Remaining Valid: Security Council Resolutions, Textualism, and the Invasion of Iraq

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I. INTRODUCTION

The legality of the 2003 invasion of Iraq has been hotly debated in recent years, with many international law scholars providing their own take at one time or another. Yet another opinion rehashing the same United Nations Security Council resolutions and arguments would be of little value if it provided no new information or a fresh approach. This Article provides the latter by focusing on a Security Council resolution that those in the "legal" camp surprisingly seem to ignore and those in the "illegal" camp seem to dismiss out-of-hand—Resolution 686. Ironically, one eminent commentator in the latter camp overlooks the key language of what he himself characterizes as "the much-overlooked Resolution 686."[1] Whereas reliance on a combination of Resolutions 678, 687, and 1441, the no-fly zones, and self-defense leads some scholars and governments to conclude that the invasion was legal, at least as many come to the opposite conclusion, making this standard rationale suspect from the very beginning. However, an analysis based on Resolution 686, in combination with just Resolution 678, avoids this quagmire and leads one to conclude that the Security Council provided an open-ended authorization, with conditions, for the use of force against Iraq. This authorization remained valid at least until the 2003 invasion because Iraq did not fulfill the conditions in Resolution 686 that would have terminated the authorization, nor did the Security Council expressly limit the authorization of Resolution 686 with a later resolution.[2]

This Article is divided into five Parts, with Parts I and V constituting the introduction and conclusion, respectively. Part II provides a brief description of the relevant facts surrounding the 1991

1. Vaughan Lowe, *The Iraq Crisis: What Now?*, 52 INT'L & COMP. L.Q. 859, 865 (2003); *see also* Christopher Greenwood, The Legality of Using Force Against Iraq, Memorandum to the Select Committee on Foreign Affairs (Oct. 24, 2002), http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm (not mentioning Resolution 686 when explaining to the U.K. House of Commons why military action against Iraq might be justified); Colin Warbrick, *The Use of Force Against Iraq*, 52 INT'L & COMP. L.Q. 811, 814 (2003) (reprinting U.K. Attorney-General Lord Goldsmith's answer to a question from the House of Lords, which answer provides the legal bases for invading Iraq in 2003, though it does not even mention Resolution 686).

2. Please note that this does not necessarily mean that that use of force against Iraq in 2003 is considered to have been the militarily optimal choice or a morally correct one.

Gulf War and the 2003 invasion of Iraq.[3] Part III contains the fundamental analysis of this Article, which begins and ends with Resolution 686. Because the interpretation of Security Council resolutions is at the heart of this Article, this Part explains why a textual approach is optimal. Part IV explains why resolutions subsequent to Resolution 686 did not affect the validity of the authorization that was to continue until Iraq met certain requirements contained in Resolution 686. Throughout all portions, the theoretical framework is legal positivism, in that rights and obligations are determined by the rules to which states have consented to be bound.[4] The opinions expressed here are revisionist in a way, because they criticize earlier commentators for having overlooked or mischaracterized Resolution 686, among other things.[5] However, it is more a revision of the Author's previously held notions of the legality of the invasion than anything else, even though the Author's views on the morality and optimality of that invasion remain unchanged.

II. THE RELEVANT FACTS OF THE 1991 GULF WAR AND THE 2003 INVASION

To begin, a thumbnail sketch of the relevant facts might be useful.[6] Iraq invaded Kuwait on August 2, 1990, which led to a string of Security Council resolutions that climaxed with Resolution 678 and its authorization of member states "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" if Iraq did not

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3. This Article refrains from referring to these conflicts as the First and Second Gulf Wars in order to avoid confusion, because the Iran-Iraq War often is considered the First Gulf War, with the Second Gulf War being the 1991 Gulf War. *See, e.g.*, Tono Eitel, *The Escape and Parole of the Imprisoned God of War: An Overview of the Second Gulf War from the Perspective of International Law*, 35 GERMAN Y.B. INT'L L. 170 (1992); Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUR. J. INT'L L. 114, 117 (1991). Moreover, as this Article asserts in Part III.B, the 2003 invasion of Iraq essentially was a continuation of the 1991 Gulf War. *See also Self-Defense in an Age of Terrorism*, 97 ASIL PROC. 141, 148-49 (2003) (remarks by Yoram Dinstein).

4. *See, e.g.*, JAMES L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 34-39 (1st ed. 1928); GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 33 (1996) (defining positivism simply as "all law is enacted law").

5. Perhaps this might be best categorized as post-revisionist, if one considers recent commentators' efforts to revise the contents and circumstances surrounding the adoption of key resolutions from the 1990s that are discussed here. *See, e.g.*, *infra* text accompanying notes 175-176. Ultimately, however, the exact classification is irrelevant.

6. Please note that this Article assumes some familiarity with the events and Security Council resolutions associated with the 1991 and 2003 operations against Iraq in order for it to maintain its focus on argumentation. The reader is invited to consult the publications cited herein for a greater description of these events and resolutions. *See, e.g.*, sources cited *infra* note 15.

leave Kuwait by January 15, 1991.[7] Language such as "all necessary means" within a Chapter VII decision of the Security Council, as is the case with Resolution 678, is commonly interpreted as an authorization to use force.[8] Importantly, Resolution 678's authorization to use force contained no sunset clause, nor did it provide the United Nations with a mechanism to control or even supervise that use of force once Iraq had failed to comply by the deadline.[9]

To make a long story short, Iraq did not comply with Resolution 678, and U.S.-led coalition forces began Operation Desert Storm on January 17, 1991.[10] This operation is considered to have been one of the most successful in modern military history, with the liberation of Kuwait on February 27, the push to Baghdad, and the capture of some 86,000 Iraqi prisoners of war (POWs)—all in approximately 42 days, only the last 100 hours of which consisted of actual ground combat.[11] This overwhelming success (for the coalition, that is) set off a cascade of events, including:

- a unilateral suspension of the fighting by President George H.W. Bush on February 28;[12]
- the adoption of Resolution 686 on March 2, setting out the requirements on Iraq for the termination of the authorization to use force under Resolution 678;[13]
- a cease-fire on the ground that was agreed to by the commander of coalition forces General Norman Schwarzkopf and the Deputy Chief of Staff for the Iraqi Ministry of Defense Lieutenant General Sultan Hashim Ahmad al-Jabburi on March 3;[14]
- and a formal cease-fire with Resolution 687 on April 3.[15]

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7. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990). Resolution 660 essentially condemned Iraq's invasion of Kuwait and demanded that "Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990." S.C. Res. 660, ¶ 2, U.N. Doc. S/RES/660 (Aug. 2, 1990).

8. *See* James D. Fry, *The UN Security Council and the Law of Armed Conflict: Amity or Enmity?*, 38 GEO. WASH. INT'L L. REV. 327, 336-39 (2006).

9. *See* Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MODERN L. REV. 153, 166 (1992).

10. *See* David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 890 (1996).

