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'Disarming' Iraq under International Law—
February 2003 Update

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Update

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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)¹ and submit to disarmament verification inspections by United Nations (UN) agencies.² After a hiatus of some 4 years, inspections resumed in late November 2002. To date, no WMD have been found,³ although inspectors have emphasised that possibly large quantities of chemical and biological agents still remain unaccounted for,⁴ and Iraq also has unlawful missiles.⁵ Some western governments, including the United States (US), the United Kingdom (UK) and Australia maintain that Iraq retains WMD and have hidden these from inspectors,⁶ a claim that has been denied by Iraq.⁷

Following on from UNSC [Resolution 1441](#), the US, the UK and Spain have circulated a further resolution stating 'that Iraq has failed to take the final opportunity afforded to it resolution 1441'. The full text of the draft resolution is at Appendix A. Notably, it contains nothing about the possible means, such as the use of force, to compel Iraq's compliance with the resolution. Moreover, the US has indicated that, even if this resolution is not adopted by the UNSC,⁸ it may go to war with Iraq to enforce disarmament.⁹ Such an attack, in partnership with the so-called 'coalition of the willing', could take place within weeks.¹⁰

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 US on 'unilateral'¹¹ enforcement of UNSC resolutions and the separate so-called right of 'pre-emptive' self-defence under article 51 of the UN Charter.¹² The paper concludes that there are some uncertainties about exactly how the principles of international law apply, particularly on the issue of unilateral enforcement. This said, the general prohibition against the use of force enshrined in the UN Charter is a fundamental feature of international law. On the information available to the author, the US, UK and Australian governments have yet to demonstrate a strong case that the exceptions to this prohibition apply in this case. Unless this is done, doubts are likely to remain about the legality of a prospective attack on Iraq that is not explicitly authorised by the UNSC.

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.¹³

The resolution provides UN inspection teams with an unprecedented mandate for unconditional access to all of Iraq, including so-called 'Presidential sites'.¹⁴ It requires Iraq to declare, by 8 December,¹⁵ 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.¹⁶

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.¹⁷

Resolution 1441 does not expressly 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 on resolution 1441, 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].¹⁸

Ambassador Negroponte's statement indicates that, even without a resolution expressly authorising the use of force, military force could be employed either in self-defence or to enforce relevant UNSC resolutions. For the reasons explored in this paper, it is highly questionable whether the principle of unilateral enforcement of UNSC resolutions has any sound basis in international law or that the proposed doctrine of pre-emptive self defence is sufficiently consistent with international law to justify military action by the US, UK and Australia.

The Australian Government's view

The Australian Government considers that Iraq has failed to comply with Resolution 1441 and that another UNSC resolution should be adopted that 'deals decisively' with this

failure.¹⁹ However, given divisions within the UNSC, it is unclear whether a resolution of any kind is likely to be adopted by the UNSC in the immediate future.

Prime Minister Howard is on the public record as saying that Australia would not take any action over the Iraq situation '[that would be] contrary to international law'.²⁰ In his recent statement to Parliament on Iraq, the Prime Minister also said:

There is a very strong argument that the terms of 1441, when coupled with all the previous resolutions passed by the Security Council about Iraq, provide a sufficient legal basis for military action, without the express need for a further resolution.

Presumably this argument relates to unilateral enforcement of obligations under UNSC resolutions or the related issue of whether the 1991 Gulf War ceasefire is now void because of Iraq's failure to comply with Resolution 687. Whatever the case, to the author's knowledge, the Government has not yet set out on the public record what this argument actually is or provided any evidence that it has substantial support in the international community.

In this context, it is interesting to recall a speech given in November last year by the Defence Minister, Senator Robert Hill. In it, Senator Hill makes an observation about the possible relationship between international law and national interest in the current climate:

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].²¹

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](#) 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 and as such no State has the right to derogate from the rule against the use of force.²² 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 high degree of acceptance by

the international community before it can be said to have crystallised as a norm of 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 Resolutions²³

Chapter VII of the UN Charter deals with the issue of international peace and security. Article 39 gives the UNSC 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 41²⁴ 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].²⁵

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]²⁶

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 1998.²⁷ 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].²⁸

Resolution 1441 affirms that Iraq remains in material breach²⁹ of Resolution 687. The draft resolution of 24 February (Appendix A) strongly implies Iraq is in material breach, although it doesn't explicitly say so.

