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Was the 2003 Invasion of Iraq Legal?

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I. Introduction

Discussion of the *jus ad bellum* and the Iraq war is anything but simple and uncontroversial. There is certainly no shortage of opinions on the subject. One of the author's favorite quotes is from General Wesley Clark, who said the 2003 invasion was legal, but illegitimate.¹ You will appreciate the irony if you remember that the Independent International Commission on Kosovo established by the United Nations called General Clark's 1999 Kosovo campaign illegal, but legitimate.²

When several leading international law professors were asked by a British newspaper, "Was the 2003 Iraq war legal?" their responses were illustrative.³ Professor Malcom Shaw replied: "[O]n the basis of the intelligence we had at the time and the publicly available knowledge, there was a credible and reasonable argument in favor of the legality of the war." Professor Christine Chinkin answered "no" because she believed UN Security Council Resolution 1441 preserved for the Security Council the decision on enforcement action. Professor Sir Adam Roberts replied: "There was in principle a possible case for the lawfulness of resort to war by the US and its small coalition." Professor James Crawford answered simply: "It comes down to a political judgment."

Unfortunately this author thinks Professor Crawford's statement is quite accurate, as it reflects the truism that law and policy are mutually affecting; nowhere is

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the interrelationship between law and policy more evident than in the *jus ad bellum*. Nevertheless, let us briefly examine the legality of the recourse to force in 2003. First, the legal argument articulated by the coalition will be summarized; then three criticisms of the coalition's legal basis will be examined.

II. The Legal Justification for the 2003 Invasion

On March 20, 2003 as the invasion of Iraq began, the United States, United Kingdom and Australia delivered letters to the President of the Security Council providing notice that coalition forces had commenced military operations in Iraq. The letters stated the use of force was necessary in response to Iraq's material breach of the ceasefire agreement reached at the end of hostilities in 1991 and the disarmament obligations contained in Security Council Resolution 687. The US letter succinctly stated: "In view of Iraq's material breaches, the basis for the ceasefire has been removed and use of force is authorized under resolution 678 (1990)."⁴

The legal justifications are explained more fully in a memorandum from the British Attorney General, Lord Goldsmith, to Prime Minister Tony Blair on March 7, 2003 and three US Department of Justice, Office of Legal Counsel opinions written in October, November and December of 2002.⁵ As there are no significant differences among the US, UK and Australian legal justifications, they will be considered as the singular coalition case.

For the coalition, the war with Iraq began on August 2, 1990 when Iraq invaded Kuwait—not with the recommencement of hostilities in March 2003. Iraq justified its invasion of Kuwait on the basis of long-standing claims of sovereignty over Kuwait, and claims that Kuwait engaged in various forms of economic warfare against Iraq.⁶ However, there was little question that Iraq's actions violated the requirement contained in Article 2(3) of the UN Charter that States resolve their disputes by pacific means and Article 2(4)'s prohibition on the use of force against the territorial integrity and political independence of another State. As a result, within a few hours of the Iraqi invasion of Kuwait the Security Council declared the Iraqi action a breach of the peace in Resolution 660. Four days later the Security Council explicitly recognized the right of Kuwait and its coalition partners to use force in collective self-defense in Resolution 661. Throughout the fall of 1990 the Security Council passed eleven resolutions that collectively denounced Iraq's invasion, declared it a breach of the peace, demanded Iraq's immediate, unconditional withdrawal from Kuwait, recognized the right of individual or collective self-defense, imposed an arms embargo and economic sanctions, and recognized Iraq's obligation to pay reparations.⁷

Even as a US-led coalition commenced maritime interdiction operations and began massing military forces, US diplomats aggressively pursued a Security Council resolution explicitly authorizing the use of military force against Iraq. Finally, on November 27, 1990, the Security Council passed Resolution 678, which authorized “all necessary means” to eject Iraq from Kuwait and “to uphold and implement . . . all subsequent relevant resolutions and to restore international peace and security to the area.”⁸ The resolution provided Iraq with “one final opportunity” to comply with the Security Council’s previous Chapter VII resolutions by January 15, 1991.

