

'Material Breach': A Valid Justification for Military Intervention in Iraq?

Written by Bhavita Rajguru

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BHAVITA RAJGURU, AUG 21 2014

To what extent was the concept of 'material breach' as applied to Iraq in 2003 a valid concept in international law?

The 'material breach' argument had been used by both the United States and the United Kingdom to justify military action in Iraq in 2003. The argument was that Iraq was in breach of the disarmament obligations as put forth in United Nations Security Council (UNSC) Resolution 687 and its continued non-compliance would result in serious consequences, in other words, the use of force. This was a controversial argument and many states were uncertain about the need to use force because of this breach.

This essay will consider three things to ascertain the validity of the 'material breach' argument. Firstly, this essay will define the concept of 'material breach' under international law. Secondly, this essay considers whether the concept of 'material breach' allows for the automatic authorisation of the use of force. Finally, the essay looks at the suspension of Resolution 687 and the revival of Resolution 678.

What is 'Material Breach'?

The concept of 'material breach' is drawn from two places: contract law and treaty law, or the Vienna Convention on the Law of Treaties (henceforth, Vienna Convention). In contract law, a material breach is essentially a 'serious violation of the terms of a contract'.^[1] Here the other party has the option of terminating the contract if one of the parties is in material breach of it.

In treaty law, under Article 60 of the Vienna Convention, material breach is defined as 'a violation of a provision essential to the accomplishment of the object or purpose of the treaty'.^[2] The material breach of a bilateral treaty allows one party to terminate or suspend the treaty if the other party is in breach of it.^[3] The material breach of a multilateral treaty allows for the termination or suspension of the treaty if it is unanimously agreed upon by all parties, if one of the parties is 'specially affected', and a state can invoke the breach if this one party's breach affects all other parties.^[4] It is usually agreed that the 'material breach' argument as applied to Iraq is borrowed from treaty law as opposed to contract law.^[5]

There is no definition of 'material breach' used by the UNSC. UNSC Resolution 687, of which Iraq was supposedly in breach as put forward in Resolution 1441, is neither a contract nor a treaty. However, as a ceasefire resolution, it has been argued that it is a special case and should be treated as such.^[6] In effect, it was viewed as an armistice.^[7] Thus, in keeping with Article 40 of the annex of the Hague Convention Respecting the Laws and Customs of War on Land, which states that 'any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately'.^[8] It must be noted that for the UNSC to apply material breach to any case would take away from their core function as it 'implies the suspension or termination of the very obligation the Council would be intent on enforcing'.^[9] It is entirely up to the UNSC to decide how to deal with a breach of a ceasefire without borrowing the material breach concept from the Vienna Convention.^[10]

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The Use of Force

There is a clear reason why the term 'material breach' had not been used since 1993, mainly because it has often been interpreted as a justification for military action.[11] Both the US and UK governments were of the opinion that if Iraq did not comply with Resolution 1441 and continued to breach Resolution 687, that they could automatically use force without the need of a second resolution. While it was generally agreed by the international community that Iraq's lack of compliance with disarmament obligations was an issue, they were also wary of the intentions of the US and UK.[12]

France, Germany, Russia and many of the UNSC Member States took the view that Iraq was not an immediate threat, the inspections of disarmament of any weapons of mass destruction which Iraq possessed was underway, and it would be of greater risk to act militarily than not at all.[13] Many states had previously stated that they only supported the Resolution 1441 because they thought that there would be no automaticity, that is to say, it would not result in the automatic use of force if Iraq did not comply with the Resolution.[14]

It must be noted that termination or suspension of a treaty does not automatically authorise the use of force. The Vienna Convention itself refers to the obligations in Article 2(3) of the UN Charter[15], which states that:

'all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. [16]

The Convention references adhering to the principles as laid out in the UN Charter and so the use of force is prohibited (with the exception of self-defence as recognised in the Charter). 'The prohibition of the use of force is a *jus cogens* rule from which no derogation is permitted.'[17] Additionally, unilaterally applying material breach is not allowed for in the Convention, especially when the treaty allows for other routes in the instance of a breach.[18] This perhaps goes some way in showing how the concept of 'material breach' was inappropriately applied in the case of Iraq.

