3. Iraq and the 'Revival' of Security Council Authorisation

From the beginning of Bush's presidency, the US administration seemed dedicated to the removal of Saddam Hussein and the 9/11 attacks certainly triggered a campaign to do so[1]. In 2003, the US acted upon this campaign. America's main justification for the invasion was Security Council authorisation - but not in the traditional sense. The Bush administration built a case for the 'revival' of past resolutions and argued the existence of implied Security Council authority. In the case of Iraq, this prompted debate as to the intended purpose of *resolution 678*[2] and the automaticity (or lack thereof) of *resolution 1441*[3]. However, it seems the greatest disputes arose where the United States' claims of revival and implied authorisation were shadowed with unilateralism. It must be considered nonetheless to what extent, if at all, these claims actually shaped the law on the use of force.

The legal position in 2003 can only properly be comprehended in the context of Iraq's invasion of Kuwait in 1990 to which *resolution 678*[4] authorised the use of 'all necessary means' to restore peace and security. Owing to this authorisation, Operation Desert Storm was initiated[5]. *Resolution 687*[6] – which set out ceasefire conditions after UN member states took action – amongst other things, obliged Iraq to disarm and destroy all WMD's in its possession. Accordingly, the US administration purports that *resolution 687*[7] suspended but did not terminate the authority to use force under *resolution 678*[8] and so a material breach of the former resolution revives the authorisation of use of force under the latter[9].

In 2002 the Security Council unanimously passed *resolution 1441*[10] which

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[1] In the 1990's many people who were to become leading advisors and members of the US government in Bush's presidency – including Dick Cheney, Donald Rumsfeld and Paul Wolfowitz – had called for Saddam Hussein's removal: Philippe Sands, *Lawless World: The whistle-blowing account of how Bush and Blair are taking the law into their own hands* (2nd edn, Penguin Group, London 2006), pg. 182. Merely two days after the twin tower attacks, Secretary of Defense Donald Rumsfeld was asking the National Security Council: 'Why shouldn't we go against Iraq, not just Al-Qaeda?': John Kampfner, *Blair's Wars* (1st edn, Free Press, London 2003), pg. 156.

[2] S/RES/678 (1990).

[3] S/RES/1441 (2002).

[4] S/RES/678 (1990).

[5] Frederic Kirgis, 'The Legal Background on the Use of Force to Induce Iraq to Comply with Security Council Resolutions' (*ASIL*, November 1997) <http://www.asil.org/insigh12.cfm> accessed 15 November 2011.

[6] S/RES/687 (1991).

[7] *Ibid*.

[8] S/RES/678 (1990).

[9] Marko Milanovic, 'Legal Advisors before the Iraq Inquiry, Part 2' (*EJIL: Talk!*, 27 January 2010) <http://www.ejiltalk.org/legal-advisors-before-the-iraq-inquiry-part-2/> accessed 13 December 2011. See also the Attorney General's response to question of legality of the use of force by the UK against Iraq: —, 'Statement by the Attorney General, Lord Goldsmith, in Answer to Parliamentary Question, 17 March 2003' (*ICO*: 17 March 2003) <http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_b_-_statement_by_attorney_general_170303.pdf> accessed 11 November 2011.

[10] S/RES/1441 (2002).

recognised Iraq's continuing breach[11]. However, Iraq was afforded 'a final opportunity to comply'[12]. *Resolution 1441*[13] warned Iraq of the 'serious' consequences if it did not do so, but did not provide states with authorisation 'to use all necessary means' to secure compliance or for any other purpose. China, France, Germany and Russia had objected to such Security Council authorisation within *resolution 1441*[14]. Given that since *resolution 678*[15] the Security Council has on several occasions authorised force by permitting states to use 'all necessary means'[16], it would arguably seem that the absence of the term 'all necessary means' in *resolution 1441*[17], indicates that there is 'no room for a doctrine of implied authorisation'[18].