Iraq failed to avail itself of this final opportunity, and so on the evening of January 16, 1991 a twenty-eight-nation, US-led coalition commenced Operation Desert Storm. It is worth noting here that the Security Council did not make a further determination regarding whether Iraq had complied with its January 15 deadline. Member States made that determination themselves and relied upon the Security Council’s November 1990 decision as authority to use force.

After six weeks of bombing and an astonishingly successful 100-hour ground campaign Kuwait was liberated and the Iraqi army was in full retreat. As the Iraqi army fled north, coalition aircraft continued to bomb Iraqi military targets. The four-lane highway from Kuwait to Basra began to clog with the charred hulks of hundreds of military vehicles and reporters began referring to it as the “Highway of Death.” While the laws of war permitted the continued destruction of the Iraqi army, at least until surrender, the coalition did not want to be seen as engaging in “slaughter for the sake of slaughter.”⁹ And so, at 5 a.m. on February 28, 1991, Operation Desert Storm was unilaterally halted. Three days later General H. Norman Schwarzkopf, the commander of coalition forces, and his Iraqi counterpart negotiated a ceasefire agreement that established a demarcation line and contained provisions for the repatriation of Kuwaitis and prisoners of war held in Iraq.¹⁰

The ceasefire agreement was put into writing by the United States, vetted by the Security Council and codified in Resolution 687 on April 3, 1991.¹¹ It was the longest resolution and most detailed ceasefire agreement in modern time and included extensive disarmament provisions. The Resolution stated its provisions established the “conditions essential to the restoration of peace and security.” The Security Council predicated activation of the ceasefire upon Iraq’s unconditional acceptance, which reluctantly came in a letter delivered to the Security Council on April 6, 1991.¹²

Even before accepting the ceasefire, Iraq began violently suppressing uprisings by the Shia in the south and the Kurds in the north. The Security Council responded by passing Resolution 688, which called on Iraq to cease such repression “as a contribution to removing the threat to international peace and security in the

region.”¹³ The Security Council believed Iraq’s suppression of its citizens, which was causing a destabilizing flow of refugees into neighboring countries, was a threat to international peace and security. The United States and United Kingdom used Resolution 688’s linkage between Iraq’s internal unrest and international peace and security as the basis for invoking Resolution 678’s authorization of the use of force as the enforcement authority.¹⁴ In other words, from the outset of the ceasefire, the coalition believed Resolution 678’s authorization to use force to restore international peace and security in the region survived the ceasefire of Resolution 687.

On several occasions between 1991 and 2003, the coalition used force in response to what it deemed to be Iraq’s material breaches of the disarmament provisions of Resolution 687 and justified its actions under the authority of Resolution 678.¹⁵ The Security Council never condemned these actions, nor questioned the reliance on the continuing validity of 678. In fact, in Resolution 949 on October 4, 1994, the Security Council explicitly reaffirmed Resolution 678.

In the fall and winter of 2002 as Saddam Hussein again impeded the work of UN weapons inspectors, the Security Council adopted Resolution 1441, which after recounting and deploring Iraq’s various violations of Resolution 687 at some length, found Iraq to be in material breach of the ceasefire and afforded Iraq a “final opportunity” to comply.

In accordance with the customary international law governing armistices, the United States properly provided notice on March 17, 2003 that it considered the ceasefire agreement to be denounced by Iraq: just as a right of self-defense may be exercised unilaterally without resort to the Security Council, so too may any party to a ceasefire agreement, even one endorsed by the Security Council, determine that the ceasefire has been materially breached and announce that it is resuming hostilities with the breaching party. As a final opportunity to avoid the resumption of offensive hostilities, the United States gave Saddam Hussein and his sons 48 hours to leave Iraq. They failed to seize this final reprieve and the invasion of Iraq commenced, leading ultimately to Hussein’s capture and the fall of his government.

