

A submission to the Iraq Inquiry from Kent Law School concerning Article 2(4) of the UN Charter and its implications for the interpretation of UN Security Council resolutions

1. The *jus cogens* nature of Article 2(4) of the UN Charter¹ (i.e. its status as a peremptory norm of general international law)² has important implications for the interpretation of UN Security Council resolutions. In the legal advice which he gave to the Prime Minister on 7 March 2003,³ the Attorney General explored possible legal bases for the use of force against Iraq without considering the fundamental legal status of Article 2(4). In our view, this was a serious omission which led to a flawed understanding of the legal position and compromised the advice given.
2. It is well established in international law that an exception to a rule must be interpreted narrowly.⁴ *A fortiori* if the rule is not an ordinary rule of international law but *jus cogens*.⁵ By their very nature, ‘peremptory norms of general international law generate strong interpretative principles’.⁶ Accordingly, when interpreting a Security Council resolution

¹ Article 2(4) provides: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.’

² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. ICJ Reports 1986, p 14, para 190. In its commentary on Article 50 of the Draft Articles on the Law of Treaties, the International Law Commission observed that ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*’: Yearbook of the International Law Commission, 1966, Vol II, p 247, para 1.

³ <http://image.guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf>.

⁴ Expressed in the maxim *exceptio est strictissimae applicationis*. See e.g. *Interpretation of Article 79 of the 1947 Peace Treaty*, UN Reports of International Arbitral Awards, Vol XIII, p 397.

⁵ Article 53 of the Vienna Convention on the Law of Treaties 1969 illustrates the superior legal status of *jus cogens*. Recognising that there are some rules of international law which States cannot of their own free will contract out of, it provides: ‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’

⁶ James Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge University Press, 2002), p 187.

there is a very strong presumption against construing it as authorising military action. That presumption can be rebutted, but only by the use of specific, unambiguous wording that makes it clear beyond any doubt that military action is authorised.

3. The content and character of Article 2(4) of the UN Charter, coupled with the requirement in Article 2(3) to settle international disputes peacefully, means that Security Council resolutions which are said to authorise military action by States must not be regarded as doing so unless it is clear beyond doubt that they do.
4. This is reinforced by the fact that Article 24(2) of the UN Charter provides that, in discharging the duties outlined in Article 24(1), ‘the Security Council shall act in accordance with the Purposes and Principles of the United Nations’.
5. The Purposes of the United Nations include respect for human rights, and for the dignity and worth of the human person.⁷ Respect for the right to life is paramount; for example, it is not subject to derogation in time of national emergency.⁸ As the International Court of Justice has declared, ‘In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities’.⁹
6. The Principles of the United Nations include the duty to settle disputes peacefully and the prohibition of the threat or use of force in international relations.¹⁰
7. The Purposes and Principles of the United Nations thus constitute ‘a circumscribing boundary of norms or principles within which the

⁷ Article 1 of the UN Charter read with the Preamble.

⁸ Articles 4(2) and 6 of the International Covenant on Civil and Political Rights 1966.

⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ. Reports 1996, p 226, para 25.

¹⁰ Articles 2(3) and 2(4) of the UN Charter.

Security Council's responsibilities are to be discharged... The duty is imperative and the limits are categorically stated'.¹¹

8. The Purposes and Principles of the United Nations must also, therefore, constrain the interpretation of Security Council resolutions. In the face of those Purposes and Principles, and given that military action tends to cause death and destruction, only the clearest, most specific wording in the text of a resolution can suffice to evince the Security Council's intention to authorise military action.
9. Against this background, we consider that there was and is no basis in international law for the 'revival' argument employed by the UK Government to justify the invasion of Iraq and subsequent regime change.
10. On 7 March 2003 the Attorney General advised the Prime Minister that 'a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution'.¹²
11. The Attorney General reiterated the revival argument without caveat or qualification on 17 March 2003.¹³ After advising, *inter alia*, that a material breach of resolution 687¹⁴ (which set out the ceasefire conditions after Operation Desert Storm) had revived the authority to use force under resolution 678,¹⁵ that in resolution 1441¹⁶ the Security Council had determined that Iraq had been and remained in material breach of resolution 687, and that the Security Council in resolution 1441 had given

¹¹ From Judge Weeramantry's dissenting opinion in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p 3, at p 61.

¹² Above, note 3, para 28.

¹³ Hansard, HL, 17 March 2003: Columns WA2 and 3, <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317w01.htm>.

¹⁴ Adopted on 3 April 1991.

¹⁵ Adopted on 29 November 1990.

¹⁶ Adopted on 8 November 2002.

Iraq ‘a final opportunity to comply with its disarmament obligations’ and warned Iraq of the ‘serious consequences’ if it did not, he concluded:

‘7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.

8. Thus, the authority to use force under Resolution 678 has revived and so continues today.’

12. However, the authority to use military force contained in resolution 678 had been granted more than 12 years earlier to particular States for the specific purpose of ejecting Iraq from Kuwait and restoring international peace and security in the area.¹⁷ In the context of Iraq’s occupation of Kuwait, that purpose had been achieved.

13. The peremptory nature of Article 2(4) of the UN Charter demanded a very much narrower interpretation of resolution 678. The authority which the Security Council had granted to certain States for a particular purpose in November 1990 could not be used to justify the invasion of Iraq in March 2003 and the subsequent removal of Saddam Hussein.

14. A second Security Council resolution specifically and unambiguously authorising military action was required.¹⁸ The vague warning of ‘serious consequences’ in resolution 1441 did not suffice, and to interpret resolution 678 as granting the necessary authority was not ‘good faith’ interpretation as required by international law.¹⁹

15. Without such a resolution, the invasion of Iraq constituted an act of aggression, contrary to Article 2(4) of the UN Charter.

¹⁷ Operative paragraph 2 of resolution 678 authorised ‘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, 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’.

¹⁸ Like the authorisation ‘to use all necessary means’ in resolution 678.

¹⁹ Cf Article 31(1) of the Vienna Convention on the Law of Treaties 1969.

16. According to the International Court of Justice, obligations *erga omnes* (i.e. obligations towards the international community as a whole) derive from the prohibition of aggression.²⁰ This means that the prohibition is the concern of all States, and that all States have a legal interest in its observance.²¹ Indeed, this is the logical corollary of the prohibition's character as a peremptory norm.
17. The *erga omnes* nature of the prohibition of aggression is another reason why the military action against Iraq in March 2003 needed specific and unambiguous authorisation by the Security Council on behalf of the international community.
18. The Attorney General conspicuously failed to consider the implications of *jus cogens* and obligations *erga omnes* in his legal advice to the Prime Minister. We consider that, in consequence, his advice was seriously flawed.

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²⁰ *Barcelona Traction, Light and Power Company Limited*, Judgment, ICJ Reports 1970, p 3, paras 33-34.

²¹ *Ibid*, para 33.