In pursuance of further Security Council authorisation, in March 2003, Bush declared that he would put a "second resolution" (that would recognise Iraq to be in further breach) to a vote 'no matter what the whip count is'. This indicated that he would not feel any uneasiness or hesitation about invading Iraq whatever the outcome[19]. Bush's proclamation can only suggest that the US administration would act with others when it served its interests (as in Afghanistan) but had no qualms in acting alone when it did not. Despite this, that other member states value the UN[20] ultimately strengthens its legitimising power[21]. This does not go unrecognised by the US. Condaleezza Rice stated, before becoming Bush's National Security Adviser, that America should not make a habit out of seeking Security Council approval, even where it would be beneficial, as it would hinder the administration's ability to act

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[11] The Security Council had repeatedly found Iraq to be in breach of resolution 687 in the past: see for example, S/RES/707 (1991), S/RES/949 (1994), S/RES/1060 (1996), S/RES/1115 (1997), and S/RES/1137 (1997).
[12] S/RES/1441 (2002).
[13] *Ibid*.
[14] *Ibid*. Philippe Sands, *Lawless World: The whistle-blowing account of how Bush and Blair are taking the law into their own hands* (2nd edn, Penguin Group, London 2006), pg. 185. Notably, *resolution 1441* was adopted unanimously. There was an obvious desire to place pressure onto the Iraqi government, but states were only willing to do so if the resolution would not be open to certain interpretations. For example, during the discussion on the adoption of *resolution 1441*, Russia's representative warned against "yielding to the temptation of unilateral interpretation of the resolution's provisions". The French ambassador expressed "that the Security Council would maintain control of the process at each stage". Syria's deputy UN ambassador Fayssal Mekdad has said that Syria had voted in favour of *resolution 1441* after being assured from the US and France "that this resolution would not be used a pretext to strike Iraq [...] SC res 1441 reaffirms the central role the SC": see Rachel Taylor, 'The United Nations, International Law and the War in Iraq' (*World Press*, no date) <http://worldpress.org/specials/iraq/> accessed 31 March 2012.
[15] S/RES/678 (1990).
[16] See for example, S/RES/770 (1992) (Bosnia), S/RES/794 (1992) (Somalia), S/RES/940 (1994) (Haiti), S/RES/929 (1994) (Rwanda).
[17] S/RES/1441 (2002).
[18] Dominic McGoldrick, 'From 9-11 to the War in Iraq' (2004), reproduced in David Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell, London, 2010), pg. 822.
[19] The President's News Conference (6 March 2003) 39 *Weekly Comp. Pres. Doc.* 295, at 301; see Sean Murphy, 'Assessing the Legality of Invading Iraq' (2004) 92(4) Georgetown L.J. 173.
[20] This is due to the fact that it affords them greater input in global affairs and acts as a venue for advancing their goals: Mats Berdal, 'The UN Security Council: Ineffective but Indispensable' (2003) 45(2) Survival 7, at 10-14.
[21] Ian Johnstone, 'US-UN Relations after Iraq: The End of the World (Order) As We Know It?' (2004) 15 EJIL 813, at 834.

unilaterally when need be[22]. This not only emphasises recognition of the legitimising power of the Security Council in the highest tiers of the American government, but depicts the Security Council as the subject of resentment by those that view it as an obstruction to US interests[23].

Nevertheless, since support for a second resolution seemed unlikely[24], the American administration clearly recognised the problems of putting the draft resolution to vote as it chose not to do so. It had agreed with France and Spain that overriding a failed resolution would be more destructive to the Council and international law than for the US to act on its own interpretation of existing resolutions[25]. Bush's diplomatic decisions of preserving the UN's potential viability essentially overshadowed his previous statement on putting the second resolution to vote no matter what the outcome. Even if its words did not, US action illustrated the view that a legal system of lesser ambiguity could prove to be vital for the protection of the United States and its interests in an age of terrorism.

Bush's administration proceeded to argue that a unilateral determination of a material breach of r*esolution 1441*[26] could revive the Security Council authorisation in *resolution 678*[27]. The US saw it as enough that the Security Council did *not* explicitly state that further action, subject to a veto, would be required before force could be used[28] - it supposedly already had implied authorisation[29]. In contrast,

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[22] Rice wrote that the US should not get too involved in peacekeeping or humanitarian interventions because 'we will find ourselves looking to the UN to sanction the use of American military power in these cases, implying that we will do so even when our vital interests are involved, which would be a mistake': Condaleezza Rice, 'Promoting the National Interest' (2000) 79 Foreign Affairs 54, accessed at <http://w7.ens-lyon.fr/amrieu/IMG/pdf/C._Rice_Our_National_Interest_2000-2.pdf> on 1 February 2012.

