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The Gulf War: 1990–2004 (And Still Counting)

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There is a popular notion (based on some loose language used by the Bush Administration) that the hostilities conducted by the American-led Coalition of the willing against Iraq in 2003 were based on a legal doctrine of preemptive forcible action against a potential threat. From the standpoint of international law, this popular notion is as untenable as it is unnecessary. The present article will first set the proper predicate for the legality of the action taken against Iraq. Then, the article will turn to the spurious contention of preemptive action.

A Legal Analysis of the Various Phases of the Gulf War

It is common practice to refer to the hostilities in Iraq in 2003 in a manner disconnected from the hostilities of the early 1990s: some media stories have even used the expressions "Gulf War I" and "Gulf War II." However, in reality there has been only a single Gulf War which started in 1990 and is still not over in 2004. Admittedly, that war has consisted of a number of phases, yet each phase must be viewed as a part of the whole. The three main phases of the Gulf War are:

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The Invasion and Liberation of Kuwait (1990–1991)

Iraq invaded Kuwait on August 2, 1990. Within a few hours, the United Nations Security Council adopted Resolution 660, which determined the existence of "a breach of international peace and security," and demanded immediate and unconditional withdrawal of the Iraqi forces.[1] This was (and still is) only the second resolution in the history of the Security Council in which it used the phrase "breach of international peace" and then proceeded to take action. (The first being Resolution 82 of 1950 relating to the invasion of South Korea by North Korea,[2] although that resolution used the slightly different phrase "breach of the peace.")

Following Resolution 660, the Council adopted a string of other resolutions which, *inter alia*, imposed on Iraq mandatory economic sanctions under Chapter VII of the Charter (Resolution 661[3]) and even a blockade (Resolution 665[4]). When Iraq did not relent, the Council—in Resolution 678 of November 29, 1990—authorized the "Member States co-operating with the Government of Kuwait," should Iraq not fully comply with previous Council resolutions by January 15, 1991, "to use 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."[5] The formula "to use all necessary means" has since become the common and accepted euphemism for the use of force.

Pursuant to Resolution 678, and upon the expiry of the ultimatum, the armed forces of a large American-led Coalition struck at Iraq on the night of January 16/17, 1991. It is important to understand that at no time did the Council establish a United Nations force for combat purposes against Iraq.[6] The legal foundation of the use of force against Iraq by the coalition was collective self-defense.[7] Under Article 51 of the United Nations Charter, when an armed attack occurs, any State is entitled to respond by exercising its right of individual or collective self-defense.[8] A specific affirmation of "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter," was already incorporated into Resolution 661.[9] Even the phrase "Member States co–operating with the Government of Kuwait" suggests that these are "nations engaged in collective [self-] defense with Kuwait."[10]

The meaning of Resolution 678 is that, while the Security Council abstained from deploying a veritable United Nations force as an instrument of collective security, it gave its blessing in advance to the voluntary exercise of collective self-defense by the members of the Coalition (following an interval of several weeks designed for the exhaustion of the political process). The core of the resolution was the prospective approval of future action.[11] In an ordinary constellation of events, States first employ force in individual or collective self-defense and only then report to the Council about the measures that they have taken, so that the Council

investigates the nature of the hostilities retrospectively. In the particular case of Iraq, the Coalition sought and obtained from the Council a green light for the exercise of collective self-defense against the perpetrator of an armed attack (Iraq) well before the projected military clash. Thereafter, the Coalition did not have to worry about the reaction of the Council, inasmuch as that reaction had predated the actual combat.

Considering that the military operations of the Coalition in 1991 were a manifestation of collective self-defense—rather than collective security—there was technically no need for the specific mandate of Resolution 678 to legally validate the employment of forcible measures against Iraq.[12] Article 51 *per se* ought to have sufficed in authorizing the Coalition to resort to force in response to the Iraqi armed attack, and arguably Resolution 678 only tied the hands of the countries cooperating with Kuwait in that they had to hold their fire until January 15.[13] Of course, in political and psychological terms, Resolution 678 had an incalculable effect: internationally (cementing the solidarity of the Coalition and swelling its ranks) as well as domestically (mobilizing public opinion to political support of the action against Iraq).

