Preemption, Iraq, and International Law

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Charter's norms and reform of its systemic features. A first reason that she finds it premature to pronounce the death of Charter law is that the legal case for the use of force against Iraq is much closer than the critics acknowledge: in Resolution 1441, Security Council members left open the possibility of military action without a subsequent authorizing resolution, or at least agreed to disagree on this point. Second, the core of the Charter remains viable, because all states and their informed publics continue to place a heavy burden of justification in terms of the Charter on those who use or propose to use force. Third, the Charter system is flexible enough to evolve to meet changing conditions. Stromseth then turns to concrete proposals for addressing the daunting challenges of the present and future, including terrorism and weapons of mass destruction. In place of the Bush administration's open-ended preemption doctrine, Stromseth recommends intensified efforts to enlist collective support for U.S. initiatives, in the first instance through regional self-defense organizations. She also makes specific proposals for revitalizing the Security Council to improve its capabilities to meet threats to peace and security.

We encourage our readers to carry on this debate in classrooms of international law, in the press, in their communities, and in communications with their elected representatives and other public officials.

**Lori Fisler Damrosch and Bernard H. Oxman**

**PREEMPTION, IRAQ, AND INTERNATIONAL LAW**

Preemption comes in many forms and what we think of it depends on the circumstances. One state may not strike another merely because the second might someday develop an ability and desire to attack it. Yet few would criticize a strike in the midst of an ongoing war against a second state's program to develop new types of weapons. Between these two examples lie countless fact patterns.

In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.

Operation Iraqi Freedom has been criticized as unlawful because it constitutes preemption. This criticism is unfounded. Operation Iraqi Freedom was and is lawful. An otherwise lawful use of force does not become unlawful because it can be characterized as preemption. Operation Iraqi Freedom was conducted in a specific context that frames the way it should be analyzed. This context included the naked aggression by Iraq against its neighbors, its efforts to obtain

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1 Editors in Chief.

The legal basis for the doctrine of preemption is set out in President Bush's *National Security Strategy*:

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 preemption on the evidence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

The *National Security Strategy of the United States of America* 15 (Sept. 17, 2002), available at [http://www.whitehouse.gov/nsc/nss.pdf](http://www.whitehouse.gov/nsc/nss.pdf). The notion of preemption is inherent in the right of self-defense, recognizing the need to adapt the concept of imminence to the capabilities and objectives of today's adversaries. The use of force preemptively in self-defense is the right of each state and does not require Security Council action. In calculating whether the test of imminence has been met, it would be irresponsible to ignore that these adversaries "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." Id. (emphasis added). In the case of Iraq, President Bush made clear that the United States could always proceed in the exercise of its inherent right of self-defense recognized in Article 51 of the United Nations Charter. See Report in Connection with Presidential Determination Under Public Law 107-245, reprinted in 149 CONG. REC. H1957, H1958 (daily ed. Mar. 19, 2003) (on resolution authorizing use of force against Iraq).
weapons of mass destruction, its record of having used such weapons, Security Council action under Chapter VII of the United Nations Charter, and continuing Iraqi defiance of the Council’s requirements.

On August 2, 1990, Iraq invaded Kuwait. It is easy to forget the wantonness of Iraq’s invasion, which was unprovoked and carried out with particular cruelty, and the horror with which the world received news of it. That invasion rightly shaped, forever after, the way the world would look at Saddam Hussein’s Iraq; and the United States, its allies and friends, and the international community as a whole came to realize that this was a menace from which the world needed special protection. In the midst of over a dozen years of an essentially ongoing conflict, conducted at different times at different levels of intensity, the Iraqi regime committed itself to comply with conditions that would have brought the story to a close. But it could never bring itself to fulfill its commitments.

Virtually immediately, the Security Council adopted UN Security Council Resolution 660, the first of many resolutions condemning Iraq’s actions and demanding withdrawal from Kuwait. Additional Council actions were designed to apply further pressure and bring about Iraq’s withdrawal. The Council’s actions paralleled steps taken by the United States and others pursuant to the inherent right of collective self-defense recognized in Article 51 of the UN Charter. The United States moved forces to the Persian Gulf and then commenced maritime interdiction efforts in response to the Iraqi attack. But Iraq was intransigent.

Eventually, in November 1990, the Council adopted Resolution 678, which authorized the use of “all necessary means” to uphold and implement Resolution 660 and subsequent relevant resolutions, and to restore international peace and security in the area. The resolution provided Iraq with “one final opportunity” to comply with the Council’s earlier decisions and authorized the use of force “unless Iraq on or before 15 January 1991 fully implements” the Council’s resolutions. It specifically invoked the authority of Chapter VII of the Charter, which permits the Security Council to respond to either a threat to, or a breach of, the peace by authorizing the use of force to maintain or restore international peace and security.

