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## A LEGAL APPRAISAL OF MILITARY ACTION IN IRAQ

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*James P. Terry*

**T**he determination by the George W. Bush administration to enter Iraq and remove the regime of Saddam Hussein from power in early 2003 followed twelve years of Iraqi violations of United Nations Security Council resolutions. Prior to the decision by the United States and its coalition partners to intervene in Iraq with military force, Saddam Hussein had done everything possible to avoid complying with the will of the international community. Of the twenty-six demands made by the Security Council since 1990, Iraq had complied with only three. Equally significant, the regime's repression of the Iraqi people continued.

The 2 October 2002 joint resolution of Congress authorizing the use of all means, including force, to bring Iraq into compliance was merely one of a series of actions by Congress to address Baghdad's noncompliance with its interna-

tional obligations.<sup>1</sup> In 1998, for example, Congress passed a similar resolution declaring that Iraq's continuing weapons of mass destruction programs threatened vital U.S. interests as well as international peace and security; declaring Iraq to be "in material breach of its international obligations"; and urging President Clinton "to take all appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations."<sup>2</sup>

These congressional and UN Security Council resolutions were not the only outcries for change. In the

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Iraq Liberation Act, passed in 1998, lawmakers expressed the sense of Congress that it should be the policy of the United States to support efforts to remove the Iraqi regime from power and to promote the emergence of a democratic government to replace that regime.<sup>3</sup> The reasons for this strong congressional reaction to the Hussein regime rested not solely on Iraqi defiance of United Nations resolutions but also on Saddam Hussein's repression of the Iraqi people, his support for international terrorism, and his refusal to account for Gulf War prisoners or to return stolen property to Kuwait following the 1990–91 conflict, as well as the Baathist regime's efforts to circumvent economic sanctions.

#### FRAMEWORK AND CONTEXT

This article examines these Iraqi violations in the context of contemporary international law standards justifying intervention. More significantly, it examines the right of states to enforce mandates issued by the Security Council and to redress violations of its edicts when the Council, as a body, refuses to do so. This is precisely what occurred when the Baathist regime refused to comply fully with the requirements of UN Security Council Resolution 1441.<sup>4</sup> Finally, the article examines the independent authority available to states, such as the right to intervene to address a threat to international peace and security under Article 51 of the Charter and to invoke the doctrine of humanitarian intervention, when the Security Council cannot or will not act although its edicts have been clearly violated.

The intervention by the United States and its coalition partners in Iraq in March 2003 must be viewed as a significant historical precedent in the relationship of a major power to the Security Council. Previously, in 1998 in Kosovo, the United States and a coalition largely made up of NATO partners had intervened to rescue and protect the threatened Albanian population from Serb aggression without specific Security Council approval. While the military action in Kosovo could arguably be justified as a humanitarian intervention, the coalition entry into Iraq in 2003 was justified on the basis of repeated violations of UN Security Council resolutions under Chapter VII (authorizing all necessary means) and of the threat to international peace and security in the region and the world community posed by the Saddam Hussein regime as a result thereof.<sup>5</sup> As President Bush stated to the UN General Assembly on 12 September 2002:

Twelve years ago, Iraq invaded Kuwait without provocation. And the regime's forces were poised to continue their march to seize other countries and their resources. Had Saddam Hussein been appeased instead of stopped, he would have endangered the peace and stability of the world. Yet the aggression was stopped—by the might of coalition forces and the will of the United Nations.

To suspend hostilities, to spare himself, Iraq's dictator accepted a series of commitments. The terms were clear, to him and to all. And he agreed to prove he is complying with every one of those obligations.

He has proven instead only his contempt for the United Nations, and for all his pledges. By breaking every pledge—by his deceptions, and by his cruelties—Saddam Hussein has made the case against himself. . . .