In reference to the Hague Convention mentioned previously, it should be noted that this Convention came before the use of force prohibition as we know it today. UNSC practice has changed and considers armistices to be 'of permanent character' once two and a half years of peace has been stabilised.[19] Thus, the use of force in violation of the terms of the armistice is not acceptable.

Additionally, with the ceasefire resolution argument mentioned in the previous section, it would have to be determined which states are 'specially affected'. In the case of Iraq, the answer would be none. The reason being is that the resolution involves a legal relationship between Iraq and the UNSC only, not its Member States nor any other state.[20] Even if the US or UK were 'specially affected' by Iraq's breach, on the basis of the ceasefire resolution being considered as a multilateral treaty, all final decision still remains with the UNSC (except for in cases of self-defence).[21] Furthermore, all states were expected to respect the territorial integrity, political independence and sovereignty of Iraq in accordance with the UN Charter once the ceasefire resolution was adopted. The requirement to adhere to the UN Charter once again meant that the use of force was no longer permitted.[22] Resolution 687 also declared that 'upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678',[23] which Iraq did on 11 April 1991.[24] Thus further emphasising that the use of force was once again prohibited.

In accordance with the *lex specialis*, which governs the use of force in a ceasefire, the only justifiable reason for using force is in cases of self defence.[25] This was clearly not the case in 2003 with Iraq as the violation of the terms of the ceasefire resolution did not pose enough of a threat to warrant the use of force in self defence. In 1956, this is exactly what the Secretary-General had stated due to the confusion surrounding this issue.[26] He additionally stated that the use of force in self-defence can only be carried out in accordance with the principles set out in the UN Charter. In other words, only if an 'armed attack' occurs and, even then, the retaliation would have to be 'necessary and proportionate'. [27]

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As the UNSC mentioned the 'material breach' in Resolution 1441, this explicitly implies a threat to use force that can be authorised by the Council. However, this does not allow for the *automatic* use of force following a further breach of disarmament obligations by Iraq[28] and the final decision to authorise the use of force still remains with the UNSC, thus the US and UK could not have acted without the need of a further resolution as authorised by the UNSC. Additionally, seeing as

'the party that negotiated and authorised the cease-fire, the Security Council, was still in existence, and empowered by the Charter to deal with precisely such issues as violations of cease-fire agreements, and had determined to do so, it is difficult to see how a "material breach" could be said with any authority to revive automatically an authorisation to use force from an earlier resolution that dealt with an earlier situation'. [29]

The Suspension of Resolution 687 and the Revival of Resolution 678

Resolution 1441 recognised 'the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security'.[30] It specifically referred to resolutions 678 and 687, as well as Resolution 688. The term 'material breach' was used twice in the resolution: firstly, to state that Iraq is indeed in material breach of Resolution 687 and secondly, that any false statements made by Iraq would be a further material breach. It also states that non-compliance would result in 'serious consequences',[31] however, it makes no explicit reference to the authorisation of the use of force. Additionally, while the resolution reminds Iraq that the ceasefire was based on their compliance with disarmament obligations, no mention of suspension or termination of said ceasefire is made. It seems that the language of Resolution 1441 was kept intentionally vague to allow for it to be interpreted in such a way as to justify military action.[32] Nevertheless, a point that is worth mentioning is that in this resolution the UNSC explicitly stated that they 'remain seized of the matter'.[33] In other words, the right remained with the UNSC to use their authority, under Chapter VII of the UN Charter, to make decisions on breaches of peace.[34] Thus, this again shows that it should have been the UNSC which authoritatively decided what action it should take regarding Iraq. The US and UK could not act without the authority of the UNSC.

The revival of Resolution 678 rested on overturning what was explicitly stated in Resolution 687 with the argument that it was only effective as long as Iraq complies with its disarmament obligations.[35] As it had not been complying with these obligations, the material breach argument was invoked. It is perhaps worth noting that Iraq has previously been accused of breaching the disarmament obligations set out in Resolution 687 several times.[36] The apparent lack of action taken by the UNSC in response to these breaches led to the US and UK governments applying pressure on the Council,[37] thus resulting in Resolution 1441.