As mentioned earlier in this paper,³⁰ the US appears to take the view that it would be legally justified in forcing Iraq to comply with the relevant UNSC resolutions if the Council itself fails to do so. However, there is very mixed evidence in terms of State practice whether this position has any consistent support among UN Members and its basis in international law is therefore questionable. The 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 follows:

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."³¹

Following the cessation of Iraqi cooperation with inspections in October 1998, the USA and UK launched *Desert Fox*, a four day campaign of air and missile strikes against Iraq. In UNSC debate, the US and UK took the view that the use of force was authorised by previous resolutions. There was a mixed view amongst members,³² but several rejected

this view. Brazil for example said 'the Council remained the sole body with legal authority to mandate actions aimed at reinforcing compliance with its own resolutions'.³³ Russia said the strikes 'violated the principles of international law ... no one could act independently on behalf of the UN or assume the functions of a world policeman'.³⁴

There is nothing in the express wording of Resolution 1441 or in the debate leading to its adoption that has fundamentally changed the situation regarding who may enforce UNSC resolutions. 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.³⁵

Permanent members of the UNSC, such as [France](#), have made similar statements. Of course, a difficulty arises if, through the use of a veto by a permanent member, the UNSC is unable to pass a resolution stating what enforcement action is to be taken. In such cases, a reasonable argument might be made for the legality of specific enforcement action that was supported by a clear majority of UNSC members.

An argument is also sometimes made that the Gulf War ceasefire agreement referred to in Resolution 687 was dependent on Iraq's carrying out its disarmament obligations.³⁶ 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 that 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.³⁷ Again, in the event of a permanent member veto preventing the UNSC from taking steps to force Iraqi compliance, an argument could possibly be made for specific enforcement action.

Finally, 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](#).³⁸ 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 firm support in international law.³⁹

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*⁴⁰ 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](#).⁴¹

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 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.⁴²

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.⁴³

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. Unfortunately, the issue has not been considered in any depth by the International Court of Justice (ICJ). In the 1986 case *Nicaragua vs the United States*,⁴⁴ the ICJ 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.⁴⁵ Overall, there has been no general acceptance of a pre-emptive self-defence doctrine within the UN beyond possibly a right of '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.⁴⁶ 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 primarily 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.⁴⁷

Israel's action was condemned by the UNSC as 'a clear violation of the Charter of the United Nations'.⁴⁸ It is notable that the then UK Prime Minister, Margaret Thatcher, characterised the airstrike 'as a grave breach of international law'.⁴⁹ 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 latter 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 is 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*⁵⁰ rely on self-defence for its legal justification.⁵¹

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 Jennings⁵² 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].⁵³

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]

This question of 'updating' the *Caroline* formula to reflect modern realities was discussed in hearings before the UK House of Commons Foreign Affairs Committee. Part of the committee report recounted evidence given by Professor Christopher Greenwood.⁵⁴

Professor Greenwood agrees that 'the right of anticipatory self-defence only applies where there is an imminent threat of an armed attack [so] it could not be used as the basis for some kind of longer term programme of disarmament.' In his view, it is important to separate the question of disarmament of Iraq—as demanded by UN Security Council Resolutions—from questions of self-defence ...

In assessing the limits of the right to self-defence, Professor Greenwood told us that 'one has to take account of military developments since *Caroline*' ... It is 'necessary to take account of two factors which did not exist at the time of the *Caroline*. The first is the gravity of the threat; the threat posed by a nuclear weapon or a biological or chemical weapon used against a city is so horrific that it is in a different league from the threats posed by cross-border raids by men armed only with rifles (as in the *Caroline*). The second consideration is the method of delivery of the threat. It is far more difficult to determine the time scale within which a threat of attack by terrorist means, for example, would materialise than it is with threats posed by, for example, regular armoured forces.'