11. *See id.*

12. *See id.*

13. S.C. Res. 686, ¶¶ 2-3, U.N. Doc. S/RES/686 (Mar. 2, 1991).

14. *See* Morriss, *supra* note 10, at 891.

15. *See generally id.* at 888-97 (providing an outstanding overview of the facts and issues surrounding the 1991 Gulf War); Greenwood, *supra* note 9 (same); JOHN F. MURPHY, THE UNITED

Despite the obligation on Iraq to comply with certain requirements, Iraq remained defiant and even aggressive, which led to the establishment of a coalition-enforced no-fly zone in the north of Iraq just days after the adoption of Resolution 687.[16] Iraq's defiance and coalition enforcement action continued, to varying degrees, up until 2002, when the United States and the United Kingdom pushed Iraq's noncompliance onto center stage of the Security Council's agenda.[17] Between 1991 and 2002, the President of the Security Council made several statements pointing out that Iraqi defiance constituted a material breach of Resolution 687 and warned of "serious consequences" if Iraq did not begin to comply.[18] More importantly, the Security Council itself, on several occasions, came to such a conclusion and threatened Iraq with "serious consequences" or their equivalent if it did not comply with its obligations.[19]

The Security Council unanimously adopted Resolution 1441 on November 8, 2002, which:

- recalled "all its previous relevant resolutions" from the 1990s involving Iraq in the first preambular paragraph;
- decided that Iraq "has been and remains in material breach of its obligations under relevant resolutions" in the first operative paragraph;
- decided to give Iraq a "final opportunity to comply with its disarmament obligations under relevant resolutions of the Council" in paragraph 2;
- decided to "convene immediately upon receipt of a report . . . to consider the situation and the need for full compliance

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STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 147-77 (2004) (providing the same for both the 1991 Gulf War and the 2003 invasion of Iraq).

16. Nico Krisch, *Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council*, *in* 3 MAX PLANCK Y.B.U.N.L. 59, 71-75 (Jochen Frowein & Rüdiger Wolfrum eds., 1999).

17. *See id.*

18. *See, e.g.*, The President of the Security Council, *Note by the President of the Security Council*, at 2, U.N. Doc. S/25081 (Jan. 8, 1993).

19. *See, e.g.*, S.C. Res. 1205, pmbl. ¶¶ 4-5, ¶¶ 1-5, U.N. Doc. S/RES/1205 (Nov. 5, 1998) (making similar findings and threats as Resolution 1154); S.C. Res. 1154, ¶¶ 3-4, U.N. Doc. S/RES/1154 (Mar. 2, 1998); S.C. Res. 1137, pmbl. ¶¶ 8, 10, ¶ 3, U.N. Doc. S/RES/1137 (Nov. 12, 1997) (requiring Iraq, inter alia, to "cooperate fully and immediately and without conditions or restrictions"); S.C. Res. 1115, ¶ 1, U.N. Doc. S/RES/1115 (June 21, 1997) (finding "clear and flagrant" violations). *See* PAUL SCHOTT STEVENS ET AL., FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD., THE JUST DEMANDS OF PEACE AND SECURITY: INTERNATIONAL LAW AND THE CASE AGAINST IRAQ 8-12 (n.d.), *available at* http://www.fed-soc.org/doclib/20070325_iraqfinalweb.pdf; Krisch, *supra* note 16, at 64-65.

with all of the relevant Council resolutions in order to secure international peace and security" in paragraph 12; and

- recalled that the Security Council "repeatedly warned Iraq that it [would] face serious consequences as a result of its continued violations of its obligations" in paragraph 13.[20]

After receiving several key reports, the Security Council met again to consider the situation, including the February 5 meeting where United States Secretary of State Colin Powell presented the U.S. case for why military intervention in Iraq was needed.[21] No second resolution was passed in 2002 or 2003 that specifically authorized an invasion of Iraq. Nonetheless, approximately 173,000 U.S., U.K., Australian, Czech, Polish, and Slovak troops invaded Iraq on March 20, 2003 in what was called Operation Iraqi Freedom.[22] This Article questions the legality of that invasion. This Part has provided most of the relevant facts needed for this analysis. Other, more detailed facts are provided throughout the analysis below. With these facts in mind, the Article proceeds to the language of Resolution 686 and how to interpret it.

III. RESOLUTION 686 AND ITS "REMAIN VALID" LANGUAGE

In analyzing whether a certain use of force is legal, one must start by looking at the parameters established by the U.N. Charter. U.N. Charter article 2(4) requires that all members "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."[23] Traditionally the only exceptions, at least according to the majority of commentators, seem to be collective security measures taken at the direction of the Security Council and self-defense under U.N. Charter

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20. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

21. *See* Colin Powell, U.S. Sec'y of State, Address to the U.N. Security Council (Feb. 5, 2003) (transcript available at http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html); MURPHY, *supra* note 15, at 170.

22. *See The War in Numbers*, WASH. POST, Apr. 20, 2003, at A20.

23. U.N. Charter art. 2, para. 4. This Article intentionally ignores the argument that the U.N. Charter was designed to keep armed conflict involving one of these permanent members outside of U.N. control, especially because of the veto provided to permanent members of the Security Council in article 27(3). *See* BARDO FASSBENDER, *The UN Security Council and International Terrorism*, *in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 83, 90 (Andrea Bianchi ed., 2004). Such an argument empties U.N. Charter article 2(4) of its meaning when it comes to bellicose acts of permanent members, including the 2003 invasion of Iraq. Such an interpretation of the U.N. Charter would render moot any discussion of the invasion's legality, something that this Article would like to avoid, if only for the sake of argument.

article 51, both of which fall under U.N. Charter Chapter VII.[24] Therefore, under the traditional approach to analyzing the legality of the use of force, whether the invasion of Iraq was legal depends on the answer to these two issues: (1) whether the Security Council authorized the action; and (2) whether the invasion can be considered as falling under self-defense. The George W. Bush Administration provided many political reasons for invading Iraq,[25] though it had only two legal bases for invading, both of which parallel the two issues listed above.[26] Here, however, one need not proceed past the first issue in order to answer this Article's question of whether the 2003 invasion was legal: this answer is provided by the clear language of Resolution 686.

A. Interpretation of Security Council Resolutions

Before delving into the specific language of Resolution 686, it is important to say a few words about interpreting Security Council resolutions in general. Surprisingly, only a limited amount of literature—much of which this Article criticizes—addresses how to interpret Security Council resolutions. Equally surprising is the fact that most of this literature overlooks the notion that the terms that the Security Council uses in a Chapter VII resolution are of utmost importance in determining the Security Council's intent with regard to a particular resolution and the consequent rights and obligations bestowed upon states. This Part looks at several methods of interpretation, with particular emphasis being placed upon the textual approach.[27]

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24. *See, e.g.*, IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 251-80 (1963); David Kaye, *Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law*, 44 COLUM. J. TRANSNAT'L L. 134, 143-44 (2006) (citing, inter alia, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100 (June 27)); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond*, 35 CORNELL INT'L L.J. 533, 536-37 (2002).