Iraq refused to comply with the resolutions by the January 15 deadline, and coalition forces commenced military operations the next day. Significantly, the Security Council did not make a further determination prior to January 15 as to whether or not Iraq had taken advantage of the “one final opportunity” it had been given two months earlier. Member states made that judgment themselves and relied on the Security Council’s November decision as authority to use force.

3 Among other things, Resolution 661 (Aug. 6, 1990), 29 ILM 1326 (1990), imposed broad sanctions on Iraq; Resolution 662 (Aug. 9, 1990), 29 ILM 1327, decided that Iraq’s annexation of Kuwait was “null and void” and demanded that Iraq rescind its actions purporting to annex it; Resolution 664 (Aug. 18, 1990), 29 ILM 1328, reaffirmed those decisions, demanded that Iraq rescind its order that foreign diplomatic and consular missions in Kuwait be closed, facilitate departure and consular access for nationals of third states, and take no action to jeopardize their safety, security, or health; Resolution 665 (Aug. 25, 1990), 29 ILM 1329, called upon member states to use such measures commensurate to the specific circumstances as may be necessary to ensure implementation of trade restrictions; Resolution 667 (Sept. 16, 1990), 29 ILM 1332, demanded that Iraq release foreign nationals that it had abducted; Resolution 670 (Sept. 25, 1990), 29 ILM 1334, imposed restrictions on air traffic; Resolution 674 (Oct. 29, 1990), 29 ILM 1561, invited states to collate and make available to the Council information on grave breaches committed by Iraq; and Resolution 677 (Nov. 28, 1990), 29 ILM 1564, condemned Iraqi attempts to alter Kuwait’s demographic composition and destroy the civil records of the legitimate government of Kuwait.
On April 3, 1991, the Council adopted Resolution 687. That resolution did not return the situation to the status quo ante, the situation that might have existed if Iraq had never invaded Kuwait or if the Council had never acted. Rather, Resolution 687 declared that, upon official Iraqi acceptance of its provisions, a formal cease-fire would take effect, and it imposed several conditions on Iraq, including extensive obligations related to the regime’s possession of weapons of mass destruction (WMD). As the Council itself subsequently described it, Resolution 687 provided the “conditions essential to the restoration of peace and security.”

The Council’s conclusion that these WMD-related conditions were essential is neither surprising in the wake of the history of aggression by the Iraqi regime against its neighbors nor irrelevant to the legal situation faced by the coalition when Operation Iraqi Freedom began in March 2003. The Iraqi regime had demonstrated a willingness to use weapons of mass destruction, including by inflicting massive deaths against civilians in large-scale chemical weapons attacks against its own Kurdish population in the late 1980s, killing thousands. On at least ten occasions, the regime’s forces had attacked Iranian and Kurdish targets with combinations of mustard gas and nerve agents through the use of aerial bombs, rockets, and conventional artillery shells. There was no question that such weapons in the hands of such a regime posed dangers to the countries in the region and elsewhere, including the United States, because of the possibility both of their use by Iraq and of their transfer for use by others. After considering the nature of the threat posed by Iraq, the Council, acting under its Chapter VII authority, established a special set of rules to protect against it.

As a legal matter, a material breach of the conditions that had been essential to the establishment of the cease-fire left the responsibility to member states to enforce those conditions, operating consistently with Resolution 678 to use all necessary means to restore international peace and security in the area. On numerous occasions in response to Iraqi violations of WMD obligations, the Council, through either a formal resolution or a statement by its president, determined that Iraq’s actions constituted material breaches, understanding that such a determination authorized resort to force. Indeed, when coalition forces—American, British, and French—used force following such a presidential statement in January 1993, then Secretary-General Boutros-Ghali stated that the raid was carried out in accordance with a mandate from the Security Council under resolution 678 (1991), and the motive for the raid was Iraq’s violation of that resolution, which concerns the cease-fire. As Secretary-General of the United Nations, I can tell you that the action taken was in accordance with the resolutions of the Security Council and the Charter of the United Nations.