These questions 'would be material considerations in assessing whether Iraq posed an imminent threat to the United Kingdom or its allies.' In Professor Greenwood's view, 'If Iraq did pose such an immediate threat then, in my opinion, military action against Iraq for the purpose of dealing with that threat would be lawful.' Professor Greenwood did

not state, however, that Iraq currently does pose such a threat to the United States or the United Kingdom: responsibility for taking this kind of judgement lies with governments rather than lawyers.

The difficulty with advocating any relatively wide legal doctrine of self-defence is that it may become so elastic that the prohibition against the use of force in Article 2(4) would be seriously weakened. In the words of the UK Foreign Affairs Committee report:⁵⁵

We conclude that should the US, British and other governments seek to justify military action against Iraq for example, on an expanded doctrine of 'pre-emptive self-defence,' there is a serious risk that this will be taken as legitimising the aggressive use of force by other, less law-abiding states.

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.⁵⁶ If the UNSC declines to authorise force it is presumably because it does not agree with an assessment of the immediacy 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* even under an 'updated' *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 Cassese⁵⁷ 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'.⁵⁸ This precedent has been referred to many times by Prime Minister Howard,⁵⁹ although to the author's knowledge not in the context of establishing a rule of international law.

The legal right of 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:⁶⁰

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

More recently, the US Secretary of State, Colin Powell presented⁶¹ to the UNSC satellite images that purported to show various storage and production facilities for chemical and biological agents as well as rocket testing sites being 'cleaned up' before inspections. Secretary Powell also asserted that Iraq had between 100 and 500 tons of chemical weapons agent and is attempting to produce missiles that have a range of over 1 000 kms. In terms of links with terrorist organisations, Secretary Powell has stated:⁶²

But what I want to bring to your attention today is the potentially much more sinister nexus between Iraq and the al-Qaida terrorist network, a nexus that combines classic terrorist organizations and modern methods of murder. Iraq today harbours a deadly terrorist network headed by Abu Musab al-Zarqawi an associate and collaborator of Usama bin Laden and his al-Qaida lieutenants...

When our coalition ousted the Taliban, the Zarqawi network helped establish another poison and explosive training center camp, and this camp is located in northeastern Iraq. Those helping to run this camp are Zarqawi lieutenants operating in northern Kurdish areas outside Saddam Hussein's controlled Iraq. But Baghdad has an agent in the most senior levels of the radical organization Ansar al-Islam that controls this corner of Iraq. In 2000, this agent offered al-Qaida safe haven in the region.

In later testimony before the US Budget committee, Secretary Powell commented that:⁶³

... as I tried to demonstrate before the United Nations last week, there are linkages [between Iraq and terrorist groups]. They are not as firm as some would like to see in order to conclude that it is actually happening, but they are firm enough to give us every indication and sufficient evidence that if allowed to continue, if this regime was allowed to continue to develop weapons of mass destruction, it is just a matter of time before coincident interests between the Iraqi regime and organizations such as al-Qaida will raise the likelihood that these kinds of weapons could fall into their hand (sic). And it is that nexus, especially in the post-9/11 environment, that persuades us even more that this is the time to deal with this regime once and for all.

Iraq has denied that it retains any WMD or that it any 'relationship' with Al Qaeda.⁶⁴

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.⁶⁵

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.⁶⁶

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 action 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 a further UNSC resolution 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 immediacy of the potential threat posed by Iraq. 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.

In the current circumstances, there is no solid basis in international law for the US or any other State using military force to unilaterally implement or enforce Iraq's WMD obligations under the various UNSC resolutions, except perhaps if this was supported by a significant majority of UNSC members. 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 international law actually are suggests work needs to be done by the international community on the subject.

However, obtaining international agreement to possibly expanding the legal boundaries regarding the use of force – say by amending 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. In the meantime, the statements by Ambassador Negroponte and Senator Hill quoted earlier in this paper 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.