The conduct of the Iraqi regime is a threat to the authority of the United Nations, and a threat to peace. Iraq has answered a decade of U.N. demands with a decade of defiance. All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?<sup>6</sup>

Thus, the intervention in Iraq must be viewed through a different lens than either our intervention in Afghanistan, where we responded to a direct attack on America, or our intervention in Kosovo, where the coalition responded to a solely humanitarian crisis.<sup>7</sup> In Iraq, the coalition led by the United States and the United Kingdom was responding to an attack on the very effectiveness of the United Nations security system, by seeking redress for repeated violations of Security Council resolutions. If not addressed directly, these violations would have done irreparable harm to the minimum world order system represented by Article 2(4) and Chapter VII of the United Nations Charter, to the peace and security of the region, and to the well-being of the Iraqi people.<sup>8</sup>

#### ANALYSIS OF IRAQI VIOLATIONS OF SECURITY COUNCIL MANDATES

Prior to intervention on 19 March 2003 and the inception of Operation IRAQI FREEDOM, the regime of Saddam Hussein had repeatedly violated sixteen UN Security Council resolutions (UNSCRs) designed to place sharp controls on the regime's activities and to ensure that Iraq did not pose a threat to international peace and security.<sup>9</sup> These violations spanned a period of more than twelve years and were first addressed in Security Council resolutions arising from the Iraqi invasion of Kuwait in August 1990.

In UNSCR 678, passed in the fall of 1990, UN member states were authorized "to use all necessary means" to redress the Iraqi invasion of Kuwait.<sup>10</sup> Resolution 686 (1991) placed requirements on Iraq to return all prisoners, restore all property seized, and accept liability for all damages arising from its illegal invasion of Kuwait.<sup>11</sup> The most significant of the early resolutions addressing Iraqi violations, UNSCR 687 (the cease-fire resolution of 3 April 1991), required that Iraq "unconditionally accept" the destruction, removal, or neutralization "under

international supervision” of all “chemical and biological weapons and all stocks of agents and all related subsystems and components”; it further required that Iraq declare fully its weapons of mass destruction programs, not “use, develop, construct or acquire” any weapon of mass destruction, and reaffirm its obligations under the Nuclear Non-Proliferation Treaty.<sup>12</sup> This instrument was followed by UNSCR 688 (1991), which “condemn[ed]” Iraq’s repression of its civilian population, “the consequences of which threaten international peace and security,” and demanded that this repression cease.<sup>13</sup>

In UNSCR 707 (1991), the Security Council “condemn[ed]” Iraq’s “serious violation” of UNSCR 687 and further “condemn[ed]” Iraq’s noncompliance with the International Atomic Energy Agency (IAEA) and its obligations under the Nuclear Non-Proliferation Treaty. This resolution required that Iraq halt nuclear activities of all kinds, and it mandated that Baghdad make a full and complete disclosure of all aspects of its weapons of mass destruction and missile programs.<sup>14</sup> When Iraq did not comply, the Council passed UNSCR 715 (1991) mandating that Iraq cooperate fully with UN and IAEA inspectors.<sup>15</sup>

In 1994, Saddam Hussein’s regime began military deployments designed to threaten Kuwait once again. The Security Council passed UNSCR 949 (1994) condemning these military deployments and directing Iraq not to utilize its military or other forces in a hostile manner so as to threaten its neighbors or UN operations in Iraq.<sup>16</sup>

Within two years, it was apparent that Saddam Hussein was again acquiring unauthorized weapons components. In response, the Security Council passed UNSCRs 1051 and 1060 (1996). In UNSCR 1051, the Council demanded that Iraq report to the UN and IAEA shipments of dual-use items related to weapons of mass destruction.<sup>17</sup> It also required Iraq to cooperate fully with UN and IAEA inspectors and to allow them immediate, unconditional, and unrestricted access. This was followed by UNSCR 1060, which “deplored” Iraq’s refusal to allow access to UN inspectors and Iraq’s “clear violations” of previous UN resolutions.<sup>18</sup>

In 1997, with access for inspectors still effectively denied, the Security Council passed UNSCR 1115, which “condemn[ed] repeated refusal of Iraqi officials to allow access” to UN officials. The Council charged that these actions constituted a “clear and flagrant violation” of UNSCRs 687, 707, 715, and 1060.<sup>19</sup> In UNSCR 1134 (1997) the Security Council repeated its demands contained in UNSCR 1115.<sup>20</sup> When Iraqi actions threatened the safety of UN personnel in late 1997, the Council “condemn[ed] the continued violations by Iraq” of previous UN resolutions, including its “implicit threat to the safety of aircraft operated by UN inspectors and its tampering with UN inspector monitoring equipment.”<sup>21</sup>