III. Criticism of the Legal Basis for the 2003 Invasion

The legal basis put forth by the coalition to justify the 2003 invasion of Iraq was hardly without criticism. The Security Council does not conduct straw polls, but France made no effort to hide the fact it would veto the so-called second or eighteenth resolution—a resolution finding Iraq in violation of Resolution 1441 and explicitly authorizing the use of force to compel compliance.¹⁶ Any attempt to

prognosticate the level of support in the Security Council, or in the international community writ large, was complicated by the fact that France was quite public in its insistence that the Security Council would not explicitly authorize force, and the United States was equally public in its insistence that such authorization was not legally required.

Over the intervening six years, many international law scholars have critiqued the *jus ad bellum* basis for the 2003 invasion.¹⁷ Their criticism of the coalition's legal case generally revolves around three concerns: 1) Resolution 678 only authorized the use of force to expel Iraq from Kuwait, 2) Resolution 687 does not permit unilateral enforcement and 3) Resolution 1441 required further authorization or findings by the Security Council before force could be used.

Resolution 678 Only Authorized Expelling Iraq from Kuwait

The coalition's legal basis was grounded on the belief that Resolution 678 authorized not just the expulsion of Iraq from Kuwait, but more broadly the use of force to restore international peace and security to the region and that Iraq's material breaches of Resolution 687 constituted a continuing threat to such peace and security. The plain language of Resolution 678 authorized "all necessary means to uphold and implement resolution 660 (1990) *and* all subsequent relevant resolutions *and* to restore international peace and security in the area" (emphasis added). Resolution 687 recalled the thirteen previous resolutions on the Iraq-Kuwait conflict, reiterated its objective of restoring international peace and security in the area, and affirmed all thirteen previously referenced resolutions, including 678. Read as such, Resolution 687 arguably sets the terms for what would be required to restore international peace and security to the region.

At least two objections can be raised against this position. First, the United States in 1991 did not believe Resolution 678 authorized anything more than expelling Iraq from Kuwait. In explaining the decision to implement a ceasefire rather than pursue Hussein to surrender, several members of the US administration indicated they believed the coalition's mandate was limited to freeing Kuwait.¹⁸ However, Brent Scowcroft, the National Security Advisor at the time, couched the rationale in political rather than legal terms in a book he wrote with President George H.W. Bush: "Going in and occupying Iraq, thus unilaterally exceeding the United Nations' mandate, would have destroyed the precedent of international response to aggression that we hoped to establish. . . . Unilaterally going significantly beyond that mandate, we might have undermined the confidence of the United Nations to make future grants of authority."¹⁹ Remember the context of 1991: the fall of the Soviet Union, the Security Council's first authorization of the use of force since Korea, and the hope that a new world order would be ushered in, a world

order that would see the Security Council finally take its place as the primary guarantor of international peace and security. Nevertheless, even if the United States initially viewed its mandate as limited, that view quickly evaporated with the establishment of the no-fly zones and the legal rationale put forth to justify the no-fly zones, a rationale grounded in 678's authority to restore international peace and security in the region.

A second objection to the relevance of Resolution 678 in 2003 is that Resolution 678 only authorized those member States "co-operating with the Government of Kuwait" to use force. In 1991, Kuwait communicated to the Security Council that it requested assistance from the coalition in expelling Iraq from Kuwait. In 2003, however, Kuwait made this statement to the Security Council: "Kuwait reaffirms that it has not participated and will not participate in any military operation against Iraq and that all measures we are undertaking are aimed at protecting our security, safety and territorial integrity."²⁰ Admittedly, it is a bit of a stretch to argue that the 2003 coalition was "cooperating" with the government of Kuwait.

This argument weakens, however, in light of the operational reality of the intervening twelve years. During that period, the coalition repeatedly took action against Iraq, especially the establishment and enforcement of the no-fly zones that extended beyond strict protection of and cooperation with Kuwait. Those uses of force were consistently justified as authorized by Resolution 678 and the Security Council never formally objected or ruled otherwise. Thus, the argument that 678 had a very limited purpose weakens in light of subsequent State practice and the at-least-tacit acceptance of such practice by the Security Council.