The Cease-Fire Period (1991–2003)

Cease-fire terms were dictated to Iraq by the Security Council, in April 1991, in Resolution 687.[14] These were rigorous terms, which compelled Iraq, *inter alia*, to disarm itself of weapons of mass destruction (WMD), but Iraq accepted them. It must be appreciated that, although the conditions of the cease-fire were delineated by Resolution 687, the ensuing cease-fire constituted an agreement between the Coalition—rather than the United Nations (which remained above the fray)—and Iraq.

The cease-fire in Iraq went on for a dozen years, yet it failed to spawn peace. Instead of moving towards a peaceful settlement, the Coalition and Iraq were constantly at loggerheads, inasmuch as Iraq—from the very onset of the cease-fire—was unwilling to fully comply with its agreed-upon terms, especially as regards disarmament of WMD. Huge quantities of chemical weapons agents, and a variety of biological weapons production equipment and materials, were destroyed under the supervision of UN inspectors.[15] However, quite frequently between 1991 and 2003 (in particular, in 1998/1999), Coalition warplanes struck Iraqi targets, striving unsuccessfully to compel Iraq to abide by the cease-fire conditions and especially to cooperate with UN disarmament inspectors.[16] The sundry air strikes by the Coalition must be construed as a resumption of combat operations in the face of Iraqi violations of the cease-fire terms.[17]

Already under Resolution 688, adopted within a few days of the entry into force of the cease-fire, the Security Council (without naming Chapter VII) held that the

Iraqi repression of the civilian population (particularly the Kurds) "threaten international peace and security in the region" and insisted that Iraq "allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operation."[18] As a result, with the military help of armed forces of the United States and other Coalition countries, "access" to humanitarian aid was achieved through the creation of an air exclusion ("no-fly") zone securing a Kurdish enclave in the north of Iraq. In 1992, another "no-fly" zone was established over the Shiite areas in the south of the country. In the next decade, many air strikes were conducted by Coalition warplanes against Iraq in response to Iraqi defiance of the "no-fly" zones.[19]

The Occupation of Iraq (2003)

The state of war between Iraq and the Coalition continued notwithstanding the suspension of general hostilities in 1991. When the friction between Iraq and the Coalition culminated in the resumption of general hostilities of 2003, events were examined by a host of commentators against the backdrop of a doctrine of "preemption" set out by President George W. Bush (see below).[20] But, as conceded by the Legal Adviser of the Department of State: "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."[21]

There is absolutely nothing preemptive about the resumption of hostilities when a cease-fire disintegrates. The leading partner of the United States in the Coalition against Iraq—the United Kingdom—formally took the position that the legal basis of the 2003 hostilities was a revival of the Coalition's right to use force against Iraq consequent upon the Iraqi material breach of the cease-fire.[22]

As indicated, Iraqi reluctance to comply with its obligations of WMD disarmament brought about numerous clashes with the Coalition throughout the cease-fire period. Ultimately, in the face of persistent reports about Iraq's violations of its obligations in this regard, the Coalition decided to terminate the cease-fire. The fact that no WMD were found in Iraq after its occupation is irrelevant: on the eve of the resumption of hostilities, everybody—including the UN inspectors—believed that Iraq had not fully observed its disarmament undertakings.[23] Iraqi refusal to cooperate unreservedly with UN inspectors led to a series of Security Council resolutions branding its conduct a "material breach" of its disarmament obligations.

It is wrong to argue (as was done by the United Kingdom) that the legality of the Coalition's right to use of force against Iraq in 2003 hinged on a revival of Security Council Resolution 678.[24] Resolution 678 gave the blessing of the Security Council to the military action taken in 1991, and surely it had nothing to do with operations

conducted a dozen years later under totally different circumstances. However, there was no need for a revival of Resolution 678 in 2003, just as there was no strict need for its original adoption in 1990. Both in 1991 and in 2003, the Coalition acted on the basis of the right of collective self-defense with which it was directly vested by Article 51 of the Charter and by customary international law.

A cease-fire, which merely suspends hostilities without terminating the war, does not extinguish the right of collective self-defense that remains legally intact for the duration of the war.[25] The criteria for the legitimate exercise of this right remain anchored to the circumstances of the outbreak of the war (in this case, in 1990). The disintegration of a cease-fire by dint of its violation by one belligerent party—and the forcible response of the adversary—is not to be confused with the initiation of a new war.