The Iraqi lack of cooperation with the inspection regime continued in 1998, and in March the Security Council passed UNSCR 1154, which stated that any

violation would have the “severest consequences for Iraq.”<sup>22</sup> On 5 August 1998, the Baathist regime suspended all cooperation with UN and IAEA inspectors. This led to Security Council condemnation in UNSCR 1194 (1998), and the claim that Iraqi actions constituted “a totally unacceptable contravention” of its obligations under UNSCRs 687, 707, 715, and 1060.<sup>23</sup> On 31 October 1998 the Iraqis made their August suspension permanent and ceased cooperation with UN inspectors. The Council, in UNSCR 1205, “condemn[ed]” this decision and described it as a “flagrant violation” of UNSCR 687 and other resolutions.<sup>24</sup>

In 1999, frustrated by the continued lack of Iraqi cooperation, the Security Council passed UNSCR 1284, which created the United Nations Monitoring, Verification, and Inspections Commission (UNMOVIC) to replace the previous weapons inspection team, the United Nations Special Commission (UNSCOM), which had been in existence since 1991. In creating this new entity, the Council stated (in Resolution 1284) that Iraq must allow UNMOVIC “immediate, unconditional and unrestricted access” to Iraqi officials and facilities.<sup>25</sup> This concern with Iraqi weapons was reemphasized in UNSCR 1382 (2001), where the Council reaffirmed the obligation of all states to prevent the sale or supply to Iraq of weapons or any other military equipment.<sup>26</sup>

Finally, in UNSCR 1441 (2002) under Chapter VII of the Charter, the Security Council stated that it was “determined to secure full compliance with its decisions.”<sup>27</sup> The Council “decide[d] that Iraq ha[d] been and remain[ed] in material breach of its obligations under relevant resolutions . . . , [d]ecide[d] . . . to afford Iraq . . . a final opportunity to comply with its disarmament obligations,” and “decide[d] that false statements or omissions in the declarations submitted . . . shall constitute a further material breach of Iraq’s obligations and will be reported to the Council for assessment.”<sup>28</sup>

Equally disturbing, during the period represented by the preceding resolutions Saddam Hussein had repeatedly circumvented UN economic sanctions. Further, he refused to allow weapons inspectors to oversee the demolition of his weapons of mass destruction; failed to destroy all of his ballistic missiles with a range greater than 150 kilometers; failed to stop support for terrorism or prevent terrorist organizations from operating within Iraq; failed to help account for missing Kuwaitis; refused to return stolen Kuwaiti property and bear financial responsibility for damage from the first Gulf War; and continued his repression of the Iraqi people.<sup>29</sup>

In addition to the legally binding UNSCRs, the Security Council also issued at least thirty statements from its president regarding Saddam Hussein’s continued violations of these resolutions.<sup>30</sup> Following the thirty days allowed in Resolution 1441 for an Iraqi response to the unanimous adoption of UNSCR 1441, Secretary of State Colin Powell addressed the unresponsiveness of the Iraqi regime in

detailed remarks to the Security Council on 7 March 2003, in which he documented Baghdad's failure to meet the requirements of UNSCR 1441:

Iraq's current behavior, like the behavior chronicled in Dr. Blix's document, reveals its strategic decision to continue to delay, to deceive, to try to throw us off the trail, to make it more difficult, to hope that the will of the international community will be fractured, that we will go off in different directions, that we will get bored with the task, that we will remove the pressure, we will remove the force. And we know what has happened when that has been done in the past. We know that the Iraqis are still not volunteering information and, when they do, what they are giving is often partial and misleading. We know that when confronted with facts, the Iraqis are still changing their story to explain those facts—but not enough to give us the truth. So has the strategic decision been made to disarm Iraq of its weapons of mass destruction by the leadership in Baghdad? My judgment, I think our judgment, has to be clearly not.<sup>31</sup>

### CONFRONTING UN SECURITY COUNCIL INACTION

When President Bush secured broad bipartisan support for the Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq on 2 October 2002, few imagined that the Security Council would not ultimately follow suit.<sup>32</sup> After all, American leaders had obtained unanimous support in the Council for UNSCR 1441, which all but delivered an ultimatum. Secretary Powell clearly defined the burden of Council membership in his 7 March 2003 address:

Security Council membership carries heavy responsibilities. We must not walk away. We must not find ourselves here this coming November with the pressure removed and with Iraq once again marching down the merry path to weapons of mass destruction, threatening the region, threatening the world.

