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## 'Disarming' Iraq under International Law

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'Disarming' Iraq under International Law

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Law and Bills Digest Group  
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## **Introduction**

As a consequence of United Nations Security Council (UNSC) resolutions passed after the 1990–91 Gulf war, Iraq is required by international law to renounce weapons of mass destruction (WMD)<sup>1</sup> and submit to verification inspections by United Nations (UN) agencies.<sup>2</sup> At least in terms of the inspections, Iraq has not fulfilled its obligations. It is yet to be determined whether Iraq still retains WMD, although many western governments maintain that it does.

This paper examines whether, in the absence of any explicit authorisation from the UNSC, international law allows a State to use military force to compel Iraq into meeting its obligations. In particular it looks at the position taken by the United States (US) on unilateral enforcement of UNSC resolutions and so-called 'pre-emptive' self-defence. The paper concludes that there is no firm basis in international law for the US stance, although it has to be conceded that the doctrine of self-defence is in real need of clarification in the light of the growth of organised international terrorism.

This paper does not directly deal with the related matter of pre-emptive strikes on foreign terrorist groups as raised by the [Prime Minister](#) on 1 December 2002 and subsequently debated in Parliament. However, many of the legal principles discussed in this paper are relevant to the issue.

## **Resolution 1441**

On 8 November 2002, the UNSC unanimously passed [Resolution 1441](#). The latest in a long line of resolutions, its purpose is:

to afford Iraq ... a final opportunity to comply with its disarmament obligations ... and to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 ... and subsequent resolutions of the Council.<sup>3</sup>

The resolution provides UN inspection teams with an unprecedented mandate for unconditional access to all of Iraq, including so-called 'Presidential sites'.<sup>4</sup> It requires Iraq to declare, by 8 December,<sup>5</sup> a full list of its WMD programs, including any chemical, biological and nuclear facilities that are claimed not to be related to weapons purposes. The resolution specifies that:

any 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.<sup>6</sup>

In the event of a report by the heads of UN inspection agencies of any interference by Iraq in inspection activities or failure to comply with any disarmament obligations – including

those relating to the declaration mentioned above – under this, or previous resolutions, the UNSC is to:

convene immediately ... 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 ... [and] ... recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.<sup>7</sup>

Resolution 1441 does not authorise the use of force against Iraq should it be seen by the UNSC or any other State as committing a material breach: there is no 'automatic trigger'. However, the United States has made it clear that it considers unilateral military action as an option even in the absence of such authorisation. For example, the US Ambassador to the UN, [John Negroponte](#), in a statement to the UNSC after the vote, said that

if the Security Council fails to act decisively in the event of further Iraqi violations this resolution does not constrain any member state from acting to *defend itself against the threat posed by Iraq* or to *enforce relevant United Nations resolutions and protect world peace and security* [emphasis added].<sup>8</sup>

In the absence of a further UN resolution authorising force, Ambassador Negroponte seems to be implying that military force could be employed either in self-defence or to enforce UNSC resolutions, including 1441. For the reasons explored in this paper, it is highly questionable whether this is consistent with international law.

While the Australian Government has been more circumspect, it has certainly left the door open regarding possible support for US military action that is not expressly authorised by the UNSC. In a recent [speech](#), the Defence Minister, Senator Hill said

Some would argue that it's time for a new and distinct doctrine of pre-emptive action to avert a threat. A better outcome might be for the international community and the international lawyers to seek an agreement on the ambit of the right to self defence better suited to contemporary realities. *But in the meantime those responsible for governance will continue to interpret self-defence as necessary to protect their peoples and their nations' interests* [emphasis added].<sup>9</sup>

The statements by Ambassador Negroponte and Senator Hill illustrate the limitations of international law. Whilst most States may generally attempt to act consistently with international law, their respective governments perceptions of national interest is the most powerful driver of foreign policy, particularly in the short term.

## **Use of force under international law**

Under international law, the use of force against States is strictly limited. Article 2(4) of the [UN Charter](#)<sup>10</sup> provides:



All Members shall refrain in their international relations from 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.