25. *See* Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 173 (2004) (pointing out that the U.S. government based its decision to invade Iraq, at different times, on national security concerns, on fighting terrorism, on protecting Iraq's neighbors, on protecting Iraqis, on upholding Security Council resolutions ordering Iraq to give up its weapons of mass destruction (WMDs), and on the need to protect U.S. and global energy resources).

26. *See, e.g.*, William H. Taft, IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557-63 (2003). Please note that Taft and Buchwald did not include the standard disclaimer that their article did not represent the views of the United States Department of State or the George W. Bush Administration, so it is assumed that their views can be imputed.

27. Please note, however, that the purpose of this Part is not to provide a definitive rule on how disputes over interpretation are settled generally, but rather to provide a normative framework for interpreting Security Council resolutions in general and Resolution 686 in particular.

1. The Textual Approach to Interpretation

As with the textual approach to treaty interpretation, the first question that ought to be asked when interpreting a Security Council resolution is: What does the resolution actually say?[28] Evidence of Security Council intent that is outside of the four corners of the relevant resolution should be relied on only when the resolution's key language is prima facie ambiguous or leads to an absurd result.[29] Admittedly, whether such language is ambiguous on its face itself requires a modicum of interpretation.[30] Moreover, the language in question ought to be interpreted in the context of the other words making up the sentence.[31] However, the point here is that such preliminary steps in the interpretation process must be limited to the four corners of the document (considered here to be that language's context, which is different from the type of context discussed in Part III.A.2, which goes more to evidence of subjective intent), thus requiring all parties to refrain from delving into extra-resolution evidence of intent before a bona fide ambiguity has been established. The following paragraphs further explain why this Article favors this approach to interpretation.

a. Textualism and International Tribunals

In addition to the overwhelming logic of a textual approach to interpreting any legal instrument, various international tribunals appear to have adopted such an approach to interpreting U.N. resolutions at one time or another.[32] For example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case looked to the object and purpose behind the Security Council's enactment of the statute establishing the ICTY only after it had determined that the terms of the statute's jurisdictional provisions were

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28. *See* Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318, 319 (1969).

29. *See id.*

30. *See id.* at 340-41.

31. *See* CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 69 (2005) (explaining how the sentence is the fundamental unit of language, not the word, and so words ought to be interpreted in this broader, though still textualist, manner).

32. In addition, other commentators appear to have relied on this approach in interpreting Security Council resolutions. For example, Lobel and Ratner correctly point out that "express authorizations that contain ambiguous language should be confined to objectives that were clearly intended by the Security Council," thus implying that unambiguous language governs. Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 137-38 (1999).

unclear.[33] The Security Council adopted this statute along with Resolution 827, which made reference to the statute that was attached to a Secretary-General report,[34] so this case can be considered as involving (even though indirectly) interpretation of a Security Council resolution. The International Court of Justice (ICJ) often seems reluctant to interpret Security Council resolutions, perhaps out of a desire to avoid even the appearance of having some type of judicial review powers over the Security Council. Regardless, when the ICJ interprets or applies Security Council resolutions, it typically does so in such a way as to place primary emphasis on the resolution's text. Perhaps the best example of this is the order of April 14, 1992, on provisional measures in the *Lockerbie* case, where, after quoting large portions of Security Council Resolutions 731 and 748, the ICJ held that the disputants were obliged to abide by the resolutions under U.N. Charter article 25 (regardless of what potentially conflicting treaty obligations required), with the court simply taking the resolutions at face value.[35] Though in the context of interpreting a General Assembly resolution, ICJ Judge de Castro succinctly wrote in his separate opinion in the *Namibia* (S.W. Africa) advisory opinion, "[t]he terms of the resolution . . . clearly show the nature and the purpose of the resolution."[36] Likewise, the ICJ asserted in the *Certain Expenses of the United Nations* advisory opinion that not even the actual proceedings leading up to the adoption of a resolution (where a key amendment was rejected) are essential in interpreting a particular resolution.[37] This approach to interpreting General Assembly resolutions might further support this Article's approach to interpreting Security Council resolutions if one is willing to accept such an analogy.

Further analogies to treaty interpretation by international judicial bodies might also be useful in this context. The ICJ often places emphasis on the ordinary meaning of the text over evidence outside of the text, even though it rarely is required to apply the Vienna Convention on the Law of Treaties (VCLT) in disputes because rarely are both of the

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33. *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 71 (Oct. 2, 1995).

34. S.C. Res. 827, ¶¶ 1-2, U.N. Doc. S/RES/827 (May 25, 1993) (citing, inter alia, The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Regulation 808 (1993), U.N. Doc. S/25704/Add.1 (May 19, 1993)).

35. Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 3, 13-17 (Order of Apr. 14).

36. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 3, 189 (Jan. 26) (separate opinion of Judge de Castro).

37. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 156-57 (July 20); *see also* MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW 180 (1984) (raising this same point).

parties to a dispute also parties to the VCLT and the treaty in question was agreed after the VCLT entered into force, as required by VCLT article 4.[38] The ICJ tends to use a sequential method of interpretation that starts by looking at the treaty's text to see whether it provides a definition of the key language or if dictionaries can be used to define the target language, then moves on to the object and purpose of the treaty and its *travaux préparatoires*, before providing its own interpretation of the key language when all else is ambiguous. This is the exact method of interpretation that the court used in the *Avena* case for interpreting "without delay" in article 36 of the Vienna Convention on Consular Relations,[39] as well as in the *Sovereignty over Pulau Ligitan & Pulau Sipadan* case,[40] among many others.[41] Moreover, the ICJ in the eight *Legality of Use of Force* cases of 2004 repeatedly declared that "[i]nterpretation must be based above all upon the text of the treaty."[42]

This primary focus on the text of the legal instrument being interpreted is not a new phenomenon within the ICJ, but can be traced back to its earlier days. For example, in the *Admission to the United Nations* advisory opinion, the ICJ declared:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, *and then only*, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. . . .
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38. Vienna Convention on the Law of Treaties, art. 4, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]; *see, e.g.*, NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 157-58 (1989).

39. Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 48-49 (Mar. 31).

40. Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625, 646-65 (Dec. 17).

41. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Feb. 3, 2006, ¶ 107, 45 I.L.M. 562, 587 (requiring the ICJ to interpret "interpretation of" the United Nations Educational, Scientific and Cultural Organization Constitution (itself a treaty), although taking the language solely at face value); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 174-75, 178-80 (July 9).

42. *E.g.*, Legality of Use of Force (Serb. & Mont. v. Belg.), ¶ 100, Dec. 15, 2004, 44 I.L.M. 299, 329 (finding that the text itself was ambiguous and basing its interpretation on the object and purpose of the statute as derived from the text; appearing in paragraphs 98-102 of the other companion cases).