Under Article 40 of the Regulations annexed to Hague Convention (II) of 1899 and to Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land, a serious violation by a party to a cease-fire ("armistice" in the original wording of the Regulations) empowers the other side to denounce it and, in cases of urgency, to resume hostilities immediately.[26] The modern practice is to refer not to a serious violation but to a "material breach." This phrase appears in Article 60(1) of the Vienna Convention on the Law of Treaties (as a ground for termination or suspension of bilateral treaties).[27] The applicability of the "material breach" criterion to general cease-fire agreements had been recognized in the international legal literature even before the Vienna Convention was crafted in its final form.[28]

The meaning of the phrase "material breach" is not unequivocal.[29] Article 60(3) of the Vienna Convention defines a "material breach" as either "a repudiation of the treaty not sanctioned by the present Convention" or a "violation of a provision essential to the accomplishment of the object or purpose of the treaty."[30] Which provision is to be considered "essential"? It is generally recognized that, in the context of a material breach, the term covers any "important ancillary provision" of a treaty.[31] Thus, the WMD disarmament clauses in the cease-fire agreement with Iraq were decidedly essential (albeit ancillary to the suspension of hostilities), and their violation constituted a "material breach."

It is therefore noteworthy that, as early as August 1991 (a few months after the entry into force of the cease-fire suspending hostilities), the Security Council—acting under Chapter VII of the Charter, in Resolution 707 (1991)—already condemned Iraq's serious violation of its disarmament obligations and established that the violation "constitutes a material breach of the relevant provisions of resolution 687."[32] Eleven years late, in Resolution 1441 (2002), the Security Council (again acting under Chapter VII) decided "that Iraq has been and remains in

material breach of its obligations under relevant resolutions, including resolution 687 (1991)."[33]

Many commentators maintain that—subsequent to Resolution 1441—the Coalition could not take military action against Iraq in 2003 without obtaining a specific go-ahead signal from the Security Council to resort to force.[34] The fact that the Coalition failed to persuade the Security Council to adopt a further resolution expressly authorizing—in the vein of Resolution 678—the use of "all necessary means" (i.e., force) against Iraq was regrettable from a political standpoint. But, legally speaking, such an additional resolution was not required. Even those contending that Resolution 1441 "does not contain any 'automaticity' as concerns the potential use of force" have to concede that the text lends itself to a different interpretation.[35] It most assuredly does not prescribe—or even necessarily imply—that, prior to recourse to force, the Coalition must return to the Security Council for a second (confirmatory) resolution.[36]

The clear inference from the determination by the Security Council as regards the Iraqi "material breach" was that the other side to the cease-fire agreement was released from its obligation to continue to respect the cease-fire.[37] A salient point, often missed by commentators on this topic,[38] is that the other side to the cease-fire agreement with Iraq was not the United Nations as such but the Coalition.[39] Resumption of the hostilities, therefore, did not require an explicit stamp of approval from the Security Council.

In reality, even the determination of the existence of an Iraqi "material breach" need not have been made by the Security Council.[40] By right, this determination could have been made by the Coalition itself. Differently put, there was no legal (as distinct from a political) need for the Coalition to have turned to the Security Council in the first place (just as in 1990/1991 the Coalition did not have to go the Security Council for Resolution 678 or, for that matter, Resolution 687). Yet, since the Coalition chose to bring the matter before the Security Council in 2002—and since the Council did set up an enhanced inspection regime, giving Iraq a "final opportunity" to comply with the disarmament obligation[41]—the Coalition was constrained to give that inspection regime a chance of success. Similarly to Resolution 678, which equally offered Iraq a "final opportunity"[42] and tied the hands of the Coalition by introducing a temporal interval during which it had to hold its fire, Resolution 1441 did not leave the Coalition the option to recommence hostilities immediately. Thus, despite the determination of the existence of a "material breach" of the cease-fire terms, the Coalition had to await new UN inspectors' reports. However, when a number of reports were in, it became clear that there were still unresolved issues and that Iraq had failed to take all the steps required to put an

end to its "material breach."[43] The freedom of action of the Coalition was accordingly regained.