Article 2(4) is considered to be a *jus cogens* principle, or peremptory norm, of international law.<sup>11</sup> In practical terms, this means that any use of force can only be exercised in strict conformity with international law: there is no 'wiggle room' that allows a country to say that its use of force was consistent with the 'spirit' of international law, if not the letter of the law. It also means that any modification of the norm – such as is arguably being advocated by the US through its positions on pre-emptive self-defence and unilateral enforcement of UNSC resolutions – must meet with a very degree of acceptance by the international community before it becomes international law.

In this context, the only situations when force can clearly be used are:

- under a UNSC resolution under Article 42, or
- self-defence under Article 51.

These two possibilities are examined in the following two sections.

## **The use of force under Security Council Resolutions**

Chapter VII of the UN Charter deals with the issue of international peace and security. Article 39 gives the UNSC<sup>12</sup> the power to:

determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall ... decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 42 states:

Should the Security Council consider that measures provided for in Article 41<sup>13</sup> would be inadequate or have proved to be inadequate it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 42 was used to authorise the military response against Iraq in the Gulf War of 1990–91. The key passage of the authorising Resolution 678 is:

The Security Council, acting under Chapter VII of the Charter ... *authorises member states cooperating with Kuwait* ... unless Iraq fully implements all resolutions ... *to use all necessary means to implement and uphold* ... all relevant resolutions and restore international peace and security to the area [emphasis added].<sup>14</sup>

There are two key points that should be noted in the above. Firstly, the authorisation is clearly directed to UN members. Secondly, it provides them with a broad discretion as to what is considered necessary – including the use of military force – to secure implementation of the resolutions requiring Iraq's withdrawal from Kuwait.

In April 1991, the UNSC adopted Resolution 687 which, amongst other matters, spelt out Iraq's obligation to agree unconditionally to the destruction of WMD and to accept inspections for verification purposes. Specifically, it states that:

upon official notification by Iraq to the Security Council of its acceptance of [its obligations], a formal cease-fire is effective between Iraq and Kuwait and the member states cooperating with Kuwait in accordance with Resolution 678 ... and that the Security Council will remain seized of the matter *and take such further steps as may be required for the implementation of the present resolution and secure peace and security in the region* [emphasis added]<sup>15</sup>

While [inspections](#) took place during the 1990s, increasing tension between the inspection teams and Iraq during 1996–98 eventually lead to the cessation of inspections by late 1998.<sup>16</sup> UNSC resolutions during this period contained frequent condemnation of Iraq for failing to uphold its disarmament obligations. Notably, Resolution 1154 stated that:

the Council was determined to ensure immediate and full compliance by Iraq without conditions or restrictions with its obligations under resolution 687 ... and that...*any violation [of its obligations] would have the severest consequences for Iraq* [emphasis added].<sup>17</sup>

Resolution 1441 affirms that Iraq remains in material breach<sup>18</sup> of Resolution 687.

As mentioned earlier in this paper,<sup>19</sup> the US appears to take the view that it would be justified in forcing Iraqi to comply with the relevant UNSC resolutions if the Council itself fails to do so. It is hard to see that this position has any tenable basis in international law. This same issue of unilateral, or 'automatic', implementation was debated at the UNSC meeting which led to the adoption of Resolution 1154. The relevant part of that debate has been summarised as:

No agreement was reached on this issue. The US and the UK did not receive support for the view that UN members would have such an automatic right. The other members of the Council, including the other permanent members, emphasized the powers and authority of the Security Council and in some cases explicitly rejected any automatic right for members to use force. Sweden emphasised that "the Security Council's responsibility for international peace and security, as laid down in the Charter of the United Nations, must not be circumvented." Brazil stated that it was "satisfied that nothing in its [the Resolution's] provisions delegates away the authority that belongs to the Security Council under the Charter and in accordance with its own resolutions." And Russia concluded that, "there has been full observance of the legal prerogatives of the Security Council, in accordance with the United Nations Charter. The resolution clearly states that it is precisely the Security Council which will directly ensure its

implementation, including the adoption of appropriate decisions. Therefore, any hint of automaticity with regard to the application of force has been excluded; that would not be acceptable for the majority of the Council's members."<sup>20</sup>

The passing of Resolution 1441 does not change the situation. For example, the Irish representative on the UNSC has [stated](#) that:

as far as Ireland is concerned, it is for the Council to decide on any ensuing action. Our debate on 17–18 October [in relation to Resolution 1441] made it clear that this is the broadly held view within the United Nations.<sup>21</sup>

Permanent members of the UNSC, such as [France](#), have made similar statements.