> When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.[43]

The ICJ went on to give the words in question their ordinary meaning and refused to look into the *travaux préparatoires*.[44] This same approach was used in the *Inter-Governmental Maritime Consultative Organization* advisory opinion, where it determined the following:

> The words of [the text] must be read in their natural and ordinary meaning, in the sense which they would normally have in their context. It is *only if*, when this is done, the words of the [text] are ambiguous in any way that resort need be had to other methods of construction.[45]

The ICJ again went on to take the words at face value without looking into the *travaux préparatoires* or other extrinsic evidence to determine intent.[46]

This textualist approach can be traced back further to the Permanent Court of International Justice (PCIJ). The *Lotus* case is just one of many examples, where the PCIJ acknowledged the following: "The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."[47] The PCIJ again reasoned that "it is impossible . . . to construe the [key language] otherwise than as meaning" what it says.[48] In short, the PCIJ ended its interpretation of the language in question ("principles of international law") by giving it the meaning as ordinarily used, without placing significance on extrinsic evidence to come to this conclusion.[49]

These are just a few examples of the ways international courts have placed primary emphasis on the text of the instrument being interpreted over extrinsic evidence of the parties' intentions. As any interpretation of

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43. Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) (emphasis added); *see also* Jacobs, *supra* note 28, at 322-23 (quoting part of this same language).

44. *See Admission of a State to the United Nations*, 1950 I.C.J. at 8.

45. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150, 159-60 (June 8) (emphasis added); *see also* Georg Ress, *The Interpretation of the Charter*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 25-26 (Bruno Simma ed., 2d ed. 2002) (quoting other cases where the ICJ has adopted such an interpretation method); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 121-26 (2d ed. 1984) (discussing various treaty interpretation cases that appear to adopt the "ordinary meaning" interpretation method).

46. *See Inter-Governmental Maritime Consultative Organization* Advisory Opinion, 1960 I.C.J. at 160.

47. S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10, at 16 (Sept. 7).

48. *Id.* at 17.

49. *See id.* at 16-17.

a Security Council resolution ought to give effect to the council's intentions,[50] there is no reason to refrain from applying this approach to treaty interpretation to the interpretation of Security Council resolutions. Although some caution is required when analogizing treaties to Security Council resolutions in general,[51] such an analogy is warranted here for the basic principle that the actual text ought to be the initial and central focus of any exercise in interpretation, especially where no ambiguity exists on the resolution's face. When genuine ambiguity exists, the statements of Security Council members, the United Nations Secretary-General and the opinions of eminent jurists, inter alia, might be useful in making such a determination, though in a position of secondary importance to the written word.[52] This is so despite any one state's desire to place less emphasis on the text of the instrument at the interpretation stage.[53] This approach to interpretation makes intuitive sense, as the language of the instrument being interpreted is the most concrete manifestation of the crucial intent that the interpreter is charged with determining.

b. Textualism and the Vienna Convention

This method of interpretation appears to be supported by the VCLT, assuming the rules for interpreting treaties apply to interpreting decisions of international organizations' organs. This might not be a valid assumption, because such decisions lack parties, among other features commonly associated with treaties.[54] Some commentators assert that resolutions such as those of the Security Council fall under treaty law because they are adopted under powers provided by an international

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50. *See* Michael C. Wood, *The Interpretation of Security Council Resolutions*, *in* 2 MAX PLANCK Y.B.U.N.L., *supra* note 16, at 73, 95 (1998).

51. *See, e.g.*, David D. Caron, *The United Nations Compensation Commission for Claims Arising Out of the 1991 Gulf War: The "Arising Prior to" Decision*, 14 J. TRANSNAT'L L. & POL'Y 309, 328 & n.104 (2005).

52. *See generally* Shabtai Rosenne, *The Perplexities of Modern International Law: General Course on Public International Law*, 291 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 354-81 (2001) (discussing the key importance of the written word in determining the obligations of states).

53. *See* Michael Byers, *Agreeing To Disagree: Security Council Resolution 1441 and International Ambiguity*, 10 GLOBAL GOVERNANCE 165, 176 (2004) (mentioning how the United States prefers "a more contingently purposive and less textually oriented approach" to interpretation, even though the VCLT calls for a textually oriented approach when there is no ambiguity in the document being interpreted).

54. *See* BOS, *supra* note 37, at 177; Byers, *supra* note 53, at 176 ("Security Council resolutions . . . resemble executive orders more than contracts, and the interpretive rules that apply to them might therefore be somewhat different."); Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989*, 67 BRITISH Y.B. INT'L L. 27, 29 (1996).

treaty,[55] though this would seem to be a highly controversial assertion.[56] Regardless of their exact nature, looking to the intent of the parties to a treaty simply can be replaced with the intent of the organ making the decision, with the subjective intent of the individual member states of that organ having little, if any, significance. This appears to have been the approach taken by the PCIJ in the *Access to German Minority Schools in Upper Silesia* advisory opinion, where it looked at the text of a Council of the League of Nations resolution in determining the council's intent.[57] Likewise, the ICJ, in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* advisory opinion, seemed to have used this approach in the context of the adoption of a reservation, where it saw the need to determine the intent of the General Assembly as a whole, and not the intent of the individual members per se.[58] Therefore, the VCLT rules might be useful in interpreting Security Council resolutions, even if not directly on point. VCLT article 32, entitled "Supplementary means of interpretation," provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm that meaning resulting from the application of [the general rule of interpretation], or to determine the meaning when the interpretation according to [that rule]:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.[59]

Part III.A posits that nonresolution statements of individual Security Council members, inter alia, are supplementary means of interpretation that are unnecessary when it comes to interpreting facially unambiguous resolutions. Instead, the actual text of the resolution must be given its due regard.

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55. *See, e.g.*, RENATA SONNENFELD, RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL 7 (Tomasz Dobrowolski trans., 1988) (citing Polish legal scholars such as Bierzanek and Nahlik who make this assertion).

56. *See, e.g.*, Jochen Abr. Frowein, *Unilateral Interpretation of Security Council Resolutions—A Threat to Collective Security?*, *in* LIBER AMICORUM GÜNTHER JAENICKE—ZUM 85. GEBURTSTAG 97, 99 (Volkmar Götz et al. eds., 1998) ("It should not be automatically assumed that Security Council resolutions be interpreted in all respect [sic] in the same way as treaties.").

57. Access to German Minority Schools in Upper Silesia, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 40, at 16-18 (May 15).

58. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23-24 (May 28); BOS, *supra* note 37, at 177-79 (citing this and other cases).