Following a final ultimatum, the Coalition terminated the cease-fire with Iraq and resumed hostilities on March 20, 2003. Baghdad fell on April 9th, and in a few days major combat operations were over. All the same, irregular fighting has persisted long after the occupation of Iraq (with an upsurge in the violence a year later, in 2004). Already in May 2003, the Security Council determined that the situation in Iraq, although improved, continued to constitute "a threat to international peace and security."[44] In October 2003, the Council expressly authorized "a multinational force under unified command" (structured around the Coalition military units) "to take all necessary measures to contribute to the maintenance of security and stability in Iraq."[45] In June 2004, in accordance with Security Council Resolution 1546, the formal occupation of Iraq by the Coalition ended, and an Interim Government reasserted full responsibility and authority; nevertheless, the multinational (Coalition) force remained in the country and its authority "to take all necessary measures" was reaffirmed by the Council.[46]

Preemptive Self-Defense

The United States has traditionally taken the position that a State may exercise "anticipatory" self-defense,[47] in response not merely to a "hostile act" but even to a "hostile intent" (a dichotomy elevated to the level of doctrine by the US Rules of Engagement).[48] In the past, the United States was careful to underscore that anticipatory self-defense—or response to a hostile intent—must nevertheless relate to the "threat of *imminent* use of force."[49] The emphatic use of the qualifying adjective "imminent" is of great import. As we shall see, the imminence of an armed attack (provided that it is no longer a mere threat) does indeed justify an early response by way of interceptive self-defense. However, after the heinous terrorist attacks of September 11, 2001 (9/11), a well-known statement of policy on preemptive action in self-defense was issued as part of the US National Security Strategy,[50] and this is often referred to as the "Bush Doctrine" (after President George W. Bush).[51] The new policy appears to push the envelope by claiming a right to "preemptive" self-defense countering pure threats based on the "capabilities and objectives" of today's adversaries, especially terrorists and in particular when the potential use of WMD comes into the equation.[52] It is not yet clear what practical effects the new policy will have in reality. But to the extent that it will actually bring about the preventive use of force in response to sheer threats, it will not be in compliance with Article 51 of the Charter.

Since Article 51 permits self-defense solely when an "armed attack" occurs, the question arises whether there exists—independently of the Charter—a broader customary international law right of anticipatory self-defense. The International Court of Justice, in the *Military and Paramilitaries Activities* case of 1986, based its decision on the norms of customary international law concerning self-defense as a sequel to an armed attack.[53] Yet, the Court stressed that this was due to the circumstances of the case, and it passed no judgment on the issue at hand.[54]

On the other hand, Judge Schwebel—in his Dissenting Opinion—did take a clear-cut position on the subject. In conformity with a scholarly school of thought maintaining that Article 51 only highlights one form of self-defense (viz., response to an armed attack), without negating other patterns of legitimate action in self-defense vouchsafed by customary international law,[55] Judge Schwebel rejected a reading of the text which would imply that the right of self-defense under Article 51 exists "if, and only if, an armed attack occurs."[56]

In the opinion of the present writer, precisely such a limitative reading of Article 51 is called for. Any other interpretation of the Article would be counter-textual, counter-factual and counter-logical.

First, a different interpretation of Article 51 would be counter-textual because the use of the phrase "armed attack" in Article 51 is not inadvertent. The expression should be juxtaposed with comparable locutions in other provisions of the Charter. It is particularly striking that the framers of the text preferred in Article 51 the coinage "armed attack" to the term "aggression," which appears in the Charter in several contexts (the Purposes of the United Nations (Article 1(1)), collective security (Article 39) and regional arrangements (Article 53(1)).[57] The choice of words in Article 51 is deliberately confined to a response to an armed attack.

An armed attack is, of course, a type of aggression. Aggression in its generic meaning may be stretched to include mere threats, although it is interesting that a consensus Definition of Aggression, adopted by the General Assembly in 1974—while not pretending to be exhaustive—does not cover the threat of force. [58] Yet, only a special form of aggression amounting to an armed attack justifies self-defense under Article 51. The French version of the Article sharpens its thrust by speaking of "*une agression armée*."[59] Under the Article, a State is permitted to use force in self-defense only in response to aggression which is armed.