Similarly, the idea that UNSC resolutions can be sometimes seen as 'implicitly' authorising the unilateral use of military force has likewise been rejected in other [academic writings](#). Although not directly relevant to this paper, one implication of this is that the maintenance of 'no-fly' zones over Southern and Northern Iraq have no support in international law.<sup>22</sup>

A related argument sometimes made is that the Gulf War ceasefire agreement referred to in Resolution 687 was dependent on Iraq's carrying out of its disarmament obligations. As Iraq has failed to carry these out fully, the argument runs that Resolution 678 – which authorised the use of force against Iraq – remains operative. However, Resolution 687 says the UNSC may take further steps 'as may be required for the implementation of the present resolution'. It does not state or imply that *UN members themselves* may do so. Also, the thrust of 678 relates more to Iraq's failure to withdraw from Kuwait rather than Iraq's possession of WMD.

In summary, international law does not allow the US, or any other country, to take military action against Iraq for the purpose of enforcing any of the UNSC disarmament resolutions. Explicit authorisation would be required from the UNSC along the lines of Resolution 678.

## **The use of force in self-defence**

Article 51 of the UN Charter states:

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

This 'inherent right' under customary international law, is usually described under the classic 1837 *Caroline*<sup>23</sup> formula as occurring when the 'necessity of self-defence is instant, overwhelming, leaving no choice of means, and no moment of deliberation ... [the act of self-defence must also involve] nothing unreasonable or excessive'.

The right of self-defence was invoked by the US as legal justification for its military campaign in Afghanistan and is discussed in a [previous publication](#).<sup>24</sup>

The main point of controversy is whether the phrase 'if an armed attack occurs' rules out self-defence before an attack occurs – i.e. does international law allow 'anticipatory' or pre-emptive' self-defence. The US position on this issue was set out in September 2002 by President Bush in the [National Security Strategy of the United States of America](#):

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning ... To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.<sup>25</sup>

This approach has since been further detailed in an [address](#) by Condoleezza Rice, President Bush's national security adviser:

Extremists who seem to view suicide as a sacrament are unlikely to ever be deterred. And new technology requires new thinking about when a threat actually becomes "imminent." So as a matter of common sense, the United States must be prepared to take action, when necessary, before threats have fully materialized ... Pre-emption is not a new concept. There has never been a moral or legal requirement that a country wait to be attacked before it can address existential threats ... But this approach must be treated with great caution. The number of cases in which it might be justified will always be small. It does not give a green light – to the United States or any other nation – to act first without exhausting other means, including diplomacy. Pre-emptive action does not come at the beginning of a long chain of effort. The threat must be very grave. And the risks of waiting must far outweigh the risks of action.<sup>26</sup>

Whilst a literal reading of Article 51 of the UN Charter suggests that self-defence is only lawful after an attack occurs, this is nonsensical if it means that a State must let itself be harmed, perhaps fatally, before it can respond with force. In the 1986 case *Nicaragua vs the United States*,<sup>27</sup> the International Court of Justice did not dismiss the possibility of some limited form of anticipatory self-defence out of hand – it merely stated it 'expresses no view

on ... the lawfulness of a response to the imminent threat of an armed attack' as the issue was not raised by the parties.<sup>28</sup> Overall, there has been no general acceptance of a pre-emptive self-defence doctrine within the UN beyond possibly 'interceptive' self-defence, ie an action of sufficient magnitude that clearly has a hostile intent can be 'defended' against before the aggressor's forces actually execute the attack.<sup>29</sup> But are there any situations falling short of this that would attract a legally valid exercise of Article 51 self-defence?