Resolution 687 Does Not Authorize Unilateral Enforcement

A second general criticism of the coalition's legal basis for the 2003 invasion is that once the ceasefire was encapsulated in a Security Council resolution it became an agreement between Iraq and the Security Council and only the Security Council could redress violations. The belief is that once the Security Council directs the parties to a conflict to comply with a ceasefire agreement, as it did here in Resolution 687, the Security Council's ceasefire directive has the force of law under Article 24 of the UN Charter and the parties may not resume hostilities without the express permission of the Security Council. In essence, a Security Council-approved ceasefire agreement, such as Resolution 687, extinguishes the right of self-defense and any prior Security Council authorization to use force and revives the controlling norm of Article 2(4).

This argument makes the fundamental error of confusing the suspension of hostilities with their termination and it confuses a Security Council order to "cease hostilities" with an order to "cease hostilities so long as the following ceasefire

terms are complied with.” A ceasefire, which is synonymous with what was historically termed an armistice, is a suspension of arms that does not end the hostile relations between the two sides—the state of war remains both *de jure* and *de facto*.²¹

The customary international law governing armistices was codified in the Fourth Hague Convention of 1907. It states an armistice only “suspends” military operations and the parties may resume hostilities after providing proper notice, and any “serious violation” of the armistice gives the other party the right to denounce the ceasefire and resume hostilities.²² A “serious violation” under Hague IV is consistent with the “material breach” phrase that appears in Article 60(1) of the 1969 Vienna Convention on the Law of Treaties.²³

As the continuing nature of the Iraq conflict seems to often be forgotten, the following briefly summarizes the ongoing nature of the conflict between 1991 and 2003.²⁴

- Between April 1991 and early 2003 over 250,000 sorties were flown by coalition combat and reconnaissance aircraft over Iraq in enforcement of the ceasefire agreement and no-fly zones. Those aircraft were fired upon by Iraqi forces thousands of times and returned fire thousands of times, dropping bombs, firing missiles and launching hundreds of cruise missiles into Iraq.²⁵

- Within two days of Iraq’s acceptance of the formal ceasefire agreement, the coalition (led by the United States, United Kingdom and France) established a no-fly zone in northern Iraq in response to Iraq’s repression of its Kurdish population. The coalition established a second no-fly zone a few months later in southern Iraq after Shiite dissidents were brutally attacked by Iraqi helicopter gunships.²⁶

- On December 27, 1992, US aircraft shot down an Iraqi fighter plane flying in the no-fly zone.

- In January 1993 the President of the Security Council twice issued statements declaring Iraq to be in material breach of Resolution 687. US, British and French aircraft attacked several air defense targets in southern Iraq and forty-five Tomahawk cruise missiles were launched at a nuclear fabrication facility.

- On June 26, 1993 the United States launched twenty-four Tomahawk cruise missiles against the Iraqi intelligence headquarters in Baghdad in response to an Iraqi assassination plot against former President George H.W. Bush.

- On September 3, 1996 the United States launched forty-four cruise missiles at fifteen air defense sites located in the newly extended portion of the no-fly zone. Fighter aircraft followed up these attacks the next day by bombing air defense sites that had survived the cruise-missile attacks.

- After another broken promise by Iraq in November 1998 to permit resumption of inspections, President Clinton declared Iraq to be in material breach of the ceasefire and ordered the execution of Operation Desert Fox, which lasted four days, and involved 29,900 troops, thirty-seven ships and 348 aircraft from the United States and additional forces from the United Kingdom. Those forces launched nearly four hundred cruise missiles and over six hundred other bombs and missiles at Iraqi military and weapons of mass destruction targets.²⁷

- Between 1999 and 2002 Iraqi forces shot missiles and anti-aircraft fire at coalition aircraft on over one thousand separate occasions. In the majority of those incidents the coalition responded by bombing the offending Iraqi site and in the process damaged or destroyed over four hundred targets. On other occasions US and British aircraft attacked anti-ship missile sites, command-and-control sites, military communications sites, and fuel and ammunition dumps.²⁸

- In February 2001 two dozen coalition aircraft attacked five Iraqi targets located just outside of the southern no-fly zone.