Second, the idea that one can go beyond the text of Article 51 and find support for a broad concept of preventive self-defense in customary international law is counter-factual. When did such customary international law evolve and what evidence in the practice of States (as distinct from scholarly writings) do we have for it? The right of self-defense crystallized only upon the prohibition of the use of force between States. That prohibition was first evinced in the Kellogg-Briand Pact

of 1928[60] and reiterated, in clearer and broader terms, in Article 2(4) of the Charter in 1945.[61] What preventive war of self-defense was unleashed between 1928 and 1945?

Third, the reliance on an extra-Charter customary right of self-defense is also counter-logical. After all, the framers of Article 51 introduced significant limitations on the exercise of self-defense (which is subject to the overriding powers of the Security Council). Does it make sense that the most obvious case of self-defense—in response to an armed attack—is subordinated to critical conditions, whereas self-defense putatively invoked in other circumstances (on a preventive basis) is absolved of those conditions? What is the point in stating the obvious (i.e., that an armed attack gives rise to the right of self-defense), while omitting any reference whatever to the ambiguous conditions of an allegedly permissible preventive war? Preventive war in self-defense (if legitimate under the Charter) would require regulation by *lex scripta* more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater. Surely, if preventive war in self-defense is justified (on the basis of "probable cause" rather than an actual use of force), it ought to be exposed to no less—if possible, even closer—supervision by the Security Council. In all, is this not an appropriate case for the application of the maxim of interpretation *expressio unius est exclusio alterius*?

Having said all that, it is the considered opinion of the present writer that the right to self-defense can be invoked in response to an armed attack as soon as it becomes evident to the victim State (on the basis of hard intelligence available at the time) that the attack is in progress. There is no need to wait for the bombs to fall—or, for that matter, for fire to open—if a moral certainty exists that the armed attack has actually begun (however incipient the stage of the attack is at that point). The target State can lawfully (under Article 51) intercept the armed attack with a view to blunting its edge.

The best way to illustrate the circumstances in which interceptive self-defense can be relied upon is to assume that the Japanese carrier striking force, en route to the point from which it mounted the notorious attack on Pearl Harbor in December 1941, had been destroyed by American forces before a single Japanese naval aircraft got anywhere near Hawaii.[62] If that were to have happened, and the Americans would have succeeded in aborting an onslaught which in one fell swoop managed to change the balance of military power in the Pacific, it would have been preposterous to look upon the United States as answerable for inflicting an armed attack upon Japan.

The proper analysis of the case should be based on three disparate hypothetical scenarios (all based on the counter-factual postulate that the Americans knew the Japanese plans).

The easiest scenario relates to the hypothetical shooting down by the Americans of the Japanese aircraft—following detection by radar or other means—in the relatively short time-frame between their launch from the air carriers and the actual execution of the attack mission. Once the launch was completed, there can be no doubt that (although theoretically the mission could still be called off) the United States as the target State had every right to regard the Japanese armed attack as having commenced and to intercept it.

The more difficult scenario pertains to a hypothetical sinking of the Japanese fleet when poised for the attack on Pearl Harbor but before the launch of the aircraft. In the opinion of the present writer, the turning point in the unfolding events was the sailing of the Japanese fleet towards its fateful destination (again, notwithstanding the possibility of its being instructed to turn back). Had the Americans—perhaps through the breaking of Japanese naval codes—been in possession of conclusive evidence as to the nature of the mission in which the Japanese Striking Force was already engaged, and had the Americans located the whereabouts of the Japanese fleet, they need not have relinquished the opportunity to intercept.

On the other hand, had the Americans sought to destroy the Japanese fleet before it sailed—while it was still training for its mission, war-gaming it or otherwise making advance preparations—this would have been not an interceptive (hence, lawful) response to an armed attack but an (unlawful) preventive use of force in advance of the attack which had not yet commenced. As and of themselves, training, war-gaming and advance preparations do not cross the red line of an armed attack.