There have been very few cases where a State has attempted to legally justify the use of force primary on the grounds of pre-emptive self-defence. Probably the most well-known occasion was the 1981 Israeli airstrike on the Osirak nuclear reactor in Iraq. Israel claimed:

[that in] removing this terrible nuclear threat to its existence, [it] was only exercising its legitimate right of self-defence within the meaning of this term in international law and as preserved also under the United Nations Charter.<sup>30</sup>

Israel's action was condemned by the UNSC as 'a clear violation of the Charter of the United Nations'.<sup>31</sup> It is notable that the then UK Prime Minister, Margaret Thatcher, characterised the airstrike 'as a grave breach of international law'.<sup>32</sup> The legal justifications for other Israeli actions have been mixed. For example, the airstrikes against Egypt at the start of the 1967 war were characterised both as pre-emptive (or perhaps interceptive) self-defence, on the grounds that Egypt and other countries were on a threshold of an imminent attack, and as a response to the blockade of the Straits of Tiran, on the basis that this later act was an act of aggression against Israel. In the 1967 case, the UNSC demanded a cease-fire, but did not condemn Israel for its actions.

It also interesting to look at US practice. For example, in mounting the naval blockade 'to defend the security of the United States' during the 1962 Cuban missile crisis, the US apparently *did not*<sup>33</sup> rely on self-defence for its legal justification.<sup>34</sup>

No doubt the phrase "armed attack" must be construed broadly enough to permit some anticipatory response. But it is a very different matter to expand it to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome. To accept that reading is to make the occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism, either.

Given such a relative paucity of recent historical examples of pre-emptive self-defence, it is worthwhile to review the writings of jurists that have served on relevant international courts or tribunals. For example Robert Jennings<sup>35</sup> writes in Oppenheim's *International Law* that:

while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; *the requirements of*

*necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances [emphasis added].*<sup>36</sup>

He then goes on re-state the *Caroline* formula as:

The use of armed force and the violation of another state's territory, can be justified as self defence under international law where:

- (a) an armed attack is launched, *or is immediately threatened*, against a state's territory or forces (and probably its nationals)
- (b) there is an *urgent necessity* for defensive action against that attack
- (c) there is *no practicable alternative* to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect
- (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, ie to the needs of defence ... [emphasis added]

It is interesting to place this up against the passage from Condoleezza Rice's address quoted early in this paper. Dr Rice states that other means, including diplomatic efforts – this would include attempts to persuade the UNSC to authorise the use of force under Chapter VII to disarm 'rogue states' and/or terrorist organisations, particularly in terms of any WMD capacity – must be exhausted before the question for anticipatory or pre-emptive action legally arises.

If the threat to international peace and security posed by a particular 'rogue state' or a terrorist organisation ally refusing to demonstrably give up WMD is indeed grave, the record of the UNSC over the last decade or so suggests that it would be prepared to give authorisation for the use of force.<sup>37</sup> If the UNSC declines to authorise force it is presumably because it does not agree with an assessment of the threat and / or the method of dealing with it. In such circumstances, it would be difficult to characterise military action as an *urgent necessity* under the *Caroline* formula. Of course, if a resolution on the use of force was supported by a majority of the 15 member Council and only defeated on the veto of a permanent member, it might well be possible for a strong case of urgent necessity to be made out, depending on the circumstances.

By way of comparison of Professor Jennings view, Antonio Cassese<sup>38</sup> in *International Law* writes:

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

This idea is analogous to the use of force for the purposes of humanitarian intervention as occurred in Kosovo in the later 1990s. For example, in UK Parliamentary debates over the

Kosovo action, some speakers argued that while there is no general right of humanitarian intervention under international law, such action could be justifiable in exceptional circumstances 'when that was the only means to avert an immediate and overwhelming humanitarian catastrophe'.<sup>39</sup>

### **Self-defence and the threat posed by Iraq**

On 24 September 2002, the UK government released [Iraq's Weapons of Mass Destruction - the assessment of the British Government](#). This concluded that Iraq possessed chemical and biological agents and a small number of missiles with ranges up to 650km that could deliver these agents to neighbouring countries. The assessment also concluded that Iraq lacks the fissile material to construct a nuclear weapon, but had been attempting to do so, and if sufficient material is obtained, a weapon might be constructed within one to two years. The report of the International Institute for Strategic Studies (IISS) reached broadly similar conclusions, commenting that the missiles, armed with chemical or biological agents:

could pose a potential threat to civilian populations, mainly in terms of disruption and terror, but are unlikely to cause mass casualties.<sup>40</sup>

The US Government has not publicly provided any substantive evidence that Iraq possesses WMD, but has been reported as saying that it 'has extensive intelligence to document' that this is the case.<sup>41</sup>