If we fail to meet our responsibilities, the credibility of this Council and its ability to deal with all the critical challenges we face will suffer. As we sit here, let us not forget the horror still going on in Iraq, with a spare moment to remember the suffering Iraqi people whose treasure is being spent on these kinds of programs and not for their own benefit; people who are being beaten, brutalized and robbed by Saddam Hussein and his regime.

Colleagues, now is the time for the Council to send a clear message to Saddam that we have not been taken in by his transparent tactics. Nobody wants war, but it is clear that the limited progress we have seen, the slight substantive changes we have seen, come from the presence of a large military force—nations who are willing to put their young men and women in harm's way in order to rid the world of these dangerous weapons.

It doesn't come simply from resolutions. It doesn't come simply from inspectors. It comes from the will of this Council, the unified will of this Council and the willingness to use force, if it comes to that, to make sure that we achieve the disarmament of Iraq.

Now is the time for the Council to tell Saddam Hussein that the clock has not been stopped by his stratagems and his machinations. We believe that the resolution that has been put forward for action by this Council is appropriate and, in the very near future, we should bring it before this Council for a vote.<sup>33</sup>

The draft Security Council resolution Secretary Powell spoke of in his address to the Council was opposed by Russia and France and thus never was formally proposed for a vote within that body. The provisional draft of 7 March 2003, brought under Chapter VII of the Charter, stated that the Council was determined to secure full compliance with its decisions and to restore international peace and security in the area.<sup>34</sup> It further stated

that Iraq will have failed to take the final opportunity afforded by resolution 1441 (2002) unless, on or before 17 March 2003, the Council concludes that Iraq has demonstrated full, unconditional, immediate and active cooperation in accordance with its disarmament obligations under resolution 1441 (2002) and previous relevant resolutions, and is yielding possession to UNMOVIC and the AEIA [*sic*] of all weapons, weapon delivery and support systems and structures, prohibited by resolution 687 (1991) and all subsequent relevant resolutions, and all information regarding prior destruction of such items.<sup>35</sup>

When the Council did not agree to the proposed resolution, President Bush, with the support of the United Kingdom, Spain, and more than forty other nations, directed U.S. forces, in a coalition with the British, to enter Iraq on 19 March and remove the regime of Saddam Hussein.<sup>36</sup> This decision came only after President Bush had determined that reliance by the United States on further diplomatic or other peaceful means alone would not lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq, and his further determination that the Security Council, despite the Iraqi noncompliance with UNSCR 1441, would not act.

Not surprisingly, on 22 May 2003, after the United States and Great Britain had freed the region from the threat posed by the Baathist regime in Iraq and the Iraqi people from the repression of Saddam Hussein, the Security Council passed UNSCR 1483 by a vote of 14–0.<sup>37</sup> This resolution recognized the United States and the United Kingdom as the “authority” in Iraq pending establishment of an independent democratic Iraqi government, and it affirmed “the need for accountability for crimes and atrocities committed by the previous Iraqi regime.” Acting under Chapter VII of the UN Charter (and expressly recognizing that the situation in Iraq “continues to constitute a threat to international peace and security”), the Security Council further:

4. Call[ed] upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people



through the effective administration of the territory, including in particular working toward 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>38</sup>