59. VCLT, *supra* note 38, art. 32.

2. The Other Methods of Interpretation Under the Vienna Convention

Assuming, arguendo, that the VCLT is applicable to the interpretation of Security Council resolutions, critics likely will point to VCLT article 31(1) to argue that the text is not the only factor in determining the intent of the Security Council in adopting a resolution. Article 31(1) provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[60] Some commentators elevate this paragraph to the status of a formal rule of interpretation,[61] while others consider this paragraph as providing clear guidelines for interpretation.[62] Regardless of whether one calls this a rule or a guideline, it is anything but clear. Indeed, VCLT article 31(1) appears to have been drafted so as to simultaneously represent four somewhat distinct schools of treaty interpretation. Even Sinclair acknowledges that article 31(1) reflects several distinct schools at the same time, though he seems to contradict himself by asserting "broadly speaking" that its language gives preference to the textual approach.[63] This Article asserts that one can find aspects of four distinct schools within article 31(1), which have the following basic characteristics:

- "Good faith," which is a community interest-based interpretation that allows for an element of coercion to come into play (in its broadest sense, the antithesis of the textual approach);
- "Ordinary meaning," which represents the consent-based, textualist interpretation, because it looks at the language actually used in the text;
- "In their context," which, according to the rest of article 31, looks at the extrinsic circumstances surrounding the text (perhaps including the *travaux préparatoires*) in a way that reinforces the subjective intentions of the parties; and
- "In light of its object and purpose," which represents a teleological approach to interpretation by looking at the

60. *Id.* art. 31(1).

61. *See, e.g.*, Frowein, *supra* note 56, at 99.

62. *See, e.g.*, Dale E. McNiel, *The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imagining a Tariffying Bargain*, 22 YALE J. INT'L L. 345, 374 (1997).

63. *See* I.M. Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47, 61, 64-65 (1970). Perhaps a VCLT article on interpreting the articles that deal with interpretation might have been useful, although that is doubtful. These provisions on interpretation likely were intended to be ambiguous.

> instrument being interpreted as a whole—a type of textual approach that is adopted here, though broader in its scope.[64]

The multifaceted, perhaps even schizophrenic, nature of article 31(1) explains why tribunals and parties of all stripes point to, and can point to, VCLT article 31(1) to support the interpretive method that best suits their needs. As Wood inadvertently demonstrates, one fundamental rule of interpretation does not flow naturally from this smorgasbord of interpretive methods.[65] It is difficult to imagine that the International Law Commission intended for all of these interpretive schools to be used simultaneously when it drafted VCLT article 31(1), given that a textual approach and an approach that looks more at the subjective intent of the parties appear diametrically opposed to one another.[66] On the contrary, experts such as Sinclair seem to acknowledge that article 31(1) intentionally has something there for each school.[67] In short, article 31(1) provides no absolute guidance on interpretation, but instead leaves the door open for states to push for, and decision makers to adopt, whichever method of interpretation leads to the desired result.[68]

The flexibility in interpretation currently reflected in article 31(1), however, does not negate the overwhelming logic of looking first to the

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64. *See* Jacobs, *supra* note 28 (discussing these categories, though not in the exact same terms used here).

65. *See* Wood, *supra* note 50, at 88-93 (characterizing these interpretive methods as "elements" of a "single process" of interpretation, though he fails to explain how they relate to one another or how they all can be used to reach a coherent conclusion).

66. *See* Jacobs, *supra* note 28, at 319. The difference between these extremes appears to be based on differing opinions on whether preparatory work ought to play a role in interpretation. *See* Sinclair, *supra* note 63, at 61. As explained in Part III.A.3, its role ought to be secondary to the actual text. Indeed, article 32 on "Supplementary means of interpretation" made this secondary role for preparatory work perfectly clear, thus appearing to sweep the legs of support out from under those advocating a contextual approach to interpreting facially unambiguous instruments like Resolution 686. Please note that this ignores the "good faith" community interest-based approach to interpretation on account of it rarely being discussed by the commentators, and so its actual meaning within the VCLT is entirely unclear. If it is, in fact, an entirely separate school of interpretation based partially on coercion, then this will go beyond the contextual approach on the liberal end of the interpretive spectrum.

67. *See, e.g.*, Sinclair, *supra* note 63, at 61.

68. That said, where tribunals have relied on multiple schools of interpretation in their analyses, it appears that they often start with the textual approach and then use the other schools to help support their initial interpretation of the text, thus suggesting that a hierarchy and its accompanying interpretive framework might develop, or has developed, through practice. *See, e.g.*, *supra* Part III.A.1; *see also* SGS Société Générale de Surveillance SA v. Republic of the Philippines, 8 ICSID 515, 554-55 (W. Bank) (Jan. 29, 2004) (relying first on the ordinary meaning of "disputes with respect to investments," then using as support the teleological approach by looking at the purpose of the treaty and the meaning of other provisions in that same treaty vis-à-vis the language being interpreted, as well as a contextual approach by looking at how "investments are characteristically entered into"). This Article welcomes such a development.

text of Security Council resolutions to determine the Security Council's intent in adopting the resolution, and then outside the text of the resolution when the text is ambiguous. This approach is prevalent in treaty interpretation and should be used with Security Council resolutions, despite whatever derogatory title McDougal and his coauthors use to describe commentators who disagree with their methods of interpretation.[69] As Reuter points out, "The primacy of the text, especially in international law, is the cardinal rule for *any* interpretation,"[70] which would include the interpretation of Security Council resolutions. Contrary to the assertion of Frowein,[71] this method of interpretation is no less valid for Security Council resolutions than for treaties, as the explicit intent of the organ is just as important as is the explicit intent of the parties to a treaty. Indeed, there is no better way to determine that explicit intent than by looking at the written words of the Security Council. After all, as Vattel asserted several centuries ago, "The first general maxim of interpretation is, that [*i*]*t is not allowable to interpret what has no need of interpretation*."[72] These relatively ancient ideas have not lost their persuasiveness over time. This is not to say that a relatively unambiguous text cannot be checked against its context and in light of its object and purpose, however these are defined. Rather, the contrary appears accurate.[73] That said, such a text's context or its object and purpose should not be given a predominant position over the key language being interpreted, especially when these are contrary to the intent exhibited in that text.

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69. *See* MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE 78 (1994) ("The continuing occasional expressions of a contrary view appear to reflect only either the exaggerations of special advocacy or intermittent naïve exceptions to the main trends in decision and commentary.").

70. PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 96 (José Mico & Peter Haggenmacher trans., 2d ed. 1995) (emphasis added).

> The ordinary meaning of the terms may only be departed from if the parties' intention to do so can be established.
>
> . . . Recourse to supplementary means of interpretation (article 32) . . . is only admissible at a later stage, either to confirm the results of the interpretation or to avoid reaching ambiguous or manifestly absurd or unreasonable results on the sole basis of the primary elements.

Id. at 97.

71. *See* Frowein, *supra* note 56, at 112.

72. [EMERICH] DE VATTEL, THE LAW OF NATIONS OR, PRINCIPLES OF THE LAW OF NATURE, bk. 2, at 343 (Joseph Chitty ed., 1883) (1758).

73. *See* SINCLAIR, *supra* note 45, at 116.