The crux of the issue, therefore, is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon. The casting of the die, rather than the actual opening of fire, is what starts the armed attack. It would be absurd to require that the defending State should sustain and absorb a devastating (perhaps a fatal) blow, only to prove an immaculate conception of self-defense. As Sir Humphrey Waldock phrased it: "Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier."[63]

Interceptive self-defense is lawful even under Article 51 of the Charter,[64] inasmuch as it takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike anticipates an armed attack that is merely "foreseeable" (or even just "conceivable"), an interceptive strike counters an armed attack which is in progress, even if it is still incipient: the blow is "imminent" and practically "unavoidable."[65] To put it in another way, there is nothing preventive about nipping an armed attack in the bud. But that bud is an

absolute requirement. Self-defense cannot be exercised merely on the ground of assumptions, expectations or fear. It has to be demonstrably apparent that the other side is already engaged in carrying out an armed attack (even if the attack has not yet fully developed).

Conclusion

Based on the preceding analysis, it is clear that the Coalition case of taking military action against Iraq in 2003 was legally impregnable. Unfortunately, some leading spokesmen and supporters of the Administration in Washington—instead of focusing (like the British) on the issue of Iraqi "material breach" of the preexisting cease-fire—preferred to link the hostilities to preemptive self-defense, thereby exposing the military operations against Iraq to harsh and legitimate criticism. The moral of the story is that, at times, a wrong "spin" of the tool of international law can become a dangerous boomerang.

Notes

1. SC Res. 660 (Aug. 2, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1325, *id*. (1990).
2. SC Res. 82 (June 25, 1950), *reprinted in* 5 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 4, *id*. (1950).
3. SC Res. 661 (Aug. 6, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1325, 1326–1327 (1990).
4. SC Res. 665 (Aug. 25, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1329, 1329–1330 (1990).
5. SC Res. 678 (Nov. 29, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1565, *id*. (1990).
6. *See* Katia Boustany, *La Guerre du Golfe et le Système d'Intervention Armée de l'ONU*, 28 CANADIAN YEARBOOK OF INTERNATIONAL LAW 379, 391–2 (1990).
7. *See* Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 452, 459–460 (1991).
8. U.N. Charter, *reprinted in* 9 INTERNATIONAL LEGISLATION 327, 346 (Manley O. Hudson ed., 1950).
9. SC Res. 661, *supra* note 3, at 1326.
10. JOHN NORTON MOORE, Crisis in the Gulf: Enforcing the Rule of Law 151 (1992).
11. *See* Alissa Pyrich, *United Nations: Authorizations of Use of Force*, 32 HARVARD INTERNATIONAL LAW JOURNAL 265, 268 (1991).
12. *See* Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MODERN LAW REVIEW 153, 163 (1992).
13. *See* Christian Dominicé, *La Sécurité Collective et la Crise du Golfe*, 2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 85, 104 (1991).
14. SC Res. 687 (Apr. 3, 1991), *reprinted in* 30 INTERNATIONAL LEGAL MATERIALS 847 (1991). The express reference to "a formal cease-fire" appears *id*. at 854.

15. *See* Sean D. Murphy, *Missile Attacks against Iraq,* 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 471, 472 (1999).
16. For an overview of the sporadic hostilities between the Coalition and Iraq from 1992 to 2002, see Andru E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 165, 183–187 (2002).
17. See Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 724, 726 (1998).
18. SC Res. 688 (Apr. 5, 1991), *reprinted in* 30 INTERNATIONAL LEGAL MATERIALS 858, 859 (1991).
19. *See* Wall, *supra* note 16, at 184–187.
20. *See*, *e.g.*, Christian Henderson, *The Bush Doctrine: From Theory to Practice*, 9 JOURNAL OF CONFLICT AND SECURITY LAW 3, 15–16 (2004).
21. William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 557, 563 (2003).
22. Foreign and Commonwealth Office Paper, *Iraq: The Legal Basis for the Use of Force*, 52 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 812–814 (2003).
23. *See* John Yoo, *International Law and the War in Iraq*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 563, 566 (2003).
24. Foreign and Commonwealth Office Paper, *supra* note 22, at 812–814.
25. *See* Wall, *supra* note 16, at 183.
26. Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899, July 29, 1899, 22 Stat. 1803, 1 Bevans 247 and Regulations Respecting the Laws and Customs of War on Land, Annexed to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 55, 66, 77 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).
27. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 1969 UNITED NATIONS JURIDICAL YEARBOOK 140, 155.
28. *See* Quincy Wright, *The Termination and Suspension of Treaties*, 61 AMERICAN JOURNAL OF INTERNATIONAL LAW 1000, 1003 (1967).
29. For a detailed analysis of the expression "material breach," see MOHAMMED M. GOMAA, SUSPENSION OR TERMINATION OF TREATIES ON GROUNDS OF BREACH 25–50 (1996).
30. Vienna Convention, *supra* note 27, at 156.
31. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 238 (2000).
32. SC Res. 707 (Aug. 15, 1991), *reprinted in* 46 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 22, 23 (1991).
33. SC Res. 1441 (Nov. 8, 2002), *reprinted in* 42 INTERNATIONAL LEGAL MATERIALS 250, 251 (2003).
34. *See, e.g.*, Rüdiger Wolfrum, *The Attack of September 11, 2001, the Wars against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 15–18 (2003).
35. Rainier Hofman, *International Law and the Use of Military Force against Iraq*, 45 GERMAN YEARBOOK OF INTERNATIONAL LAW 9, 25–28 (2002).
36. *See* Taft & Buchwald, *supra* note 21, at 560–562.
37. See Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 JOURNAL OF POLITICAL PHILOSOPHY 171, 183 (2003).