#### ANALYSIS OF THE LAWFULNESS OF THE USE OF FORCE IN IRAQ

In light of the failure of the Council to act to enforce UNSCR 1441 and all preceding relevant resolutions with respect to Iraq, it is important to consider whether this inaction in the face of prior commitment authorizes any individual state or coalition of member states to enforce demands upon a member state by the Security Council. In the case of the United States, not only had President Bush persuasively argued his case before the United Nations on 12 February 2003, but Congress had likewise endorsed the use of force by the president in its 2 October 2002 joint resolution.<sup>39</sup> In that resolution, Congress identified both the threat to the United States and to international peace and security, and the need for humanitarian intervention:

Whereas Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations;

Whereas Iraq persists in violating resolutions of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace and security in the region, by refusing to release, repatriate, or account for non-Iraqi citizens wrongfully detained by Iraq, including an American serviceman, and by failing to return property wrongfully seized by Iraq from Kuwait.<sup>40</sup>

While the main responsibility for maintaining peace and security in the UN system is lodged with the fifteen-member Security Council, its effectiveness as an instrument of collective action has often been neutralized when the support of all permanent members, required by Article 27(3), for such a decision is not forthcoming.<sup>41</sup> This was in March 1999, when the Chinese and Russian delegates refused to support a draft Security Council resolution authorizing NATO-led forces to intervene in the Kosovo crisis, despite the support of twelve of the fifteen Council members. The situation arose again in March 2003, when the Russian and French delegates refused to support the coalition-led intervention in Iraq.

It was precisely this concern that led legal experts to debate, long prior to the Kosovo and Iraq crises, criteria that would respond to Council inaction in the face of obvious violations of Charter principles. In 1974, Professor Richard Lillich of the University of Virginia, distressed at the inability of the Security Council to function in matters requiring the unanimous approval of the

permanent members for Chapter VII (“all necessary means”) operations, argued that the most important task confronting international lawyers was to clarify the various criteria by which the legitimacy of a state’s use of force for ends supportive of Charter principles could be judged.<sup>42</sup>

In Iraq, as in Kosovo, the coalition’s use of military force to prevent the continuation of the myriad abuses outlined in UNSCR 1441 was consistent with state practice that has established the lawfulness of intervention when carefully circumscribed by the parameters outlined in Article 2(4). Articles 39 to 51 of the Charter establish a framework for collective security based on the use of military force and provide the Security Council with authority for enforcement.<sup>43</sup> Despite these powers, the reluctance of certain Council members in the case of Kosovo in 1998 and Iraq in 2003 left the organization on the sidelines at a time when, according to the Charter, its possibilities should have been used to the maximum. Evidence of partisanship and division among Council members, and especially among the Permanent Five, may explain the sidetracking of the Security Council. Nevertheless, we should take such matters with the utmost seriousness and ask ourselves what can be done to restore the Council to the position of influence it was given in the Charter.

In fact, Chapter VII makes extensive provision for collective action by the organization “to maintain or restore international peace and security” when a threat to the peace or an act of aggression has occurred.<sup>44</sup> Under Chapter VII it is the Council that must decide whether in any particular instance a threat to the peace exists; whether aggression has been committed and, if so, by whom; and finally, what, if any, collective steps by the world organization would best remedy the situation. With the exception of UN-sanctioned action in the defense of Kuwait in 1990, however, it has never been possible to invoke these collective enforcement provisions. Even in Korea, the potential veto of the Soviet ambassador obliged the organization to turn to the General Assembly for the necessary authority under Articles 11, 14, 18, and 24 of the Charter.<sup>45</sup>

The scarcity of actions brought under the collective-action provisions of Chapter VII does not in any way suggest a more peaceful world than the Charter’s framers envisioned. By 1970, some twenty-five years after the United Nations came into existence, Professor Thomas Franck had already recorded more than one hundred outbreaks of hostility between states.<sup>46</sup> The total is now easily double that number. In response, and as the Chapter VII collective-action provisions have been marked by their lack of visibility, increasing use has been made by states, including the United States, of Articles 51, 52, and 53, which set out the rights of states themselves, under certain exceptional circumstances, to resort to the use of force outside the UN’s collective-action framework. In fact, it is fair to

say that today the exceptions have overwhelmed the rule and transformed the system.