- Coalition aircraft dropped 606 bombs or missiles on 391 targets in 2002 alone.²⁹

This may be low-intensity conflict, but only a lawyer could argue it was not an ongoing armed conflict. This State practice strengthens the argument that the determination of material breach of a ceasefire agreement, even one endorsed by the Security Council, can be unilaterally made by parties to the agreement. The United States and other members of the coalition determined on numerous occasions that Iraq materially breached the 1991 ceasefire agreement and unilaterally responded to those violations with the use of force. Not only were those unilateral determinations of material breach not condemned by the Security Council, but the Council itself recognized in 1994 in Resolution 949 the continuing validity of Resolution 678 and at least tacitly accepted the unilateral enforcement.

To argue that the coalition needed Security Council authorization before resuming offensive combat operations against Iraq in 2003 is to argue that the right of self-defense and the use of force authorized by the Security Council in Resolution 678 were extinguished upon acceptance of the ceasefire agreement. Simply put, such a contention is without basis in State practice and contrary to an international public policy that should encourage utilization of the Security Council—not punish resort to it. If the right to use force were extinguished and the norm set forth in Article 2(4) again became controlling upon acceptance of a ceasefire agreement, the law would create a perverse disincentive to enter into such agreements. The State prevailing in a conflict would be disinclined to agree to a ceasefire at any time prior to

unconditional surrender. Such a law would leave no room for magnanimous efforts to limit the horrors of war through potentially life-saving reprieves.

Resolution 1441 Required Additional Action by the Security Council

A final criticism of the coalition's legal justification for the 2003 invasion relates to the failure to secure a second or eighteenth (depending on your perspective) resolution explicitly authorizing the use of force in response to Iraq's continued material breach of Resolution 687. Resolution 1441 recounted and deplored Iraq's history of violating Resolution 687 at some length, then found Iraq to be in material breach of the ceasefire and afforded Iraq a "final opportunity" to comply. While France and Russia stated publicly they did not believe the finding of "material breach" automatically authorized the use of force against Iraq, the United States and United Kingdom argued that "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."³⁰

No permanent member of the Security Council believed Iraq had complied with Resolution 1441. While the Security Council held several sessions on this issue, the United States and United Kingdom believed nothing in Resolution 1441 required the Security Council to adopt another resolution to establish the continuing existence of a material breach, nor did they believe the use of force was predicated on any other "triggering" mechanism.

The US State Department Legal Advisor noted there are important similarities between Resolution 1441 and Resolution 678: "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."³¹ There was no requirement that coalition members return to the Security Council for a determination that Iraq had failed to comply, nor did they do so before commencing 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."³²

Resolution 1441 is a classic example of diplomatic finesse: it provided the coalition with a clear finding of "material breach," while also requiring that Iraqi non-compliance be reported to the Security Council for "assessment." In other words, Resolution 1441 can be fairly read as an agreement to disagree—or simply as tacit acceptance of the operational code that existed for more than twelve years. Specifically, political differences prevented positive action by the Security Council, which meant that member States acting of their own volition would step into the void and take the action they believed was necessary to restore international peace and

security; those actions, based on the belief they were authorized by Resolution 678, were never condemned by the Security Council.

IV. Conclusion

Today we see a vast disparity between the sophisticated institutions established to regulate international trade and the relatively primitive system in place to regulate the international use of force. To the extent its Chapter VII resolutions are legally binding on all member States, the Security Council exercises very limited quasi-legislative and -judicial powers, yet has no real enforcement powers. While the UN Charter envisions a standing UN military force available to enforce the Security Council's Chapter VII authorities, member States declined in practice to cede such enforcement authority to the Security Council, preferring instead to keep those powers to themselves.