Iraq has denied that it retains WMD.<sup>42</sup>

In terms of the Iraqi Government's current motivations in developing its inventory of WMD, the UK Prime Minister has said:

Intelligence reports make clear that [Saddam Hussein] sees the building up of his WMD capability, and the belief overseas that he would use these weapons, as vital to his strategic interests, and in particular his goal of regional domination ... in today's inter-dependent world, a major regional conflict does not stay confined to the region in question ... the threat posed to international peace and security, when WMD are in the hands of a brutal and aggressive regime like Saddam's, is real.<sup>43</sup>

The Australian Government sees the potential Iraqi threat in like terms:

Iraq does possess weapons of mass destruction. People say to me, well, why do you pick on Iraq, North Korea has weapons of mass destruction, why the difference? Well, let me tell you the reason why there's a difference. Iraq has form, Iraq has used weapons of mass destruction against her neighbours. She invaded Kuwait. She used weapons against Israel, against Saudi Arabia and Bahrain. She used poison gas in the Iraq-Iranian war. There is a long history of Iraq assisting terrorist groups. Iraq gives support to the suicide bombers who cause such death and destruction in Israel. And there is a pattern of behaviour and it can't be ignored.<sup>44</sup>

The US President has made similar [statements](#).<sup>45</sup>

At this point, the question of whether Iraq does in fact have WMD, or the capability to rapidly develop them, is still to be answered by the UN inspectors. What can be said is that no western government has provided any substantive evidence that Iraq has been involved in al Qaeda activities.<sup>46</sup> Condoleezza Rice has said that Iraq provided some training to al Qaeda in chemical weapons development, but this is apparently a reference to activities two years ago.<sup>47</sup>

Despite the various statements referred to above, no specific claims appear to have been made by any western government that Iraq has current plans to attack or assist an attack on any State. International law does not permit a State to take military against another on the grounds of collective self-defence unless a third State has declared itself a victim of an armed attack: *Nicaragua vs United State of America*. Thus the US could not use a purely unilateral assessment that a State neighbouring Iraq was in imminent danger of attack as the legal basis for an act of 'collective' pre-emptive self-defence.

## Conclusion

Much of the rhetoric supporting the use of force against Iraq without explicit UNSC authorisation seems to be based on a relatively pessimistic view of whether key members of the Council will share the US, UK and Australian view of the alleged Iraqi threat. It is clearly arguable that the UNSC was less than vigorous in enforcing its Iraqi disarmament resolutions during the 1990s. However, things may be different in the post-September 11 environment.

As it stands, there is no basis in international law for the US or any other State using military force to 'implement or enforce' any current UNSC resolution on Iraq. Nor has the case yet been made out that force could be legally employed under so-called 'pre-emptive' self-defence. This said, the uncertainties over what the boundaries of self-defence actually are in the current climate make Senator Hill's view quoted earlier that:

the international community and the international lawyers [should] seek an agreement on the ambit of the right to self defence better suited to contemporary realities

something worthwhile exploring. However, obtaining international agreement to possibly expanding the legal boundaries of self-defence – say by amending Article 51 of the UN Charter – will likely be very difficult if States feel that this is merely an attempt to sideline the 'international peace and security' mandate of the UNSC.

## Endnotes

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1. WMD include chemical, biological and nuclear weapons.