3. Textualism and Giving Effect to Security Council Decisions

As Part III.B asserts, the authorization provided by Resolution 686 lacks the necessary ambiguity within its four corners to warrant reliance on extrinsic statements of Security Council intent. The abundance of such statements in the context of the use of force against Iraq surrounding the 1991 Gulf War and the 2003 invasion of Iraq does not change the validity of this argument. Indeed, as Wood points out, only the Security Council or its designated agent can provide an authoritative interpretation of its resolutions.[74] While the statements of individual states can be useful in shedding light on the possible motives of certain actors involved in the process, none are definitive in providing the Security Council's exact intent that then can be used to override the clear language of Resolution 686. Moreover, such statements must be viewed with a degree of suspicion, as they enable states to play one game with the public while maintaining another with their counterparts in closed sessions of the Security Council.[75] Therefore, this Article places particular emphasis on the language of the relevant resolutions above the conjecture of specialists and individual Security Council member states when such language is prima facie unambiguous.

The strict language of U.N. Charter article 25 can be seen as supporting such a restrictive approach to the interpretation of Security Council decisions, because it declares that states are bound to "accept and carry out the *decisions* of the Security Council."[76] Please notice that article 25 does not say that states are bound to carry out the subjective intentions of the Security Council as perceived by individual states or jurists. Logically, if the decisions of the Security Council trump conflicting (but otherwise binding) obligations of international agreements under U.N. Charter article 103,[77] then those decisions certainly would trump the conflicting ruminations of individual states or

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74. *See* Wood, *supra* note 50, at 82-83 (positing that only the person or body who can modify a legal rule can authoritatively interpret it).

75. Alternatively, the validity of such statements might be heavily discounted because, inter alia, they lack a rigorous certification process or contain the flawed reasoning of the individual state, just as with recourse to preparatory work in determining parties' intentions. *See* Jacobs, *supra* note 28, at 339; REUTER, *supra* note 70, at 97-98; *see also* Sinclair, *supra* note 63, at 63-65 (providing some persuasive reasons why preparatory work ought not to be relied upon when interpreting text).

76. U.N. Charter art. 25 (emphasis added); *id.* art. 48(1) ("The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine."); *see also* SONNENFELD, *supra* note 55, at 120-44 (discussing the legal effects of Security Council resolutions under U.N. Charter article 25).

77. *See* Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 3, 14 (Order of Apr. 14).

jurists on the intent of the Security Council in passing a resolution when its provisions are sufficiently clear. After all, as the PCIJ declared in the *Jaworzina* advisory opinion, "[T]he right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it."[78] It is the Security Council as a whole (or the will of the majority that determines the collective will) that has such power, and not the individual members of that whole.[79] If predictability is to have any role in the formation of international law through Security Council decisions, then effect must be given to the actual words of the Security Council first and foremost. If the language of Resolution 686 is unambiguous and the result is not manifestly unreasonable, as posited in Parts III.B and D below, then nonresolution statements about the meaning of that language simply cannot be used to undo what the Security Council explicitly did. To do otherwise would make a mockery of both the notion that Security Council Chapter VII *decisions* are binding under U.N. Charter article 25 and the particular wording chosen by the Security Council. Therefore, there is no reason to give the minutiae of language in resolutions any less effect than that given to minutiae in interpreting treaties.[80]

With these points in mind, Part III.B analyzes the text of Resolution 686 with the purpose of explaining how it can be considered to have authorized the 2003 invasion of Iraq.

B. The Language of Resolution 686

The language of Resolution 686 appears dispositive of the issue of whether the invasion of Iraq was authorized. According to paragraph 4 of Resolution 686, "during the period required for Iraq to comply with paragraphs 2 and 3 above, the provisions of paragraph 2 of resolution 678 (1990) remain valid."[81] The last two words of this paragraph jump out at the Author, and hopefully do for the reader as well: *remain valid*. For easy reference, paragraph 2 of Resolution 678 authorizes certain

78. Question of Jaworzina (Polish-Czechoslovakian Frontier) Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 8, at 37 (Dec. 6).

79. In fact, the Security Council officially can act against the will of over a third of its members, under the voting procedures of U.N. Charter article 27, as long as none of them are permanent members of the Security Council. In such a situation, the statements of the dissenting Security Council members certainly cannot provide the intent of the whole. Likewise, the statements of any subset of the Security Council cannot be authoritative as to the collective body's intent with a resolution, as the member states to the Security Council are not even parties to any particular resolution. *See* SONNENFELD, *supra* note 55, at 2.

80. *But see* Wood, *supra* note 50, at 95 (asserting that "less importance should attach to the minutiae of language" when it comes to interpreting resolutions vis-à-vis treaties).

81. S.C. Res. 686, *supra* note 13, ¶ 4.

states 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."[82] According to that paragraph, the states authorized to use force were those states that were "Member States co-operating with the Government of Kuwait"[83] or the members of the coalition during the 1991 Gulf War—namely Argentina, Australia, Bahrain, Bangladesh, Belgium, Canada, China, Czechoslovakia, Denmark, Egypt, France, Germany, Greece, Hungary, Italy, Kuwait, Morocco, the Netherlands, New Zealand, Niger, Norway, Oman, Pakistan, Poland, Qatar, Saudi Arabia, Senegal, South Korea, Spain, Syria, the United Arab Emirates, the United Kingdom, and the United States.[84] It is important to note that the states involved in the initial 2003 invasion of Iraq were the United States, the United Kingdom, Australia, the Czech Republic, Poland, and Slovakia, all of which fit this category of "Member States co-operating with the Government of Kuwait," assuming it is appropriate to lump the Czech Republic and Slovakia under Czechoslovakia.

As for termination of this authorization, paragraphs 2 and 3 of Resolution 686 provide eight requirements for Iraq to fulfill before the authorization would be terminated. The resolution:

> 2. *Demands* that Iraq implement its acceptance of all twelve resolutions noted above and in particular that Iraq:
> (a) Rescind immediately its actions purporting to annex Kuwait;
> (b) Accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq;
> (c) Immediately release under the auspices of the International Committee of the Red Cross, Red Cross Societies or Red Crescent Societies all Kuwaiti and third-State nationals detained by Iraq and return the remains of any deceased Kuwaiti and third-State nationals so detained;
> (d) Immediately begin to return all Kuwaiti property seized by Iraq, the return to be completed in the shortest possible period;
> 3. *Also demands* that Iraq:
> (a) Cease hostile or provocative actions by its forces against all Member States, including missile attacks and flights of combat aircraft;

82. S.C. Res. 678, *supra* note 7, ¶ 2.

83. *Id.*

84. *See* JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 399 (1992) (providing this list of coalition members in an annex).

> (b) Designate military commanders to meet with counterparts from the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to arrange for the military aspects of a cessation of hostilities at the earliest possible time;
> (c) Arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990);
> (d) Provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in the adjacent waters.[85]

Paragraph 7 of Resolution 686 requires Iraq to "notify the Secretary-General and the Security Council when it has taken the actions set out above."[86] In sum, Resolution 686 expressly continued the validity of the authorization to use force from Resolution 678 until Iraq fulfilled the eight requirements contained in paragraphs 2 and 3 of Resolution 686 and notified the Secretary-General and Security Council of this fact.

