



Congressional Authorization for Iraq War Stretching The Law too Far?

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In an age of global interdependence, the arrogant exercise of power and disregard for the rule of international law poses a serious threat to world order. At the very least, there is a danger of future lawlessness as other powerful states arrogantly and unilaterally claim and exercise their own rights to preemption and preventive war, rather than resort to peacefully settle disputes as required by the UN Charter. Despite the extensive powers that may be exercised by the executive in the conduct of international relations, the President of United States should not treat fundamental international rules with disdain.

Introduction:

On September 11, 2001, a formidable and existential global threat militant extremism erupted onto the unsuspecting international scene and shook the global world. On that fateful day, 19 fanatical operatives of bin Laden's Al Qaeda network carried out a barbaric attack on America. Using commercial airplanes as missiles, they deliberately crashed into civilian targets, killing about three thousand persons, injuring hundreds of others. While the vast majority of casualties were Americans, about eighty other countries also reported fatalities or serious casualties. The horrendous attacks destroyed part of the Pentagon and demolished the Twin Towers, key symbols of American prowess. The US economy suffered tens of billions of dollars of property and general damages; countless lives were permanently disrupted.

The horror and the unmitigated barbarity of the attack, evoking Pearl Harbor, were unmatched in US peace time history. After 9/11, the president of United States, Mr. Bush was quick to recognize the serious nature of the threat posed to international peace and security by the growing Al Qaeda movement. The President demonstrated effective global leadership by unequivocally denouncing the evil of international terrorism as an anathema to world order and civilization and attacking Afghanistan later followed by a war against Iraq.

The war in Iraq and its aftermath raised many questions about the value of international law the system of rules that governs relations between nation states. The resolution cited many factors to justify the use of military force against Iraq. The United States Congress passed a joint resolution in October 2002, "Authorization for Use of Military Force Against Iraq Resolution of 2002" authorizing the Iraq War.

The resolution cited many factors to justify the use of military force against Iraq, including Iraq's noncompliance with the conditions of the 1991 cease fire, including interference with weapons inspectors, Iraq's alleged weapons of mass destruction, and programs to develop such weapons, posed a "threat to the national security of the United States and international peace and security in the Persian Gulf region", Iraq's "brutal repression of its civilian population etc. Besides, the resolution cited the United Nations Security Council Resolutions 678 and 687 as authorizing the United States to use force against Iraq as it was acting in breach of its International obligations. The article analyses how far the Security Council Resolutions quoted in the Joint Resolution justified the use of military force in Iraq.

Authorization Under SC Resolution 678:

On the US interpretation, Resolution 678 authorized the use of force for a material breach of Resolution 687. Certain aspects of Resolution 678, however, suggest that such an interpretation is unpersuasive. Resolution 678 begins by listing in its preamble the ten resolutions passed by the Security Council after Iraq's invasion of Kuwait, beginning with Resolution 660.

then The first two operative paragraphs of Resolution 678 state that the Security Council:

(1) Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so,

(2) Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, the foregoing resolutions, to use all necessary means to uphold and implement resolution

restore international peace and security in the area m to The structure of Resolution 678 suggests that the resolution is focused on Iraqi compliance with the Security Council's resolutions adopted after Iraq's invasion of Kuwait but before November 29, 1990, the date of Resolution 678 itself. The phrase "all subsequent relevant resolutions" in paragraph one appears to be a reference back to the ten resolutions specified in the preamble Further, the authorization in paragraph two only becomes effective if Iraq fails to comply with such resolutions by January 16. In other words, had Iraq complied with the obligations set forth under those ten resolutions which related to Iraq's withdrawal from Kuwait, return of Kuwaiti nationals and property, and other matters, but which did not relate to weapons of mass destruction on or before January 15, 1991, then the authorization contained in paragraph two would not be effective. Given that Iraq could not possibly comply by January 16 with resolutions that did not exist as of that date, the only reasonable interpretation of the language is that "all subsequent relevant resolutions" refers to the ten resolutions existing at the time Resolution 678 was adopted, and not resolutions adopted thereafter

Finally, the second paragraph of Resolution 678 only authorizes the use of force (whether to uphold Security Council resolutions or to restore international peace and security) by states who are "co-operating with the Government of Kuwait" Having been expelled from its country in 1990, the government of Kuwait was extremely vocal and enthusiastic about the deployment of military force against Iraq to restore the Kuwaiti government's authority, as envisaged in Resolution 661. In 1991, at the advent of Operation Desert Storm, the coalition was careful to ensure that Kuwait communicated to the Security Council that it had requested the coalition states to assist it in repelling Iraqi forces from Kuwait. Further, the coalition forces were careful to note that they had been requested by Kuwait to use force against Iraq. In 2003, however, no such communication was sent by Kuwait to the Security Council, nor did Australia, the United Kingdom, or the United States indicate in their communications to the United Nations either that Kuwait had requested assistance or that those states were acting in cooperation with Kuwait. Kuwait did allow the U.S.-led forces to use Kuwaiti territory to launch operations against Iraq and, in that sense, "cooperated" with the invasion in a very critical sense. On the other hand, in a presentation to the Security Council, Kuwait - which had reestablished diplomatic relations with Iraq in 2002-distanced itself from the U.S.-led invasion, saying that "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 The absence of a request from Kuwait to the UN Security Council for assistance, when considered in the context of collective self-defense, would cast doubt on whether the conduct was truly undertaken as a matter of self-defense. Analogously, the lack of any Kuwaiti request

that the two states had agreed upon in 1963. In paragraph four, the Security Council decided "to guarantee the inviolability of the above-mentioned and to take as appropriate all necessary measures to that end in accordance with the Charter of the United Nations Such language was sufficiently similar to Resolution 678 to worry some states about whether it constituted agreement by the Security Council that states could use force to ensure

the sanctity of the boundary. (2) Limitations on the Revived Use of Force:

The other problem with the "revival" theory concerns the objectives for which the revived use of force may be used. Even assuming that a material breach of Resolution 687 sufficient basis to trigger the use of force under the authority of Resolution 678, then presumably that use of force is limited to what is necessary and proportionate in addressing the material breach Finally, it must be noted that a Security Council resolution by its nature is not the same thing as a bilateral or even multilateral treaty Security Council resolutions adopted under Chapter VII are decisions by an international organization that are directly binding on UN Member States whether or not a given state agrees with the decision As such, it is doubtful that rules relating to the material breach of a treaty equally apply to the material breach of a Security Council resolution The Security Council did require Iraq to consent to Resolution 687, but for political reasons, not out of legal necessity. Iraq's consent did not convert Resolution 687 into a bilateral or multilateral agreement whereby UN Member States could decide on their own that Iraqi transgressions justified those states in using military force against Iraq Rather, as the International Court stated in the Namibia case, it is for the Security Council to decide upon the measures to be taken, and who should take them, in the event that a state breaches a Security Council resolution Conclusion:

The legal theory put forward by the United States to justify the invasion of Iraq is not persuasive. The language of the relevant resolutions nor the practice of the Security Council with respect to those resolutions supports the use of force against Iraq, especially in light of the extensive opposition of most of the members of the Security Council over the course of 2002-03. The willingness of the United States to proceed with the invasion in the face of such opposition certainly calls into question the utility of international norms on the use of force and the Security Council as a vehicle for collective security.

In an age of global interdependence, the arrogant exercise of power and disregard for the rule of international law poses a serious threat to world order. At the very least, there is a danger of future lawlessness as other powerful states arrogantly and unilaterally claim and exercise their own rights to preemption and preventive war, rather than resort to peacefully settle disputes as required by the UN Charter. Despite the extensive powers that may be exercised by the executive in the conduct of international relations, the President of United States should not treat fundamental international rules with disdain.

References

Efio 587 TTF 20 CAL WINT 243 277 (1999) (Pure 10 SC UN SCOR 4S 2013 No (3) LD171991 of Kiowan to the Cined Mama Addressed in the Presidene of the UN SCOR ash Sess. UN D22091 Severty Ca Leter Dated 17 Jamary 1991 from P Oted Sum of Amto the Umand Nation Prenders of De Security Count UN SCOR 4 Sea (1991) UN \$23000(on Lock & Brolley Graham, Rapal Badd Go Horizon WASH POST Dec 20, 2002. a 445 (8) N SCOR SRA Sess 4726th mig 14 14 N Dec 4726 (2001) itary and Paramiliters Atties in and against Nicaragua USA 1985 C2 14 15 (10) Sor ca. Letter Duted 3 March 1901 Pom the Parm Representative of the Lined States of Amer to the mind N Addressed to the President of the Security Council, UN SCOR Sess N Doc 3/22541 (1991). Le Dated 17 Junurry 1991 (11 forse of Malnary Force Against Re 14 accessible at <http://hdl.loc.gov/foc/astungres> 2002 (1) Pub 1 107-243, 116 148 acted One 18 2002 Segslation 107114 (12) 14N JOHNSTONE AFTERMATH OF THE GULF WAR AN ASSESSMENT OF UN ACTION 39(1984) SC 687 UK SCOR in Sess. 2981 mg. UN Dac KES/88 (1991) Para 22 (14) Ibid. Para 21. (13) state prepared by German Ferrat Parlament's Research Service on the apple Security Counes restations 678 687, and 1441 (16) Sup Pure (17) lhed Para 4 (18) See. THE CHARTER OF THE UNITED NATIONS A COMMENTARY 753 (Drums Smma ed e 2002) (19) DUN CHARTER as 23 39-42 (20) See UN Совреклалия Сививиднон. Report and Recommendation Made by the Panel of Commisioners Concerning the First Installment of "22" Claims UN Do S/AC 28/1998/734 (1998) (21) Legal Consequences for States of the Continued Presence of South Africa in Namibia South West Africal Notwithstanding Security Council Beluri 278 (1970), 1971 CJ 16 33 (June 21

Bibliography:

Articles:

(1) Nigel D White & Robert Cryer Lindateral Enforcement of Resolution 687 A Threat Too Far? 29 CAL W INT'LLJ 243 272/1999) (2) Vernon Loeb & Bradley Graham. Rapud helgin Gulf on Horizon, WASH POST. Dec 20 2002, at 443

Cases:

(1) Nicaragua (Nieur US) 1986103 14 105 Chudgment of June 27) (2) South West Africa Cases (Eth. S. Afe. Liber S

1966 ICJ 6:47 (July 18) United Nations Documents:

(1) Letter Dated 17 January 1991 from the Permanent Representative of Kimeait to the United Nations Addressed to the Doc 5/22094 (1991) (2) Letter Dated 3 March 199) from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council UN SCOR 46th Sess. UN Doc \$22341 (1991) (3)SC Res 661, UN SCOR. 43th Sess. 2933d mty. UN Doc. S/RES/161 (1990) (4) LUN SCOR. 36th Sess. 2978th mig. UN Doc. S PV2978 (1991) (5) UN SCOR, 58th Sera, 4726th may at 14. Prezident of the Security Council. UN SCOR, 46th Sess. UN

UN. Doc. S/PV/4726 (2003) Websites:

(1) Authorization for Use of Military Force Againat brat Resolution of 2002 [1]. Puh L. 107-243, 116 Saat 1498, enacted October 16. 2002. HJ. Res 114, accessible at handl toe gow loc sscongress-legislation. 107hires 114