38. *See*, *e.g.*, Philippe Weckel, *L'Usage Déraisonnable de la Force*, 107 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 378, 386 (2003).
39. It is true that the Coalition of 2003 (still led by the United States) was of a different composition compared to the original anti-Iraq array of 1990/1991, but this is largely immaterial. Wartime coalitions are not engraved in stone: the Grand Alliance which defeated Germany and Japan in World War II underwent even greater permutations within a shorter period of time.
40. *See* Taft & Buchwald, *supra* note 21, at 560.
41. SC Res. 1441, *supra* note 33, at 251.
42. SC Res. 678, *supra* note 5, at 1565.
43. See Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INTERNATIONAL LAW JOURNAL 7, 31–32 (2003).
44. SC Res. 1483 (May 22, 2003), *reprinted in* 42 INTERNATIONAL LEGAL MATERIALS 1016, 1017 (2003).
45. SC Res. 1511 (Oct. 16, 2003), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 254, *id.*, 256 (2004).
46. SC Res. 1546 (June 8, 2004), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 1459, 1462 (2004).
47. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS 263 (A.R. Thomas & James C. Duncan, eds., 1999) (Vol. 73, US Naval War College International Law Studies).
48. United States Army, Judge Advocate General's Legal Center and School, Operational Law Handbook 75 (2004).
49. *Id. See also* ANNOTATED SUPPLEMENT, *supra* note 47, at 263.
50. OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2002), *reprinted in* 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 947 [hereinafter National Security Strategy].
51. *See* Henderson, *supra* note 20, at 8–9.
52. National Security Strategy, *supra* note 50, at 951–952.
53. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 102–6 (June 27) (merits).
54. *See id.* at 103.
55. *See*, *e.g.*, MYRES S. MCDOUGAL AND FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232–241 (1961).
56. Military and Paramilitary Activities, *supra* note 53, at 347.
57. U.N. CHARTER, *supra* note 8, at 331, 343, 347.
58. GA Res. 3314 (XXIX) (Dec. 14, 1974), paras. 2–4, 29(1) RESOLUTIONS OF THE GENERAL ASSEMBLY 142, 143 (1974).
59. U.N. CHARTER, *supra* note 8, at 346.
60. General Treaty for Renunciation of War as an Instrument of National Policy (Aug. 27, 1928), 94 L.N.T.S. 57.
61. U.N. CHARTER, *supra* note 8, at 332.
62. The Pearl Harbor example was adduced in debates in the United Nations. *See* MARJORIE M. WHITEMAN, 5 DIGEST OF INTERNATIONAL LAW 867–868 (1965).
63. C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 498 (1952).
64. For support of this view, see MALCOLM N. SHAW, International Law 1030 (5th ed. 2003).

65. *Cf.* Christopher C. Joyner and Michael A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VIRGINIA JOURNAL OF INTERNATIONAL LAW 621, 659–660 (1984–1985).