It was on this basis that the United States under President Clinton concluded that the Desert Fox campaign against Iraq in December 1998, following repeated efforts by the Iraqi regime to deny access to weapons inspectors, conformed with the Council’s resolutions. To be sure, that campaign did not lack critics, who raised questions about whether further Council

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7 See, e.g., SC Res. 707 (Aug. 15, 1991). The use of the term “cease-fire” itself carries the connotation that one party is not bound to observe it in the face of violations by the other. Even a more formal armistice is subject to the same qualification, as specifically reflected in Article 40 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, which states that “a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it.”
9 Michael J. Matheson, Remarks, in Legal Authority for the Possible Use of Force Against Iraq, 92 ASIL PROC. 141 (1998).
action was required to authorize it specifically. Some said that, in the absence of a Council determination that a material breach had occurred, an individual member state or group of states could not decide that a particular set of circumstances constituted a material breach, and there was debate about whether language that the Council had used in the period leading to Desert Fox was equivalent to a determination of material breach. The U.S. view was that whether there had been a material breach was an objective fact, and it was not necessary for the Council to so determine or state. The debate about whether a material breach had occurred and who should determine this, however, should not obscure a more important point: all agreed that a Council determination that Iraq had committed a material breach would authorize individual member states to use force to secure compliance with the Council's resolutions.

This was well understood in the negotiations leading to the adoption of Resolution 1441 on November 8, 2002, and, indeed, the importance attached to the use of the phrase “material breach” was the subject of wide public discussion. The understanding of the meaning of the phrase was also reflected in the structure of Resolution 1441 itself. Thus, the preamble contained specific language recognizing the threat that Iraq's noncompliance and proliferation posed to international peace and security, recalling that Resolution 678 had authorized member states to use “all necessary means” to uphold the relevant resolutions and restore international peace and security, and further recalling that Resolution 687 had imposed obligations on Iraq as a necessary step for achieving the stated objective of restoring international peace and security.

After recounting and deploring Iraq's violations at some length, the resolution in operative paragraph 1 removed any doubt that Iraq's actions had constituted material breaches.

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12 Among other things, in March 1998, Resolution 1154 (Mar. 2, 1998), 37 ILM 503 (1998), had warned Iraq that continued violations of its disarmament obligations "would have severest consequences"; and in November of that year, Resolution 1205 (Nov. 5, 1998), 38 ILM 292 (1999), characterized Iraq's failure to cooperate with inspectors as a "flagrant violation."

13 Matheson, supra note 9, at 141. The United States noted at the time that previous Council findings removed any doubt that Iraq's actions constituted material breaches. For example, the chargé d'affaires of the U.S. Mission to the United Nations stated:

Following the liberation of Kuwait from Iraqi occupation in 1991, the Security Council, in its resolution 687 (1991) of 3 April 1991, mandated a ceasefire; but it also imposed a number of essential conditions on Iraq, including the destruction of Iraqi weapons of mass destruction and acceptance by Iraq of United Nations inspections.

. . . . .

. . . Iraq has repeatedly taken actions which constitute flagrant, material breaches of these provisions. On a number of occasions, the Council has affirmed that similar Iraqi actions constituted such breaches, as well as a threat to international peace and security. In our view, the Council need not state these conclusions on each occasion.


15 See, e.g., Julia Preston, Threats and Responses: Diplomacy; U.S. Raises Pressure on Russia and France for Iraq Resolution, N.Y. TIMES, Oct. 26, 2002, at A8 (French officials call phrase a "hidden trigger" that could permit United States "to declare war by itself"); Tim Weiner, Threats and Responses: The U.N. Debate, N.Y. TIMES, Oct. 28, 2002, at A11 (French-circulated text omits "two crucial words from the American proposal, which would find Iraq in 'material breach' of a number of past Council resolutions" and which France considers would be a "tripwire").

16 Among other things, the resolution, supra note 14, in its preamble, deplored

— "that Iraq has not provided an accurate, full, final, and complete disclosure, as required by resolution 687 (1991), of all aspects of its [WMD programs] and of all holdings of such weapons;"

— "that Iraq repeatedly obstructed the immediate, unconditional, and unrestricted access to sites designated by the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA), failed to cooperate fully and unconditionally with UNSCOM and IAEA weapons inspectors, as required by resolution 687 (1991), and ultimately ceased all cooperation with UNSCOM and the IAEA in 1998"; and

— "the absence, since December 1998, in Iraq of international monitoring, inspection, and verification, as required by relevant resolutions, of weapons of mass destruction and ballistic missiles, in spite of the Council's repeated demands that Iraq provide immediate, unconditional, and unrestricted access to the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), . . . . as the successor organization to UNSCOM, and the IAEA."
Specifically, paragraph 1 stated that "Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under [the WMD and missile provisions] of resolution 687." In adopting the "material breach" language, the resolution established that Iraq's violations of its obligations had crossed the threshold that earlier practice had established for coalition forces to use force consistently with Resolution 678.

