

# C H A P T E R

# 24

## The United Nations Charter and the Invasion of Iraq

.....

John Burroughs, J.D., Ph.D., and Nicole Deller, J.D.

**T**HE UNITED STATES' formal claim that the invasion of Iraq complied with international law relied on United Nations Security Council resolutions. In a March 20, 2003, letter to the United Nations, U.S. Ambassador John Negroponte asserted that coalition forces had commenced military operations in order to secure Iraq's compliance with disarmament obligations laid down by the Security Council in a series of resolutions beginning with resolution 687 of April 3, 1991, and culminating in resolution 1441 of November 8, 2002.<sup>1</sup> The underlying, substantive rationale for the war was the emphatic U.S. articulation of a novel doctrine of self-defense articulating a right to take preemptive military action against threats arising from possession or development of nuclear, biological, or chemical weapons coupled with links to terrorism, "even if uncertainty remains as to the time and place of the enemy's attack."<sup>2</sup>

Taken on their own terms, both U.S. rationales have been fatally undermined by the post-invasion failure to discover significant programs to develop nuclear, biological, and chemical weapons and missiles, stocks of chemical and biological weapons or materials, or Ba'athist regime links to global terrorism.<sup>3</sup> The collapse of the factual underpinnings for the rationales should not obscure an essential, larger point: the doctrine of

---

1. Letter dated March 20, 2003, from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2003/351.

2. George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House), September 2002, p. 15.

3. See Barton Gellman, "Iraq's Arsenal Was Only on Paper: Since Gulf War, Nonconventional Weapons Never Got Past the Planning Stage," *Washington Post*, January 7, 2004, online.

preemptive war, and the related assertion of a right to enforce Security Council resolutions on disarmament, are contrary to international legal constraints on use of force, traditionally known as *jus ad bellum*, and now embodied in the United Nations Charter.

The UN Charter is a treaty of the United States, and as such forms part of the “supreme law of the land” under the U.S. Constitution.<sup>1</sup> The Charter is the highest treaty in the world, superseding states’ conflicting obligations under any other international agreement.<sup>2</sup> Adopted in the wake of World War II and proclaiming the determination “to save succeeding generations from the scourge of war,” the Charter established a prohibition on the use of force to resolve disputes among states. Article 2(4) bans the threat or use of force (1) against the territorial integrity of a state, (2) against the political independence of a state, and (3) in any other manner inconsistent with the purposes of the United Nations. The Charter contains two exceptions to the prohibition, authorizing the Security Council to use force on behalf of the United Nations to maintain peace and security, and recognizing the right of self-defense against an armed attack. These are the only bases for legitimate use of force generally accepted in present-day international law.

## Self-Defense Under the UN Charter

We turn first to the underlying rationale for the invasion of Iraq, self-defense. Article 51 of the UN Charter provides in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The use of “inherent” acknowledges that the Charter does not create a right to self-defense; rather, the right preexists the Charter and is fundamental to the system of states. But the Charter also strictly limits self-defense, in that the triggering condition for its exercise is the occurrence of an armed attack.

This limitation prompted an ongoing debate whether the right to use force in anticipation of an attack, which existed prior to the Charter, remains in effect. Some scholars believe Article 51 should be read literally

---

1. U.S. Constitution, Article VI, Clause 2. Regarding the role of the UN Charter and international law and treaty regimes generally in U.S. law and foreign policy, see Nicole Deller, Arjun Makhijani, and John Burroughs, eds., *Rule of Power or Rule of Law? An Assessment of U.S. Policies and Actions Regarding Security-Related Treaties* (New York: Apex Press, 2003) pp. 1–18.

2. UN Charter, Art. 103.

and therefore the right of anticipatory self-defense has been terminated. Others believe that the reference to “inherent right” expresses an intent not to limit the right of self-defense under customary international law.<sup>1</sup> States generally have been reluctant to acknowledge a right of anticipatory self-defense under the Charter, preferring if necessary to interpret “armed attack” broadly to include actions incident to launching an attack.<sup>2</sup>

The right to anticipatory self-defense under customary law has never been unlimited. One generally recognized formulation dating from the mid-nineteenth century is that set forth by Daniel Webster, that the necessity for action must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>3</sup> Since then, and especially since World War II, capabilities to launch devastating attacks with little advance warning have improved dramatically. Nonetheless, scholars have continued to affirm Webster’s restraints on legitimate self-defense, recognizing their value in inhibiting resort to war. A recent edition of a leading treatise states that self-defense may justify use of force under the following conditions: an attack is immediately threatened; there is an urgent necessity for defensive action; there is no practicable alternative, particularly when another state or authority that legally could stop or prevent the infringement does not or cannot do so; and the use of force is limited to what is needed to prevent the infringement.<sup>4</sup>

Assuming its continued relevance, application of the doctrine of anticipatory self-defense in the months preceding the invasion of Iraq should have been straightforward. The United States accused Iraq of retaining stocks of chemical and biological weapons and materials and of reconstituting the chemical, biological, and nuclear weapons and missile programs that were terminated or at least severely disrupted by the post-Gulf War inspections. However, no definitive evidence was presented to establish Iraq’s possession of such weapons or missiles, or their current use to threaten the United States or other states. In his February 15, 2003, briefing of the Security Council, Secretary of State Colin Powell focused

---

1. A standard definition of customary international law is that it consists of universally binding rules based on general and consistent practices of states followed out of a sense of legal obligation.

2. See Christine Gray, *International Law and the Use of Force* (Oxford, New York: Oxford University Press, 2000), pp. 111–115.

3. Letter from Daniel Webster, U.S. Secretary of State, to British Lord Ashburton, August 6, 1842, regarding the 1837 *Caroline* affair.

4. *Oppenheim’s International Law*, Robert Jennings and Sir Arthur Watts, eds., 9<sup>th</sup> ed. (Harlow, Essex: Longmans Group U.K., Ltd., 1992), p. 412.