This was certainly the case in Iraq in 2003. The Security Council had repeatedly condemned Iraqi actions that had resulted in violations of international peace and security.<sup>47</sup> It is important to note that after the United States and Great Britain successfully intervened in March 2003—both to eliminate the threat to international peace described in numerous Security Council resolutions and to eliminate the violations of international human rights law described in UNSCR 1441 (2002) and preceding Council statements—the Council quickly passed UNSCR 1483, unanimously recognizing the coalition as the appropriate “authority” in Iraq pending establishment of a lawful government. The incongruity of the refusal of the Security Council to support the coalition intervention when it directly supported the repeated demands the Council previously made of Iraq, and then to support unanimously a resolution recognizing the intervenors as the legitimate “authority” in Iraq, is obvious.

An equally significant credibility gap exists between the noninterventionist policy resulting from a divided Council and fulfillment of the humanitarian principles of the UN Charter with respect to Iraq. The two main purposes of the Charter as a whole are the maintenance of peace and security and the protection of human rights.<sup>48</sup> Article 2(4), the provision relevant to both these purposes, prohibits “the threat or use of force against the territorial integrity or political independence of any state, *or in any other manner inconsistent with the Purposes of the United Nations*” (emphasis supplied). The Iraq intervention clearly reflected the humanitarian purposes stated in myriad United Nations resolutions.

I would further argue that this intervention not only did not violate but actually supported the other requirements in Article 2(4), in that it did not significantly affect, other than in a positive way, the “territorial integrity” or “political independence” of the state against which it was directed. The territorial integrity of Iraq remains undisturbed. Under the Baathist regime of Saddam Hussein there was no political independence, at least not for the people of Iraq. Nor did political independence exist for the regime. Heavily sanctioned by the UN for repeated violations of international law, its economy was increasingly restricted, and the only international intercourse available to the Baathist leaders was with other rogue nations.

This argument is even more attractive legally when one studies the actual language of the UN Charter. While the instrument is admittedly best known for the articles that create a minimum world order system—as represented by Article 2(4) (prohibition on the use of force), Article 51 (exception for self-defense), and Articles 39–51 of Chapter VII (addressing Security Council responsibilities), there is certainly an equal emphasis on protection of human rights. The

preamble, in fact, focuses on the rights of individuals vice the rights of nations when it states that the purpose of the Charter is

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.

Article 1(3) reinforces this language by stating that a principal purpose of the organization is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” Article 55 emphasizes the need to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” The Economic and Social Council established in Article 61 provides the means by which the humanitarian objectives set forth in Article 55 are to be addressed and then reported to the Security Council for action.

International law requires that the community of nations first consider all means short of force to address threats to international peace and security.

#### A NEW PARADIGM

The Iraqi intervention reflects an uneasy recognition that the Charter system is inadequate to address certain of the security and humanitarian crises that may come before the UN, if unanimity among the five permanent members of the Security Council continues to be a requirement. Only the United States and United Kingdom among the Permanent Five on the Security Council were willing to support an enforcement resolution in the case of Iraq. Nevertheless, some forty nations found that authorization of the Security Council was not necessary in Iraq since the action was supportive of, rather than contrary to, the values represented in Article 2(4).

The March 2003 intervention in Iraq thus obliges us to examine once again the law relating to intervention in the case of violations of international peace and security and of human rights. We must attempt to reconcile Charter values on the one hand and required procedures on the other. Iraq is especially appropriate for consideration, since the widespread violations of its international obligations were condemned in unanimity by the Council in numerous UN resolutions. Additionally, however, the human rights violations attributed to the Baathist regime in Baghdad met all the requirements under pre-Charter law for

humanitarian intervention. Specifically, the horrendous crimes against both Kurds in the north and Sunnis in the south were widely recognized and little disputed. The intervention had as its sole purpose to redress the threat to international peace and security and to end the human rights abuses. There was no intention other than that of restoring political independence to the Iraqi people and the Iraqi nation. The territorial integrity of the nation remains intact.