Following this decision that Iraq was in material breach, operative paragraph 2 stated the Council's decision, "while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council." The resolution then required Iraq to submit, by December 8, 2002, "a currently accurate, full, and complete declaration" that, among other things, would include information on "all aspects of its programmes to develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems." At the same time, the resolution established a reinforced program of weapons inspections, and demanded that Iraq cooperate "immediately, unconditionally, and actively with UNMOVIC and the IAEA."

Operative paragraph 4 stated the Council's decision that "false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations." The Council in effect decided that, in view of the past behavior of Iraq, the threat it posed to others, and the fact that the opportunity it was being given to remedy its breaches was a final one, any such violations by Iraq would mean that the use of force to address this threat was consistent with Resolution 678.

No serious argument was put forward in the period following the adoption of Resolution 1441 either that the declaration submitted by Iraq was "currently accurate, full, and complete" or that Iraq had complied with and cooperated fully in the implementation of the resolution.\(^\text{17}\) Under Resolution 1441, the Council had already decided that any such failure to cooperate would constitute a further material breach by Iraq.

Even at this point, however, the United States returned the issue to the Council for further consideration. This course was consistent with Resolution 1441, which contemplated certain steps regarding the reporting of violations and consideration by the Council; in supporting that resolution, the United States had undertaken to "return to the Council for discussions."\(^\text{18}\) Specifically, under operative paragraph 4, Iraqi violations that constituted "a further material breach" were to be reported to the Council for assessment under paragraphs 11 and 12. Under paragraph 11, UNMOVIC and the IAEA were directed to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under Resolution 1441.

Under paragraph 12, the Council decided that it would convene upon receipt of a report "in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security." Paragraph 12 expressly provided for further Council consideration "upon receipt of a report in accordance with paragraphs 4 or 11 above."\(^\text{19}\) It thus specifically contemplated that such a report could be provided either by UNMOVIC or the IAEA in accordance with paragraph 11 or by a member state in accordance with paragraph 4. Paragraph 4 called for violations to "be reported

\(^{17}\) See Report in Connection with Presidential Determination Under Public Law 107-243, supra note 1; see also note 21 infra.

\(^{18}\) UN Doc. S/PV.4644, at 3 (2002) (remarks of Ambassador Negroponte); see also Remarks on the Passage of a United Nations Security Council Resolution on Iraq, 38 WEEKLY COMP. PRES. DOC. 2009, 2010 (Nov. 11, 2002) ("The United States has agreed to discuss any material breach with the Security Council, but without jeopardizing our freedom of action . . .").

\(^{19}\) SC Res. 1441, supra note 14, op. para. 12 (emphasis added).
to the Council for assessment in accordance with paragraphs 11 and 12," without any limitation on who might submit such a report. Thus, nothing in the language of Resolution 1441 precluded a member state from submitting a report that would be the basis for the Council to convene under paragraph 12.20

Violations of paragraph 4 were in fact reported to the Council, including by Secretary Colin L. Powell, whose comprehensive reports drew on human intelligence, communications intercepts, and overhead imagery regarding Iraq'S ongoing efforts to pursue WMD and missile programs and conceal them from United Nations inspectors. And the Council did convene and did consider the situation, as provided by paragraph 12.21

The Council held numerous formal sessions on this issue. However, nothing in Resolution 1441 required the Council to adopt any further resolution, or other form of approval, to establish the occurrence of the material breach that was the predicate for coalition forces to resort to force. The very careful wording of paragraph 12 reflected this fact clearly. Paragraph 12 contemplated that the Council would "consider" the matter, but specifically stopped short of suggesting a requirement for a further decision. As the British attorney general stated on this point, "Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force."22

The language in paragraph 12 contrasts sharply with language on this point in earlier texts circulated among Council members that would have provided for the Council "to convene immediately, upon reception of a report in accordance with paragraph 8 above, in order to decide any measure to ensure full compliance of all its relevant resolutions" (emphasis added). The fact that this language was not included in Resolution 1441 as ultimately adopted shows that the Council decided only that it would consider the matter, but not that it would be necessary for it, or even its purpose, to make a further decision. Rather, the Council had already made the decision that violations described in paragraph 4—"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"—would constitute a material breach of Iraq's obligations, and thus authorize the use of force to secure Iraqi compliance with its disarmament obligations.