[23] A great example of this is John Bolton, the previous US ambassador to the United Nations itself. He asserted many times that the United Nations is not central to US security and has even essentially said that there is no such thing as international law and the United States should not be bound by it. Bolton's methods consist of merely asserting the right to do things, whether they have legal basis in international law or not. His opinions go against the very principle that legitimacy for the use of force derives from the Security Council, as it restricts the United States ability to resort to force whenever it feels necessary: See Ruth Wedgwood and Morton Halperin, 'Will the Real John Bolton Please Stand Up?' (*Foreign Policy*, 15 July 2005) <http://www.foreignpolicy.com/articles/2005/07/14/will_the_real_john_bolton_please_stand_up> accessed 24 March 2012. Ian Johnstone, 'US-UN Relations after Iraq: The End of the World (Order) As We Know It?' (2004) 15 EJIL 813, at 834.

[24] The Foreign ministers of France, Russia and Germany had declared that they would "not allow" a new resolution on military force to pass: Sally Bolton, 'UN war doubters unite against resolution' *The Guardian* (London, 5 March 2003) <http://www.guardian.co.uk/world/2003/mar/05/iraq.politics> accessed 31 March 2012. The US had also put six 'swing vote' countries – Angola, Cameroon, Chile, Guinea, Mexico and Pakistan – under intense pressure in attempts to secure support for their draft resolution, but was met with high resilience – few if any were won over. For a description of the pressure that was placed on these states, including inducements in the form of development assistance, see statements by the then British Minister for International Development, Clare Short: —, 'Transcript of Clare Short Interview' (*BBC News*, 26 February 2004) <http://news.bbc.co.uk/1/hi/uk_politics/3489372.stm> accessed 28 October 2011.

[25] Ian Johnstone, 'US-UN Relations after Iraq: The End of the World (Order) As We Know It?' (2004) 15 EJIL 813, at 835.

[26] S/RES/1441 (2002).

[27] S/RES/678 (1990).

[28] This notion follows the pattern of the *Lotus case*, that essentially what is not prohibited is legal in international law. If the Security Council did not prohibit action without a further resolution, then any

some argue that *resolution 678*[30] was no longer in effect – the authorisation for use of force that it provided had essentially lapsed, and if revival *were* possible, it would be in the hands of the Security Council to apply it[31]. Greenwood however asserts that a second resolution authorising force simply was not necessary in international law[32]. He proposes that although *resolution 687*[33] suspended the authority to use force it had also reaffirmed *resolution 678*[34], and in doing so left open the possibility to legally resort to forcible measures once again, should Iraq breach its ceasefire obligations[35].

Natarajan suggests that *resolution 687*[36] indicated no deadline for sanctions and surveillance and that the 2003 Iraq invasion was 'the continuation of a long-standing understanding on the part of the United States that they can indefinitely continue the process of disciplining Iraq'[37]. This is in stark contrast with Colin Powell's assertion in 1995: 'The UN resolution made clear that the mission was only to free Kuwait[38]. Of course, the Security Council did not aim for *resolution 678*[39] to permanently remain in force[40]. An alternative view is that the resolution was limited to the duration it took to ensure Iraq's compliance with the relevant resolutions and secure peace in the region. In paragraph 1 of *resolution 687* the council affirms earlier resolutions on Iraq for the purpose of achieving 'the goals of the present resolution', one of which is restoration of peace and security '*in the area*'[41]. The wording seems to indicate that this was not limited to the liberation of Kuwait (hence

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action taken would be legitimate. However, in the 1996 ICJ Advisory Opinion on Nuclear Weapons, Judge Bedjaoui asserted that 'The Courts decision in the "*Lotus*" case [...] should be understood to be of very limited application. It would be to exaggerate the importance of that decision [...] were it to be divorced from the particular context, both judicial and temporal, in which it was taken': *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ, 8 July, para. 12, *per* Bedjaoui.

[29] Marko Milanovic, 'Legal Advisors before the Iraq Inquiry, Part 2' (*EJIL: Talk!*, 27 January 2010) <http://www.ejiltalk.org/legal-advisors-before-the-iraq-inquiry-part-2/> accessed 13 December 2011.

[30] S/RES/678 (1990).

[31] See Thomas Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 AJIL 607, at 612-614. See further a letter written to Tony Blair by several academics on 7 March 2003 where it was stated that, 'Neither security council resolution 1441 nor any prior resolution authorises the proposed use of force in the present circumstances': —, 'War would be illegal' *The Guardian* (London, 7 March 2003) <http://www.guardian.co.uk/politics/2003/mar/07/highereducation.iraq> accessed 4 February 2012. Notably, a similar letter was also written by American academics to Bush, and was sent to the media but was not published.

