S.C. Res. 1483, para. 13 & operative para. 4, U.N. Doc. S/RES/1483 (May 22, 2003).

57. CPA Regulation No. 6, sec. 1 (July 13, 2003), *available at* [http://www.cpa-iraq.org/regulations/20030713\\_CPAREG\\_6\\_Governing\\_Council\\_of\\_Iraq\\_.pdf](http://www.cpa-iraq.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf).

58. S.C. Res. 1500, U.N. Doc. S/RES/1500 (Aug. 14, 2003).

59. S.C. Res. 1546, para. 7 & operative para. 1, U.N. Doc. S/RES/1546 (June 8, 2004).

60. *Id.*, operative paras. 1 & 2.

61. S.C. Res. 1511, operative paras. 13 & 14, U.N. Doc. S/RES/1511 (Oct. 16, 2003).
62. S.C. Res. 1546, *supra* note 59, operative paras. 9–11 & 14–15.
63. *Id.*, Annex.
64. S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 8, 2005).
65. *Id.*, Annex I.
66. *Id.*, para. 12 & operative para. 1.
67. S.C. Res. 1723, Annex, U.N. Doc. S/RES/1723 (Nov. 28, 2006).
68. Letter from the Minister of Foreign Affairs of the Republic of Iraq to the United Nations, U.N. Doc. S/2006/377 (June 9, 2006).
69. S.C. Res. 1723, *supra* note 67, Annex I.
70. *Id.*, paras. 1–2 & operative para. 1.
71. S.C. Res. 1762, para. 6 & operative para. 1, U.N. Doc. S/RES/1762 (June 29, 2007).
72. Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America, Nov. 26, 2007, *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-11.html>.
73. *Id.*, Security Sphere, para. 1.
74. *Id.*, Security Sphere, para. 2.
75. S.C. Res. 1790, paras. 13, 14 & 16, operative para. 1 & Annex I (Dec. 18, 2007).
76. US-Iraq Security Agreement, *supra* note 3.
77. S.C. Res. 1859, Annex, U.N. Doc. S/RES/1859 (Dec. 22, 2008).
78. US-Iraq Security Agreement, *supra* note 3, art. 28.
79. *Id.*, art. 4.
80. *Id.*, art. 22.
81. *Id.*, art. 4.
82. *Id.*, art. 13.
83. *Id.*, art. 12.
84. *Id.*
85. *Renewing the United Nations Mandate for Iraq: Plans and Prospects: Hearing Before Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 16 (2008) (statement of Professor Oona A. Hathaway, University of California, Berkeley, School of Law, *available at* <http://foreignaffairs.house.gov/110/hat111908.pdf>).
86. Authorization for Use of Military Force, *supra* note 4.
87. Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, Nov. 17, 2008, *available at* <http://www.globalsecurity.org/military/library/policy/national/iraq-strategic-framework-agreement.htm>.
88. Iraq Security Agreement Act of 2009, H.R. 335, 111th Cong. (2009).
89. *See, e.g.*, *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). In that case the Court stated, “[O]ur cases have recognized that the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic.” *Id.* at 415.
90. United States/United Kingdom letter, *supra* note 49; CPA Regulation No. 1, *supra* note 55; S.C. Res. 1483, *supra* note 56.
91. S.C. Res. 1511, *supra* note 61; S.C. Res. 1546, *supra* note 59; S.C. Res. 1637, *supra* note 64; S.C. Res. 1723, *supra* note 67; S.C. Res. 1790, *supra* note 75.
92. Department of Defense, DoD Directive 2311.01E, DoD Law of War Program (2006), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf>.