2. UNSC Resolution 687 was passed a month after the cessation of active hostilities in the Gulf war on 1 March 1991. Under the Resolution, a condition of a permanent ceasefire was that Iraq must declare fully its weapons of mass destruction (chemical, biological or nuclear) programs and unconditionally accept the destruction or rendering harmless of chemical and biological weapons and agents, longer range missiles and related research and manufacturing facilities under international supervision. It must also agree not to use, develop, construct or acquire any weapons of mass destruction or any related material. The resolution created the United Nations Special Commission (UNSCOM) to verify the elimination of Iraq's chemical and biological weapons programs and mandated that the International Atomic Energy Agency (IAEA) verify elimination of Iraq's nuclear weapons program.
3. UNSC Resolution 1441, paragraph 2.
4. Difficulties experienced by UN inspectors at Presidential sites was a major reason for the cessation of inspections in Iraq in late 1998. The UN and Iraq agreed earlier that year that 'special procedures' would apply to these eight sites, including that inspectors would 'conduct [themselves] in a manner consonant with the nature of the site. [They] shall take into consideration any observations the Iraqi representative may wish to make regarding entry into a particular structure'. It is not clear from Resolution 1441 whether these procedures are still operable.
5. The 12,000 page declaration was delivered to the UN on time. According to the Head of the UN Monitoring, Verification and Inspection Commission (UNMOVIC), Hans Blix, Iraq maintained that they had no WMD: <http://www.un.org/Depts/unmovic/Blixtopress10Dec.htm>. UNMOVIC is the successor to UNSCOM.
6. UNSC Resolution 1441, paragraph 4.
7. *ibid.*, paragraphs 12–13.
8. 'U.S. Wants Peaceful Disarmament of Iraq, Says Negroponte' *Information release*, US Department of State, 8 November 2002.
9. Senator the Hon Robert Hill, John Bray memorial oration, University of Adelaide, 28 November 2002.
10. The UN Charter is a treaty with almost universal membership. Article 103 of the Charter provides that member States obligations under the Charter takes precedence over any obligations they might have under any other Treaty or international agreement. From this perspective, the Charter effectively sits near the top of the hierarchy of sources of international law.
11. Article 53 of the Vienna Convention on the Law of Treaties states '... for the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and *which can be modified only by a subsequent norm of general international law having the same character*'.
12. In order to be adopted, UNSC resolutions require 9 of the 15 members to vote in favour, providing none of the 5 permanent members (the USA, Russia, China, the UK and France)

votes against. One or more of the permanent members may abstain from voting and the resolution may still be adopted.

13. Article 41 gives the to UNSC power to call on members to implement measures short of the use of force to give effect to UNSC decisions.
14. UNSC Resolution 678, paragraph 2.
15. UNSC Resolution 687, paragraphs 33–34.
16. There were allegations by Iraq – and later from Scott Ritter, a member of the UN inspections teams – that information gathered by UN inspectors was used by the US for military purposes. See 'Secrets, Spies and Videotape', *Four Corners*, 17 May 1999.
17. UNSC Resolution 1154, paragraph 3.
18. Under Article 60 of the Vienna Convention on the Law of Treaties, a material breach is defined in part as 'the violation of a provision essential to the accomplishment of the object or purpose of a treaty'. While technically not a treaty, it appears that at least some States have adopted the above definition for the purposes of considering whether Iraq's actions over coming months comply with its obligations under Resolution 1441.
19. See statement of US Ambassador Negroponte, referenced in footnote 8. Similar statements were made by other US officials shortly after the adoption of Resolution 1441: for example by [Secretary Powell](#).
20. [Niels Blokker](#), in "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'" (2000) Vol. 11, *European Journal of International Law*, p. 541.
21. 'Explanation of Vote by Ireland', Security Council 8 November 2002. See <http://www.un.org/webcast/ireland110802.htm>
22. See Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), Oxford University Press, pp. 201–03. In Resolution 688, the UNSC demands that that the Iraqi Government 'cease their repression of the civilian population in many parts of Iraq ... including in the Kurdish-populated areas and appealed to all member states and humanitarian organisations to contribute to humanitarian efforts'. The resolution was not made under Chapter VII. Shortly afterward, the US and other allies said that 'consistent with Resolution 688' they would use ground forces to establish and safeguard safe havens in northern Iraq and that Iraq aircraft should not fly above the 36<sup>th</sup> parallel so as to allow air drops and to prevent any more attacks on Kurdish refugees. In August 1992, the US declared a second no-fly zone in Southern Iraq below the 32<sup>rd</sup> parallel. Again, this was said by the US to be 'consistent' with Resolution 688. This was widened to the 33<sup>rd</sup> parallel in 1996. France apparently did not agree with this last expansion and seem to have eventually ceased all air patrols in Iraq by in 1998. According to Christine Gray 'the USA and the UK prefer to avoid discussion of the difficult question of the legal basis for the establishment of the no-fly zones and to shift the debate to the right of self-defence of the US and UK aircraft patrolling the zones': Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq', (2002) Vol. 13, *European Journal of International Law*.