[32] Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq' (2003) 4 San Diego Int'l L.J. 7, at 34.

[33] S/RES/687 (1991).

[34] S/RES/678 (1990).

[35] Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq' (2003) 4 San Diego Int'l L.J. 7, at 34. Reasons for this alleged indefinite right include Iraq's continuing failure to comply with its resolution obligations, and thus continuing to pose a threat to peace 'in the area': see further for analysis.

[36] S/RES/687 (1991).

[37] Usha Natarajan, 'Creating and recreating Iraq: legacies of the mandate system in contemporary understandings of third world sovereignty' (2011) 24(4) LJIL 799, at 819.

[38] Colin Powell, *A Soldiers Way* (1st edn, Hutchinson, London 1995), pg. 490.

[39] S/RES/678 (1990).

[40] See the Judgment of Professor Vaughan Lowe for the BBC, 19 December 2002, para. 115: available at <http://www.war.inquiry.freeuk.com/paper11.htm> accessed 13 February 2012.

[41] S/RES/687 (1991).

the resolution's goal was yet to be fulfilled)[42]. The obligations imposed on Iraq through *resolution 687*[43] were in the Council's view, measures necessary to achieve this goal. It is only upon fulfilment of the ceasefire conditions that the aim of the resolution could be met. As such, the authorisation to use force staying in effect was arguably a sole consequence of Iraq's continuous violation of *resolution 687*[44].

That *resolution 1441*[45] reaffirmed *resolution 678*[46] in the preamble may be understood as a confirmation of the latter still remaining in force[47]. However, this appears to be a fairly over construed interpretation. It pays no attention to the wording of the often overlooked *resolution 686*[48] which indicates that the authorisation for use of force will continue for the period required for Iraq to comply with the cease-fire obligations, *not including disarmament*[49]. The better view it seems is that reference to *resolution 678*[50] was not a revival of authorisation to use force, but rather, a warning that the Security Council *could* revive authorisation if it wanted to[51]. Yet whichever argument one chooses to adopt, the same conclusion may be inferred from the resolutions: the concept of revival *is* seemingly a valid one[52]. Where the greatest dispute seems to arise is not in the United States' assertion of revival, but in its claim that authorisation may be revived unilaterally, independent of the Security Council, and despite what other coalition members (e.g. France, Germany and Syria) thought[53].

Indeed, the United States has before put forward the concept of revival of Security Council authorisation of *resolution 678*[54]. It did so in 1998 in Operation Desert Fox[55], and before this, revival was the basis for the use of force in Iraq in

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[42] Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq' (2003) 4 San Diego Int'l L.J. 7, at 34.
[43] S/RES/687 (1991).
[44] *Ibid*., Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq' (2003) 4 San Diego Int'l L.J. 7, at 34-35.
[45] S/RES/1441 (2002).
[46] S/RES/678 (1990).
[47] Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq' (2003) 4 San Diego Int'l L.J. 7, at 35.
[48] S/RES/686 (1991).
[49] See paragraph 4: *ibid*.
[50] S/RES/678 (1990).
[51] Dominic McGoldrick, 'From 9-11 to the War in Iraq' (2004), reproduced in David Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell, London, 2010), pg. 822.
[52] Although many scholars may disagree. For example see, Vaughan Lowe, 'The Iraq crisis: what now?' (2003) 52(4) ICLQ 859, at 865, where Lowe asserted: 'There is no known doctrine of the revival of authorisations in Security Council resolutions'.
[53] See fn 140, 185-186 and corresponding text for statements and the international community's position on 'revival' in Iraq in 2003. Sands suggests that what is essentially a non-existent authority to use force, can 'revive' at the will of merely three out of the fifteen Security Council members 'makes a mockery out of the UN system': Philippe Sands, *Lawless World: The whistle-blowing account of how Bush and Blair are taking the law into their own hands* (2nd edn, Penguin Group, London 2006), pg. 193.
[54] S/RES/678 (1990).
[55] For criticism of reliance on the authorisation of force of *resolution 678* in this instance see, Christine Gray, 'From Unity to Polarisation: International Law and the Use of Force Against Iraq' (2002) 13 Eur. J. Int'l L. 1. Notably, this military action ought not to be confused with American actions to implement no-fly zones in Iraq. The basis for the no-fly zones was not the revival of S/RES/678 (1990), but