The modalities of enforcement of Security Council resolutions will continue to be debated, yet the normative foundation of the Charter survives the 2003 invasion of Iraq. Remember the lengths to which the United States, United Kingdom and Australia went to couch their legal rationale in terms of the Charter's framework and the relevant Security Council Chapter VII resolutions. The Charter lives on, even when the Security Council is unable or unwilling to act, and even when that inaction forces member States to take enforcement action themselves.

Notes

1. Wesley K. Clark, Address at the UCLA School of Law: Iraq War Legal, Not Legitimate (Jan. 22, 2007), summary *available at* <http://www.international.ucla.edu/article.asp?parentid=61882>.

2. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000), *available at* <http://www.reliefweb.int/library/documents/thekosovoreport.htm>.

3. Owen Bowcot, *Was the War Legal? Leading Lawyers Give Their Verdict*, GUARDIAN.CO.UK, Mar. 2004, <http://www.guardian.co.uk/politics/2004/mar/02/uk.internationaleducationnews>.

4. Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/351 (2003). *See also* Letter Dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/350 (2003); Letter Dated 20 March 2003 from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/352 (2003).

5. *See* Memorandum from Peter H. Goldsmith, Attorney General, to Anthony Blair, Prime Minister, Iraq: Resolution 1441 (Mar. 7, 2003), *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/28_04_05_attorney_general.pdf; Memorandum from Jay S. Bybee, Assistant Attorney

General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Authority of the President Under Domestic and International Law to Use Military Force Against Iraq (Oct. 23, 2002) [hereinafter OLC Memorandum Opinion]; Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Effect of a Recent United Nations Security Council Resolution on the Authority of the President Under International Law to Use Military Force Against Iraq (Nov. 8, 2002); Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Whether False Statements or Omissions in Iraq's Weapons of Mass Destruction Declaration Would Constitute a "Further Material Breach" Under U.N. Security Council Resolution 1441 (Dec. 7, 2002). The US memoranda are available at <http://www.justice.gov/olc/2002opinions.htm>.

6. See Andru E. Wall, *The Legal Case for Invading Iraq*, 32 ISRAEL YEARBOOK OF HUMAN RIGHTS 165, 174 (2002).

7. S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990), declared the Iraqi invasion of Kuwait a "breach of the peace," condemned it, and demanded an immediate and unconditional withdrawal; S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990), affirmed the "inherent right of individual or collective self-defence" and imposed arms and economic sanctions; S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990), declared Iraq's annexation of Kuwait "null and void"; S.C. Res. 664, U.N. Doc. S/RES/664 (Aug. 18, 1990), demanded the protection and release of third-country nationals; S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990), authorized the use of force in maritime interdiction operations to enforce the sanctions; S.C. Res. 666, U.N. Doc. S/RES/666 (Sept. 13, 1990), again demanded the immediate release of third-country nationals; S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990), condemned Iraq's "aggressive acts" and violations of international law; S.C. Res. 669, U.N. Doc. S/RES/669 (Sept. 24, 1990), addressed the issue of assisting countries harmed by the sanctions regime; S.C. Res. 670, U.N. Doc. S/RES/670 (Sept. 25, 1990), condemned Iraq's "flagrant violation . . . of international humanitarian law" and strengthened the sanctions regime; S.C. Res. 674, U.N. Doc. S/RES/674 (Oct. 29, 1990), condemned Iraq's treatment of third-country nations and reminded Iraq of its obligation under international law to pay reparations for the "invasion and illegal occupation of Kuwait"; and S.C. Res. 677, U.N. Doc. S/RES/677 (Nov. 28, 1990), condemned Iraqi treatment of the Kuwaiti population.

8. See Security Council Resolution 678, which authorized the use of force against Iraq; Resolution 687, which affirmed the continuing validity of 678; and Resolution 949, which again affirmed the continuing validity of Resolution 678. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); and S.C. Res. 949, U.N. Doc. S/RES/949 (Oct. 15, 1994).