It had been argued that the ceasefire resolution was not definitive, so it could be suspended and the conditions in Resolution 678, justifying the use of force, would be revived.[38] However, this decision would rest with the UNSC, not the US or UK. Also, the establishment of the ceasefire meant that the UNSC ended the authority to use force, which both the US and UK neglect in their arguments.[39]

Furthermore, while subsequent resolutions always referred to previous resolutions, including Resolution 678, the only resolution, which considers the use of force for all resolutions subsequent to Resolution 678 is Resolution 686.[40] Regardless, invoking the authority given by Resolution 686 over a decade later would not necessarily work as it was focused on limiting that authority, essentially only as far as Resolution 687.[41]

There was an argument that Resolution 678 allowed for the use of force beyond the liberation of Kuwait with reference to 'all subsequent relevant resolutions' allowing for further authority.[42] However, this reference

'concerned the collective security dimension of authorisation, placing it within the framework of UN Charter, Chapter VII action. The reference was included in the Resolution in deference to the Korean precedent, which had used a similar formula'. [43]

Thus, it cannot be argued that Resolution 678 allowed for the use of force beyond the liberation of Kuwait.

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Additionally, it cannot be argued that 'a revival of that mandate at a subsequent stage could justify action in pursuit of additional aims'.^[44]

As an example, consider the case of Israel and Syria. Shortly after the signing of the Israel-Syria Armistice agreement in 20 July 1949, fighting erupted, and the UNSC had stated that this was in violation of Article 2(4) of the UN Charter. While force was used in this instance, the parties were still expected to comply with the armistice and it was never suggested that this use of force would result in either the suspension or termination of the armistice.^[45] 'This practice has been consistently applied over the decades.'^[46] In the case of Iraq, no party actually formally stated that the ceasefire resolution had been suspended or terminated and, if anything, demanded that Iraq should still comply with it.^[47] Again, this shows how material breach was wrongly applied in this case.

Conclusion

In sum, the concept of 'material breach' is not valid as applied to Iraq. Firstly, the fact that the term was taken from treaty law means that peaceful solutions must be found instead of automatically resorting to the use of force, in accordance with the Vienna Convention. Secondly, the decision of whether or not Iraq had breached Resolution 687 rests with the Security Council alone. Thirdly, neither the US nor the UK had any authority to overturn Resolution 687; again, this rests solely on the Council. The concept was effectively used as a political tool, to justify military action in Iraq, as opposed to a legal one.

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[1] White, 2010, p. 125

[2] Vienna Convention, Article 60(3)(b)

[3] Vienna Convention, Article 60(1)

[4] Vienna Convention, Article 60(2)

[5] White, 2010

[6] Weller, 2010

[7] McGoldrick, 2004

[8] Hague Convention, Annex, Article 40

[9] Weller, 2010, p. 115

[10] Weller, 2010

[11] Segell, 2004

[12] Weller, 2010

[13] McGoldrick, 2004

[14] McGoldrick, 2004

[15] Weller, 2010

[16] UN Charter, Article 2(3)

[17] Weller, 2010, p. 113

[18] Weller, 2010

[19] Weller, 2010

[20] McGoldrick, 2004; Weller, 2010

[21] White, 2010

[22] Weller, 2010

[23] UNSC Resolution 687, paragraph 33

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[24] Weller, 2010

[25] Weller, 2010

[26] Weller, 2010

[27] Weller, 2010, p. 114

[28] White, 2010

[29] White, 2010, p. 129

[30] UNSC Resolution 1441

[31] UNSC Resolution 1441, paragraph 13

[32] Weller, 2010

[33] UNSC Resolution 1441, paragraph 14

[34] White, 2010

[35] Weller, 2010

[36] McGoldrick, 2004; Weller, 2010; White, 2010

[37] Keohane, 2005

[38] Weller, 2010

[39] Weller, 2010

[40] Weller, 2010

[41] Weller, 2010

[42] Weller, 2010

[43] Weller, 2010, p. 108

[44] Weller, 2010, p. 109

[45] Weller, 2010

[46] Weller, 2010, p. 114

[47] Weller, 2010

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