Endnotes

1. WMD include chemical, biological and nuclear weapons. Iraq is also prohibited from retaining missiles with a range of over 150km.
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. A small number of undeclared empty chemical munitions were found in mid January 2003.
4. Dr Hans Blix, UNMOVIC Briefing of the Security Council, 14 February 2003.
5. Information provided by Iraq showed that some tests of the Al Samoud 2 missile exceeded the allowable 150 km range. Whilst Iraq maintained that the missiles range would not exceed 150 km once equipped with warheads and guidance systems, UN inspectors have directed Iraq to destroy the Al Samoud 2 missiles.
6. See for example, the UK document [Iraq - Its infrastructure of Concealment, Deception and Intimidation](http://www.ukonline.gov.uk/Images/img213573.pdf) January 2003 at <http://www.ukonline.gov.uk/Images/img213573.pdf>
7. Statement of Ambassador Mohammed Aldouri to the Security Council, 5 February 2003
8. 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.
9. See, for example, 'President's Remarks to Reporters Following National Economic Council Meeting' 25 February 2003 at <http://www.whitehouse.gov/news/releases/2003/02/20030225-3.html>.
10. There has also been some speculation that an attack could start as early as 1 March, due to the new moon giving favourable (dark) night-fighting conditions to the US.
11. Unilateral in the sense that the method of enforcement does not have UNSC authorisation.

12. 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.
13. UNSC Resolution 1441, paragraph 2.
14. 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.
15. 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.
16. UNSC Resolution 1441, paragraph 4.
17. *ibid*, paragraphs 12–13.
18. 'U.S. Wants Peaceful Disarmament of Iraq, Says Negroponte' *Information release*, US Department of State, 8 November 2002.
19. Statement to the UNSC by Australian Ambassador to the UN, John Dauth, 19 February 2003.
20. Transcript of interview with John Miller and Ross Davie, 4BC radio, Brisbane 30 January 2003.
21. Senator the Hon Robert Hill, John Bray memorial oration, University of Adelaide, 28 November 2002.
22. 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*'.
23. Note that the UN General Assembly may also consider and make recommendations on the issue of international peace and security, but it does not have the power under the UN Charter to authorise to use of force in the way the Security Council does.
24. 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.
25. UNSC Resolution 678, paragraph 2.
26. UNSC Resolution 687, paragraphs 33–34.

27. 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.
28. UNSC Resolution 1154, paragraph 3.
29. 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.
30. See statement of US Ambassador Negroponte, referenced in footnote 18. Similar statements were made by other US officials shortly after the adoption of Resolution 1441: for example by [Secretary Powell](#).
31. [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.
32. Of other UN members, Australia, New Zealand, Germany and Japan, amongst others, apparently were supportive: 'Legal Regulation of the Use of Force' *American Journal of International Law* (1999) 471 at 476.
33. 'Security Council meets to discuss military strikes against Iraq' UN *Press release* SC/6611, 16 December 1998.
34. *ibid*.
35. 'Explanation of Vote by Ireland', Security Council 8 November 2002. See <http://www.un.org/webcast/ireland110802.htm>
36. For example, this seemed to be suggested by the UK in the debate about the legality of the 1998 *Desert Fox* strikes. The idea is also contained in the second paragraph of the 24 February draft resolution, but is expressed slightly differently: that the ceasefire was 'based on the acceptance of Iraq ... [of its] ... obligations [under Resolution 687]'.
37. For more detail on both sides of the argument regarding Resolution 687 see Professor Frederic Kirgis, 'Security Council Resolution 1441 on Iraq's Final Opportunity to Comply with Disarmament Obligations' *ASIL Insights* November 2002 at <http://www.asil.org/insights/insigh92.htm>. See also the UK House of Commons Select Committee on Foreign Affairs, *Report on Foreign Policy Aspects of the War Against Terrorism*, 19 December 2002 at paragraphs 136–140. See <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaaff/196/196.pdf>
38. Jules Lobel and Michael Ratner, 'Bypassing the Security Council' *American Journal of International Law* January 1999, vol. 93, p. 124.
39. 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 the Iraqi Government 'cease their repression of the civilian population in many parts of Iraq ... including in the Kurdish-populated areas and appeal[s] 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 36th 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 32nd parallel. Again, this was said by the US to be 'consistent' with Resolution 688. This was widened to the 33rd parallel in 1996. France apparently did not agree with this last expansion and seems to have eventually ceased all air patrols in Iraq by 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*.