Professor Louis Henkin suggests the likely result of such interventions, unless the unanimity requirement can be separated from Security Council decisions, will be the establishment of precedent whereby states or collectives, confident that the Security Council will acquiesce in their decision to intervene, will shift the burden of the veto. Instead of seeking authorization in advance by resolution subject to veto, in this view, states or collectives will act and then challenge the Council to terminate the action. A permanent member favoring the intervention could frustrate the adoption of such a resolution.<sup>49</sup>

Henkin argues that this situation may already obtain. He suggests subsequent Security Council ratification as occurred in Kosovo with UNSCR 1244, and by extension in Iraq with UNSCR 1483, effectively ratified what earlier might have constituted unilateral action questionable as a matter of law.<sup>50</sup> The actions of the Security Council in adopting UNSC Resolution 1483 and endorsing the authority of the coalition during the transition to an independent Iraq clearly reflect steps toward a change in the law. While it is unlikely there will be a formal change in the Charter, the Council action supports an interpretation of law such that intervention consistent with Charter values (i.e., when neither the territorial integrity nor the political independence of the target state is impacted in a way that would other than support the values represented by Article 2[4]) will be endorsed, not condemned. The international community must not be allowed to excuse its failure to act with pre-Charter references to principles of nonintervention and sovereign immunity and to the Charter requirement for Security Council approval by the Permanent Five, when the lack of approval is contrary to the values for which the Charter stands.

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#### NOTES

1. Public Law 107-243, Authorization for Use of Military Force Against Iraq Resolution, 2 October 2002.
2. Public Law 105-235.
3. Public Law 105-338, Iraq Liberation Act, 31 October 1998.
4. United Nations Security Council Resolution [hereafter UNSCR] 1441, 8 November 2002. Resolution 1441, in paragraph 3, placed the burden on Iraq to provide full disclosure, within thirty days, of all its WMD programs, ballistic missiles, and other delivery systems, including the precise locations of all such components.

5. For Kosovo, see James P. Terry, "Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism," *Military Law Review* (Fall 2003).
6. Statement of President Bush before the United Nations General Assembly, September 12, 2002, available at [www.whitehouse.gov/news/releases/2002/09/20020912-1.html](http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html).
7. See statement of Christopher Greenwood on behalf of the United Kingdom: "There is a right to humanitarian intervention when a government—or the factions in a civil war—create a human tragedy of such magnitude that it creates a threat to international peace. In such a case, if the Security Council does not take military action, then other states have a right to do so. It is from this state practice that the right of humanitarian intervention on which NATO now relies has emerged." "Yes, But Is It Legal?" *Observer*, 28 March 1999, p. 2.
8. Article 2(4) prohibits the use of force by states, while Chapter VII, and specifically Article 51 within Chapter VII, provides the one exception for states and states acting collectively to respond to breaches of the peace when necessary in national self-defense.
9. See UNSCR 678, 29 November 1990; UNSCR 686, 22 March 1991; UNSCR 687, 3 April 1991; UNSCR 688, 5 April 1991; UNSCR 707, 15 August 1991; UNSCR 715, 11 October 1991; UNSCR 949, 15 October 1994; UNSCR 1051, 27 March 1996; UNSCR 1060, 12 June 1996; UNSCR 1115, 21 June 1997; UNSCR 1134, 23 October 1997; UNSCR 1137, 12 November 1997; UNSCR 1154, 2 March 1998; UNSCR 1194, 9 September 1998; UNSCR 1205, 5 November 1998; UNSCR 1284, 17 December 1999.
10. UNSCR 678, 29 November 1990, also required that Iraq comply fully with UNSCR 660 (regarding Iraq's illegal invasion of Kuwait "and all subsequent relevant resolutions").
11. UNSCR 686, 2 March 1991.
12. UNSCR 687 also required Iraq not to commit or support terrorism, or allow terrorist organizations to operate in Iraq, and it reiterated the requirements respecting the return of seized Kuwaiti property and persons addressed in UNSCR 686.
13. UNSCR 688, 5 April 1991, further obligated Iraq to allow immediate access to international humanitarian organizations to those in need of assistance.
14. UNSCR 707, 15 August 1991, additionally required that Iraq allow immediate, unconditional, and unrestricted access to UN and IAEA inspectors and that it cease attempts to conceal or move weapons of mass destruction and related materials and facilities.
15. UNSCR 715, 11 October 1991.
16. UNSCR 949, 15 October 1994, also reiterated that Iraq must cooperate fully with UN weapons inspectors, and that it must not enhance its military capability in southern Iraq.
17. UNSCR 1051, 27 March 1996.
18. UNSCR 1060, 12 June 1996. It reiterated UNSCR 1051's requirement to cooperate and provide unrestricted access.
19. UNSCR 1115, 21 June 1997, further required that Iraq give immediate, unconditional, and unrestricted access to Iraqi officials whom UN inspectors wanted to interview.
20. UNSCR 1134, 23 October 1997.
21. UNSCR 1137, 12 November 1997. This resolution reaffirmed Iraq's responsibility to ensure the safety of UN inspectors.
22. UNSCR 1154, 2 March 1998.
23. UNSCR 1194, 9 September 1998.
24. UNSCR 1205, 5 November 1998, also required, once again, that Iraq provide "immediate, complete and unconditional cooperation" with UN and IAEA inspectors.
25. UNSCR 1284, 17 December 1999, further provided that Iraq must fulfill its commitment to return Gulf War prisoners and called upon Iraq to distribute humanitarian goods and medical supplies to its people and to address the needs of vulnerable Iraqis without discrimination.
26. UNSCR 1382, 29 November 2001.
27. UNSCR 1441, 8 November 2002.
28. *Ibid.*
29. UNSCR 1441 addressed each of these continuing violations.