1993, to which the Secretary General considered that the action 'conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations'[56]. A similarity in the 1993 military action and *resolution 1441*[57] is the assertion of a 'material breach'. While both instances encompassed the term, in 2003 the final opportunity afforded to Iraq to comply with its obligations meant that authorisation could not automatically be revived upon such breach[58]. There simply was no direct trigger effect[59]. However, this did not arguably necessitate that the authorisation could not be resuscitated unless the Security Council decided as such[60]. Having said this, the Secretary General in 2003, who took a different stance than his predecessor, did not agree with this view. He asserted: 'If the US and others were to go outside the Council and take military action, it would not be in conformity with the Charter'[61]. At any rate, according to McGoldrick, recourse to force in 1993 had far more of a plausible connection with the purposes of *resolution 678*[62] than use

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rather, humanitarian intervention in support of S/RES/688 (1991): for more on this see, Christopher Greenwood, 'Is there a Right of Humanitarian Intervention?' (1993) 39 World Today 34.

[56] Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq' (2003) 4 San Diego Int'l L.J. 7 at 35.

[57] S/RES/1441 (2002).

[58] This was the clear intention of the members of the Security Council: The (then) Russian Deputy Foreign Minister Yuri Fedotov had stated that with the support of China, France and other UN Security Council Members, Russia took steps to eliminate the most objectionable formulations from the draft of *resolution 1441* , including "provisions which would permit an automatic unilateral use of force"; see —, 'Lords Hansard text for 17 March 2003' (*Parliament*, 17 March 2003) <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317-20.htm> accessed 28 December 2011. Additionally, in a debate on the resolution in which Security Council members set out their express views, it was made clear that some members felt that force could not be used in Iraq without a second resolution explicitly authorising it: See UN Doc S/PV 4644 8 Nov 2002, available at: <http://www.undemocracy.com/securitycouncil/meeting_4644> accessed 4 February 2012**.**

[59] John Negroponte on the 8th of November 2002 in the Explanation of Vote that, "The resolution [1441] contains no 'hidden triggers' and no 'automaticity' with the use of force": —, 'Lords Hansard text for 17 March 2003' (*Parliament*, 17 March 2003) <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317-20.htm> accessed 28 December 2011.

[60] Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq' (2003) 4 San Diego Int'l L.J. 7 at 35. During discussion following the adoption of *resolution 1441*, John Negroponte stated, "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". The British ambassador Jeremy Greenstock had agreed: Rachel Taylor, 'The United Nations, International Law and the War in Iraq' (*World Press*, no date) <http://worldpress.org/specials/iraq/> accessed 31 March 2012.

[61] —, 'Secretary-General's press conference (unofficial transcript)' (*United Nations*, 10 March 2003) <http://www.un.org/sg/offthecuff/?nid=394> accessed 23 March 2012. Several states also expressed this view in the discussion following the adoption of *resolution 1441*: see for example statements by the Mexican ambassador stressing that, "the use of force is valid only as a last resort, with prior explicit authorization required from the Security Council". Similarly the Bulgarian delegate stressed that "[t]his resolution is not a pretext for automatic recourse to the use of force": Rachel Taylor, 'The United Nations, International Law and the War in Iraq' (*World Press*, no date) <http://worldpress.org/specials/iraq/> accessed 31 March 2012.

[62] S/RES/678 (1990).

of force in 2003[63]. Either way, if there is such concept of revival in international law, then it certainly would seem to have existed *before* 11 September and hence before the 2003 US-led invasion. On this basis, in its claims in 2003 the United States arguably posed greater challenges to the authority and viability of the Security Council than it did to international law. But perhaps action in Iraq was the start of the diminishing value of the Security Council and hence what appears to be, the structure and system on which *jus ad bellum* partly rests.

Undeniably the gravity of war is far too great so as to wage it on the basis of implication, and unless it can be accepted that all states can exercise the right to "auto-interpretation" of resolutions, then the better view of international law in 2003 is that the United States simply fell short of the permissible grounds of force articulated in the *UN Charter*[64]. Whether revival is a legitimate doctrine or not, America's war on terror does not quite appear to have established it as a unilateral means for the use of force in international law.

[63] Dominic McGoldrick, 'From 9-11 to the War in Iraq' (2004), reproduced in David Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell, London, 2010), pg. 823.
[64] *Ibid*.