The similarities in this regard between Resolution 1441 and Resolution 678 are striking. Using the same terminology that it later adopted in Resolution 1441, the Council in Resolution 678 decided to allow Iraq a "final opportunity" to comply with the obligations that the Council had established in previous resolutions. The Council then authorized member states to use force "unless Iraq on or before 15 January 1991 fully implement[ed]" those resolutions. It was clear then that coalition members were not required to return for a further

20 The conclusion that any state could submit a report was in keeping with the underlying purposes of the Charter, which, under Article 35, provides: "Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34" (which refers to "any situation which might lead to international friction or give rise to a dispute") "to the attention of the Security Council . . . " Nothing in Resolution 1441 deprived members of this right, and it is questionable whether it would be appropriate for any resolution by the Council to do so.

21 See, e.g., UN Docs. S/PV.4701 (2003), S/PV.4714 (2003). Although reports from the weapons inspectors were not required for the Council to convene and consider the situation under paragraph 12, UNMOVIC Director Blix did report Iraq's failure to comply and cooperate. See the following reports by Hans Blix to the Security Council: UN Doc. S/PV.4692, at 3 (2003) ("Iraq appears not to have come to a genuine acceptance—not even today—of the disarmament that was demanded of it and that it needs to carry out to win the confidence of the world and to live in peace"); id. at 6 (noting that Iraq's declaration included a document from which it had excised a table showing the import of bacterial growth media, and concluding that "absence of this table would appear to be deliberate, as the pages of the resubmitted document were renumbered"); UN Doc. S/PV.4714, at 5 (2003) (Iraqi initiatives in weeks prior to Operation Iraqi Freedom "cannot be said to constitute immediate cooperation, nor do they necessarily cover all areas of relevance").

Council decision that Iraq had failed to comply; nor did they do so before commencing military operations. The language of Resolution 1441 tracked the language of Resolution 678, and the resolution operated in the same way to authorize coalition forces to bring Iraq into compliance with its obligations.25

What does all this tell us about Iraq and the preemptive use of force? Was Operation Iraqi Freedom an example of preemptive use of force? Viewed as the final episode in a conflict initiated more than a dozen years earlier by Iraq’s invasion of Kuwait, it may not seem so. However, in the context of the Security Council’s resolutions, preemption of Iraq’s possession and use of weapons of mass destruction was a principal objective of the coalition forces. A central consideration, at least from the U.S. point of view, was the risk embodied in allowing the Iraqi regime to defy the international community by pursuing weapons of mass destruction. But do U.S. actions show a disregard for international law? The answer here is clearly no. Both the United States and the international community had a firm basis for using preemptive force in the face of the past actions by Iraq and the threat that it posed, as seen over a protracted period of time. Preemptive use of force is certainly lawful where, as here, it represents an episode in an ongoing broader conflict initiated—without question—by the opponent and where, as here, it is consistent with the resolutions of the Security Council.

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INTERNATIONAL LAW AND THE WAR IN IRAQ

In his speech before the United Nations (UN) in September 2002, President George W. Bush characterized the possible use of force against Iraq as necessary to enforce existing Security Council resolutions and to eliminate a dangerous threat to international peace and security.1 The Security Council responded by adopting Resolution 1441, which found Iraq to be in material breach of previous Security Council resolutions and threatened serious consequences for further intransigence.2 When Iraq refused to fully comply with these resolutions, the United States led an ad hoc “coalition of the willing” that invaded Iraq on March 19, 2003, quickly defeated Iraq’s armed forces, and ended the regime of Saddam Hussein and the Ba’ath party. On May 1, 2003, President Bush announced that major combat operations in Iraq had ended. At the time of this writing, the United States has assumed the position of an occupying power that is responsible for rebuilding Iraq, as recognized by the Security Council in Resolution 1483.

Despite these actions, other leading nations (primarily France, Germany, and Russia) and many international scholars have argued that international law did not just authorize the war in Iraq. The first part of this paper will explain why their view failed to properly read existing Security Council resolutions to authorize the use of force. Even putting the United Nations to one side, the war was further justified as an exercise of self-defense. Under basic notions of customary international law, properly understood, the United States could have attacked Iraq

25 For its part, the United States made clear that it would have preferred the Council to adopt a second resolution. Its view was that such a resolution would have operated as an important demonstration of resolve by the international community to increase the pressure on Iraq and, ultimately, to reduce the likelihood that resort to force would be necessary. While the Council’s inability to come together for such a resolution may have misled Iraq into believing it could wait out the process in New York, the absence of Council action in no way diminished the effect of what the Council had previously authorized.

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2 SC Res. 1441 (Nov. 8, 2002).