30. See UN Security Council Presidential Statements of 28 June 1991; 5 February, 19 February, 28 February, 6 March, 11 March, 12 March, 10 April, 17 June, 6 July, 2 September, 23 November, and 24 November 1992; 8 January, 11 January, 18 June, 28 June, and 23 November 1993; 8 October, 18 March, 14 June, 23 August, and 30 December 1996; 13 June, 29 October, 13 November, 3 December, and 22 December 1997; 14 January and 14 May 1998.
31. Remarks of Secretary of State Colin L. Powell before the UN Security Council, 7 March 2003, U.S. Department of State Document 2003/256.
32. Public Law 107-243.
33. Remarks of Colin L. Powell, 7 March 2003.
34. Draft resolution of 7 March 2003, S/2003/215. The United States was joined in sponsorship by Spain and the United Kingdom.
35. *Ibid.*
36. The nations indicating support for the U.S.-British intervention, in addition to Spain, were Italy, Australia, the Czech Republic, Denmark, Netherlands, Norway, Portugal, Romania, Poland, Ukraine, Hungary, Bulgaria, Slovakia, the Dominican Republic, El Salvador, Honduras, Latvia, Lithuania, Finland, Armenia, Azerbaijan, Kazakhstan, Uzbekistan, Moldova, the Philippines, Korea, Thailand, Singapore, Mongolia, Fiji, Tonga, Argentina, Nicaragua, and Nepal. The remaining nations are not listed by their request.
37. UNSCR 1483, 22 May 2003.
38. *Ibid.*
39. For the UN address, see Statement of President Bush, 12 September 2002. For the joint resolution, see Public Law 107-243.
40. Public Law 107-243.
41. Article 23 of the Charter provides that the Republic of China, Russia, France, Great Britain, and the United States are permanent members of the Security Council.
42. See Richard Lillich, "Humanitarian Intervention: A Reply to Dr. Brownlee and a Plan for Constructive Alternatives," in *National Security Law*, ed. John N. Moore (Durham, N.C.: Carolina Academic Press, 1990), pp. 152-53.
43. Articles 39-51 constitute Chapter VII of the UN Charter and provide the authority for the Council to direct intervention to restore international peace and security.
44. See Article 39, UN Charter.
45. For the defense of Kuwait, see UNSCR 678 (1990). For Korea, see UNGA [UN General Assembly] 377(V) (1950).
46. Thomas Franck, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force of States," *American Journal of International Law* 64 (1970), pp. 810-11.
47. See note 9, above, and UNSCR 1441 (2002).
48. See discussion in Moore, ed., *National Security Law*, pp. 148-49.
49. Louis Henkin, "Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention," *American Journal of International Law* 93 (1999), p. 827.
50. *Ibid.*