9. COLIN POWELL, *AN AMERICAN JOURNEY* 521 (1995).

10. See H. NORMAN SCHWARZKOPF, *IT DOESN'T TAKE A HERO* 485–90 (1992). Schwarzkopf's account should dispel the notion that the ceasefire was dictated by the Security Council and that Schwarzkopf merely conveyed its terms to the Iraqis. Rather, the terms of the ceasefire were dictated by the coalition to Iraq, which then accepted the terms in the field after gaining the concession regarding the presence of helicopters in the ceasefire zone established in southern Iraq.

11. S.C. Res. 687, *supra* note 8.

12. See Identical Letters Dated 6 April 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, U.N. Doc. S/22456 (Apr. 6, 1991).

13. S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991); S.C. Res. 687, *supra* note 8.

14. See Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL 727, 732–37 (Dec. 1998).

15. See OLC Memorandum Opinion, *supra* note 5, at 4–6.

16. See Speech by Mr. Dominique de Villepin, Minister of Foreign Affairs, before the Security Council (Feb. 14, 2003), http://www.ambafrance-uk.org/Speech-by-M-Dominique-de-Villepin_4954.html.

17. An excellent summary of the arguments critiquing the legality of the recourse to force against Iraq in 2003 is contained in Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEORGETOWN LAW JOURNAL 173 (2004). For a more balanced presentation of views on this subject, see *Agora: Future Implications of the Iraq Conflict*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 553–642 (2003) for articles by Lori Fisler Damrosch & Bernard H. Oxman, William Howard Taft IV & Todd Buchwald, John Yoo, Ruth Wedgwood, Richard N. Gardner, Richard M. Falk, Miriam Sapiro, Thomas M. Franck, Tom Farer and Jane Stromseth.

18. POWELL, *supra* note 9, at 521.

19. GEORGE H.W. BUSH & BRENT SCOWCROFT, A WORLD TRANSFORMED 489 (1998).

20. Letter to the President of the Security Council, U.N. SCOR, 58th Sess., 4726th mtg. at 14, U.N. Doc. S/PV.4726 (2003).

21. [W]hether the armistice convention is to contain provisions purely and simply for regulating the suspension of hostilities, or it is to include articles of surrender, or the vital conditions on which peace proposals will be entertained, are matters also for the determination of the combatants—or depend, rather, on the will and dictation of the victorious belligerent.

COLEMAN PHILLIPSON, TERMINATION OF WAR AND TREATIES OF PEACE 64 (1916).

22. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land art. 40, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 69 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

23. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 57 (4th ed. 2005). Dinstein clarifies, however, that “[t]he *lex specialis* of Article 36 of the Hague Regulations clearly overrides the *lex generalis* of Article 56(2) of the Vienna Convention on the Law of Treaties, which requires a twelve months’ minimum notice of intention to denounce a treaty.” *Id.*

24. See White House Background Paper: A Decade of Deception and Defiance (Sept. 12, 2002), available at <http://georgewebush-whitehouse.archives.gov/infocus/iraq/decade/book.html>.

25. See Randall Richard, *Iraq—A Decade of War*, PROVIDENCE JOURNAL, Nov. 7, 2001, at A1.

26. For more on the establishment and enforcement of the no-fly zones, see Michael N. Schmitt, *Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement*, 20 LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW JOURNAL 727 (1998).

27. Department of Defense News Briefing, Secretary of Defense William S. Cohen & General Anthony C. Zinni, Operation Desert Fox, DEFENSE.GOV, Dec. 21, 1998, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1792>.

28. DoD News Briefing, Lieutenant Colonel S. Campbell (Aug. 10, 2002).

29. MICHAEL R. GORDON & BERNARD E. TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ 79 (2007).

30. Taft & Buchwald, *supra* note 17, at 557, 561.

31. *Id.* at 562.

32. *Id.* at 563.