This authorization to use military force is surprisingly clear, especially compared to the approaches other commentators have relied on in their analyses. The authorization provided in Resolution 686 cannot easily be dismissed, as some commentators try to do. For example, Murphy suggests that it is a "faulty interpretation" of Resolutions 678, 686, and 687 if they are read to allow Resolution 678 to remain viable through the 1998 attacks against Iraq, without explaining exactly why this is the case,[87] though he does make the arguably incorrect point that Resolution 686 necessarily was a *temporary* cease-fire.[88] Moreover, contrary to the assertion of Lobel and Ratner, it is not at all clear from the history and text of the relevant cease-fire resolutions that "the Resolution 678 authorization to use force expired with the conclusion of the permanent cease-fire,"[89] as is explained in Part III.B below. Nor should commentators such as Byers disregard the plain meaning of Resolution 686 and conclude that it somehow terminated the

85. S.C. Res. 686, *supra* note 13, ¶¶ 2-3.
86. *Id.* ¶ 7.
87. Murphy, *supra* note 25, at 215.
88. *See id.* at 200.
89. Lobel & Ratner, *supra* note 32, at 148.

authorization to use force provided by Resolution 678, either on its own or in conjunction with Resolution 687, especially without providing any explanation or supporting citations.[90] In fact, instead of the United Nations accepting Iraq's voluntary withdrawal from Kuwait before the beginning of Operation Desert Storm with the condition (requested by Iraq) that the relevant resolutions *would cease to be in effect*,[91] the coalition chose to forcibly remove Iraqi troops from Kuwait and required, at the beginning of paragraph 2 of Resolution 686, that Iraq implement the acceptance of those exact resolutions that had been adopted prior to the use of military force.[92] Therefore, the resolutions referred to in Resolution 686, including Resolution 678, continued in effect beyond Resolution 686. Otherwise, there would have been no point in Operation Desert Storm if that operation were simply to remove Iraq from Kuwait and end the prior resolutions.

Having laid out the basic language and argument for why the authorization to use force under Resolution 678 remained valid beyond the end of the 1991 Gulf War with the help of Resolution 686, Parts III.C and D address potential criticisms of this thesis.

C. Questioning Iraq's Compliance with Resolution 686

The first question that arises is whether Iraq complied with the requirements established in Resolution 686 for termination of the authorization. Murphy asserts that Iraq's fulfillment of these requirements, which he sees as having been derived from prior Security Council resolutions, terminated the authorization under Resolution 678.[93] It is hard to see how the origin of the requirements is relevant to a discussion of the authorization to use force remaining valid until Iraq met the requirements, regardless of from where those requirements came. Furthermore, this Author has found no evidence that Iraq fulfilled the requirements or even asserted that it fulfilled them, and Murphy points to none. Murphy argues in the alternative that even if the requirements continued beyond Resolution 687, he faults the United States for not couching its case against Iraq in 2002 in terms of noncompliance with the eight requirements, instead focusing its justification on Resolution

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90. *See* Byers, *supra* note 53, at 171-72.

91. *See* Marc Weller, *The Kuwait Crisis: A Survey of Some Legal Issues*, 3 AFRICAN J. INT'L & COMP. L. 1, 31-32 (1991) (citing TIMES, Feb. 25, 1991, at 4).

92. S.C. Res. 686, *supra* note 13, ¶ 2.

93. *See* Murphy, *supra* note 25, at 189; *see also* Ben Saul, *The Legality of the Use of Force Against Iraq in 2003: Did the Coalition Defend or Defy the United Nations?*, 8 UCLA J. INT'L L. & FOREIGN AFF. 267, 305 (2003) (assuming that Iraq complied with the requirements of Resolution 686).

687 in relation to Iraq's alleged weapons of mass destruction (WMDs).[94] Admittedly, it is surprising that those commentators who were in favor of the invasion of Iraq did not, and have not, cited Resolution 686 for any substantive argument.[95] While Murphy's criticism appears valid, it does not change the fact that Resolution 686 made the authorization to use force "remain valid," thus providing the legal basis for the invasion notwithstanding the fact that neither the United States nor the United Kingdom relied on this provision for the invasion. In their defense, it is hard to see how Iraq's refusal to comply with Resolution 687, especially with regard to WMDs, is a stretch in fitting within the requirement that Iraq cease its "provocative actions . . . against all Member States" and "[p]rovide all information and assistance in identifying . . . any chemical and biological weapons" in Kuwait, Iraq, or adjacent waters, as required by Resolution 686.[96] Still, the point is well taken that the United States and the United Kingdom did not adequately rely on Resolution 686, although the point is irrelevant in a discussion about what the Security Council *authorized*. In the end, it is difficult to imagine more unequivocal language to make the authorization to use force under Resolution 678 continue in validity until a specified time in the future, and Resolution 687 provides no solid basis to contradict this assertion.[97]

In Iraq's defense, one might point to its acceptance of the twelve resolutions referred to in Resolution 686. Although Iraq did not

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94. *See* Murphy, *supra* note 25, at 193; *see also* Miriam Sapiro, *Preempting Prevention: Lessons Learned*, 37 N.Y.U. J. INT'L L. & POL. 357, 363-64 (2005) (asserting that the U.S. argumentation relied on an implicit authorization).

95. *See, e.g.*, Nicholas Rostow, *Determining the Lawfulness of the 2003 Campaign Against Iraq*, 34 ISR. Y.B. HUMAN RTS. 15, 20 n.22 (2004) (essentially the same); Taft & Buchwald, *supra* note 26, at 557 (never mentioning Resolution 686); Andru E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 ISR. Y.B. HUM. RTS. 165, 165 (2002) (same); Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724, 726 & n.17 (1998) (citing Resolution 686 merely for one of its preambular paragraphs to support her argument that the original cease-fire was decided by coalition forces, not the United Nations); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 570 & n.42 (merely mentioning Resolution 686 in passing as yet another resolution that reaffirmed Resolution 678). *But see* Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 178 (1999) ("This intervention by the international community was in response to an Iraqi violation of Resolution 686 because Iraq used offensive military force against the Kurds."). This is likely a typographical error, as he had not been discussing Resolution 686, but rather Resolution 688, and had made only passing reference to 686 earlier on in the article. *Id.* at 118.

96. S.C. Res. 686, *supra* note 13, ¶ 3; *see also* Murphy, *supra* note 25, at 193 ("Stretching this language to cover the stated predicate for the invasion . . . is untenable . . . .").