40. 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'.
41. 'The Right of Self-Defence under International Law—the Response to the Terrorist Attacks of 11 September', *Current Issues Brief*, no. 8, 2001–02, Department of the Parliamentary Library, Canberra.
42. See <http://www.whitehouse.gov/nsc/nss.pdf>
43. 'Dr. Condoleezza Rice Discusses President's National Security Strategy', Wriston Lecture, 1 October 2002.
44. (1986) ICJ Reports 14.
45. *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.
46. See Y. Dinstein, *War Aggression and Self-Defence*, 2001, pp 172–73.
47. 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.
48. Resolution 481 of 1981.
49. House of Commons, *Parliamentary Debates*, 9 June 1981.
50. 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

Reagan 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.

51. A. Chayes, *The Cuban Missile Crisis*, 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.
52. Sir Robert Jennings served as President of the ICJ from 1991–94.
53. *Oppenheim's International Law*, 1991 pp. 41–42.
54. *Report on Foreign Policy Aspects of the War Against Terrorism*, 19 December 2002 at paragraphs 146–149.
55. *Op. cit.*, paragraph 154.
56. 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.* fn 39.
57. Professor Cassese is the former President of the International Criminal Tribunal for the former Yugoslavia.
58. 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'.
59. Transcript of doorstep interview, AGL / ACTEW Depot Canberra, 27 January 2003.
60. *Iraq's Weapons of Mass Destruction: A Net Assessment*, September 2002, at p. 68.
61. Remarks to the Security Council, 5 February, 2003.
62. *ibid.*
63. Testimony before the Senate Budget Committee, 11 February 2003.
See <http://www.state.gov/secretary/rm/2003/17620.htm>
64. Statement of Ambassador Mohammed Aldouri to the Security Council, 5 February 2003.
65. Foreword to *Iraq's weapons of mass destruction - the assessment of the British Government*.
66. The Hon. John Howard MP, *Address to the NSW Liberal Party State Council*, 23 November 2002.

Appendix A: Draft Resolution on Iraq - 24 February 2003

The Security Council,

Recalling all of its previous relevant resolutions, in particular its resolutions 661 (1990) of August 1990, 678 (1990) of 29 November 1990, 686 (1991) of 2 March 1991, 687 (1991) of 3 April 1991, 688 (1991) of 5 April 1991, 707 (1991) of 15 August 1991, 715 (1991) of 11 October 1991, 986 (1995) of 14 April 1995, 1284 (1999) of 17 December 1991 and 1441 (2002) of 8 November 2002, and all the relevant statements of its President,

Recalling that in its resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance of Iraq of the provisions of that resolution, including the obligations on Iraq continued therein,

Recalling that its resolution 1441 (2002), while acknowledging that Iraq has been and remains in material breach of its obligations, afforded Iraq a final opportunity to comply with its disarmament obligations under relevant resolutions,

Recalling that in its resolution 1441 (2002) the Council decided that false statements or omissions in the declaration submitted by Iraq pursuant to that resolution and failure by Iraq at any time to comply with, and co-operate with fully in the implementation of, that resolution, would constitute a further material breach,

Noting, in that context, that in its resolution 1441 (2002), the Council recalled that it has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations,

Noting that Iraq has submitted a declaration pursuant to its resolution 1441 (2002) containing false statements and omissions and has failed to comply with, and co-operate fully in the implementation of, that resolution,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of Iraq, Kuwait, and the neighbouring states,

Mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security,

Recognising the threat of Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security,

Determined to secure full compliance with its decisions and to restore international peace and security in the area,

Acting under Chapter VII of the Charter of the United Nations,

Decides that Iraq has failed to take the final opportunity afforded to it resolution 1441 (2002),

Decides to remain seized of the matter.

Source: <http://www.cnn.com/2003/US/02/24/resolution.text/index.html>