23. In 1837, an armed rebellion occurred in the (then) British colony of Canada. A ship, moored in United States waters, was suspected by the British of being used by certain individuals to supply arms to Canadian rebels. British forces boarded the ship and destroyed it, killing two people in doing so. Britain justified the attack as an exercise of self-defence. The United States Secretary of State asserted that a country claiming such a right must 'show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation ... [the act of self-defence must also involve] nothing unreasonable or excessive'.
24. 'The Right of Self-Defence under International Law—the Response to the Terrorist Attacks of 11 September', *Current Issues Brief*, no. 8, Department of the Parliamentary Library, Canberra, 2002.
25. See <http://www.whitehouse.gov/nsc/nss.pdf>
26. 'Dr. Condoleezza Rice Discusses President's National Security Strategy', Wriston Lecture, 1 October 2002.
27. (1986) ICJ Reports 14.
28. *ibid.*, at paragraph 194. In a dissenting judgment, Justice Schwebel stated that he considered that self-defence was available under international law even if no 'armed attack' occurred: at paragraph 173. However, Justice Schwebel seemed to be talking about self-defence as response to the use of force that was below the threshold of armed attack, not self-defence in the context of a pre-emptive act.
29. See Y. Dinstein, *War Aggression and Self-Defence*, 2001, pp. 172–73.
30. Discussion of UNSC Resolution 487 of 1981, 19 June 1981. Note that technically Israel and Iraq were still at war at the time as no peace agreement had been signed from the time of the 1948 war.
31. Resolution 481 of 1981.
32. House of Commons, *Parliamentary Debates*, 9 June 1981.
33. This view compares to Senator Hill's 28 November speech which implies that the Cuban Naval blockade was an act of pre-emptive self-defence. The speech also mentions the 1986 US bombing raids on Libya. However, while the raids were initially justified by President Regan as 'pre-emptive' self-defence against terrorism, in the formal US letter to the UN Secretary General, the strike was justified as a response to a 'ongoing pattern of attacks by the Government of Libya' including the bombing of a Berlin disco frequented by US military personnel. Some countries (particularly the UK) supported the action, but France reportedly criticised the action as a 'reprisal', and thus not consistent with international law.
34. A. Chayes, *The Cuban Missile Crises*, Oxford University Press, 1974 at pp. 63–64. Professor Chayes was a senior legal adviser at the US Department of State during the Cuban episode.
35. Sir Robert Jennings served as President of the ICJ from 1991–94.
36. *Oppenheim's International Law*, 1991, pp. 41–42.
37. The UNSC has authorised the use of force to ensure the implementation of various Article 41 measures applying to conflict or post-conflict situations in Yugoslavia, Somalia, Haiti, Bosnia

and Sierra Leone. See C. Gray. 'From Unity to Polarization: International Law and the Use of Force against Iraq', op. cit.

38. Professor Cassese is the former President of the International Criminal Tribunal for the former Yugoslavia.
39. Baroness Symons, House of Lords, *Parliamentary Debates*, Nov 16, 1998. The issue was also examined by the UK foreign affairs committee, who said at paragraph 132 in its 2000 [Kosovo report](#) that '[it is] too ambitious in saying that a new customary right has developed. We conclude that, at the very least, the doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders NATO action legally questionable'.
40. *Iraq's Weapons of Mass Destruction: A Net Assessment*, September 2002, at p. 68.
41. 'Rivals walk a tightrope to stall for time', *The Australian*, 9 December 2002, p. 11.
42. Letter to United Nations Secretary-General from the Iraqi Foreign Minister Naji Saberi Ahmed, 13 November 2002.
43. Foreword to *Iraq's weapons of mass destruction*.
44. The Hon. John Howard MP, *Address to the NSW Liberal Party State Council*, 23 November 2002.
45. 'President Bush Outlines Iraqi Threat', Remarks by the President, Cincinnati, October 7 2002.
46. According to the US, Iraq has 'provided bases to several terrorist groups including the Mujahedin-e-Khalq (MEK), the Kurdistan Workers' Party (PKK), the Palestine Liberation Front (PLF), and the Abu Nidal organization (ANO). See 'Overview of State-sponsored terrorism' in [Patterns of Global Terrorism 2001](#).
47. 'Rice: Iraq trained al Qaeda in chemical weapons', [BBC News service](#), 26 September 2002.