97. *See infra* Part IV.B (discussing the relationship between Resolutions 686 and 687).

expressly do this when it accepted the terms of Resolution 686,[98] it implicitly did so by asserting five days later that it had already accepted these other resolutions in previous declarations.[99] However, the beginning of paragraph 2 of Resolution 686 demands Iraq's *implementation* of this acceptance by complying with the eight requirements provided in paragraphs 2 and 3,[100] going beyond mere acceptance, even assuming that Iraq properly had accepted the resolutions. The same is true with paragraph 7 of Resolution 686, which requires that Iraq "notify the Secretary-General and the Security Council when it has taken the actions set out above."[101] Iraq sent letters to the President of the Security Council and the Secretary-General on March 3, 1991, indicating that Iraq "has agreed to fulfil its obligations under the said resolution."[102] However, this response is different from what paragraph 7 of Resolution 686 requires: notification when Iraq had actually *taken the actions* required under Resolution 686, not that it intended to fulfill these obligations at some later date.[103] The notification of acceptance cannot constitute a fulfillment of paragraph 7 or compliance with the eight requirements in paragraphs 2 and 3. Indeed, Iraq never asserted that it complied with the eight requirements of paragraphs 2 and 3 of Resolution 686, as required by paragraph 4 of that resolution, for the authorization of Resolution 678 to be terminated.

One might also point to Iraq's compliance or attempts at compliance with some of Resolution 686's requirements. Indeed, Iraq appears to have implemented paragraph 2(a), which requires Iraq to rescind its actions purporting to annex Kuwait. Iraq issued a decree with the following provision: "All Revolution Command Council decisions subsequent to 2 August 1990 regarding Kuwait are null and void."[104] Furthermore, Iraq showed signs of attempting to comply with the requirement in paragraph 2(d) to "[i]mmediately begin to return all

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98. *See* Letter Dated 3 March 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, at 2, U.N. Doc. S/22320 (Mar. 3, 1991) [hereinafter Letter of March 3, 1991].

99. *See* Identical Letters Dated 8 March 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, at 2, U.N. Doc. S/22342 (Mar. 8, 1991).

100. S.C. Res. 686, *supra* note 13, ¶ 2 (emphasis added).

101. *Id.* ¶ 7.

102. Letter of March 3, 1991, *supra* note 98, at 2.

103. S.C. Res. 686, *supra* note 13, ¶ 7.

104. Identical Letters Dated 21 March 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, at 3, U.N. Doc. S/22370 (Mar. 21, 1991) (citing Revolution Command Council decision No. 55, Mar. 5, 1991).

Kuwaiti property seized by Iraq, the return to be completed in the shortest possible period."[105] However, Iraq decided to return only four types of Kuwaiti property, namely gold, Kuwaiti paper currency, museum objects, and civilian aircraft.[106] Listing only four categories is a beginning, but it is not a beginning to the return of "all Kuwaiti property seized by Iraq." Nor does the designation of the Office of the Secretary-General as the entity to hold Kuwaiti property mark an actual beginning of the return of "all Kuwaiti property."[107] Indeed, Kuwait quickly countered that the four categories of property Iraq was willing to return did not cover even a fraction of the property taken, such as silver coins, library collections, and electronics, among many other categories of property.[108] Iraq replied by reporting only the amounts of Kuwaiti gold and cash it claimed to possess and remaining absolutely silent as to the other property it apparently had in its possession.[109] Kuwait quickly raised this deficiency and continued to raise it for some time.[110] At this point, Iraq seemed to stop trying to comply with Resolution 686, and instead chose to focus on such nonissues as the number of coalition sorties that were then being flown over Iraq,[111] its own losses that resulted from Operation Desert Storm,[112] and alleged Iranian incursions into Iraqi territory.[113] While Iraq might have complied or attempted to comply with other requirements of Resolution 686, such as the requirement in

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105. S.C. Res. 686, *supra* note 13, ¶ 2(d).

106. *See* Identical Letters Dated 5 March 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, at 2, U.N. Doc. S/22330 (Mar. 5, 1991).

107. Identical Letters Dated 18 March 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, at 1, U.N. Doc. S/22355 (Mar. 18, 1991).

108. *See generally* Letter Dated 20 March 1991 from the Permanent Representative of Kuwait to the United Nations Addressed to the Secretary-General, U.N. Doc. S/22367 (Mar. 20, 1991).

109. *See* Identical Letters Dated 21 March 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, U.N. Doc. S/22375 (Mar. 21, 1991).

110. *See* Letter Dated 21 March 1991 from the Permanent Representative of Kuwait to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/22394 (Mar. 22, 1991); Letter Dated 28 March 1991 from the Permanent Representative of Kuwait to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/22427 (Apr. 1, 1991); Letter Dated 3 April 1991 from the Permanent Representative of Kuwait to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/22441 (Apr. 5, 1991).

111. Letter Dated 2 April 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, U.N. Doc. S/22434 (Apr. 2, 1991).

112. Letter Dated 3 March 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, U.N. Doc. S/22438 (Apr. 3, 1991).

113. Letter Dated 22 March 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, U.N. Doc. S/22397 (Mar. 22, 1991).

paragraph 3(c) to designate individuals to arrange the cessation of hostilities with coalition forces (coalition and Iraqi military leaders agreed to a cease-fire on March 2) and the requirement of paragraph 2(c) to release detainees to the International Committee of the Red Cross (ICRC) or other humanitarian organizations, at no point did Iraq even mention the other requirements of Resolution 686 to the Secretary-General or Security Council, let alone report to have attempted to comply with or actually complied with these requirements. Paragraph 1 of Resolution 1441 appears to acknowledge this when it states that Iraq "has been and remains in material breach of its obligations under relevant resolutions," with the first preambular paragraph designating Resolution 686 as one such "relevant resolution."[114] Therefore, Iraq ostensibly never complied with the requirements of Resolution 686, contrary to the assertion of some commentators,[115] thus making the authorization under Resolution 678 "remain valid."

D. The Proper Scope of Resolution 686

Another valid question focuses on the purpose of the 1991 Gulf War and asks whether this reading of Resolution 686 loses sight of that purpose—in other words, whether one might consider the result to be manifestly absurd or unreasonable. The initial response might be that such a reading of Resolution 686 would be unreasonable. Indeed, Iraq had invaded Kuwait, and the Security Council passed Resolution 660 that same day, demanding that Iraq "immediately and unconditionally" withdraw its forces from Kuwait.[116] Along these same lines, paragraph 2 of Resolution 678 authorized states to use force to "uphold and implement resolution 660 (1990)," the focus of which was the withdrawal of Iraq from Kuwait.[117] However, while Resolution 660 started with the objective of expelling Iraq from Kuwait, Resolution 686, with its eight requirements, broadened the requirements on Iraq beyond

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114. S.C. Res. 1441, *supra* note 20, pmbl., ¶ 1.

115. *See, e.g.*, Krisch, *supra* note 16, at 69 ("Already, according to Resolution 686 (1991), this authorization [provided by Resolution 678] ended once Iraq complied with several conditions none of which went as far as the obligations imposed by Resolution 687 (1991)" (internal citation omitted)).

116. S.C. Res. 660, *supra* note 7, ¶ 2.

117. S.C. Res. 678, *supra* note 7, ¶ 2; *see also* Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 34 (2003) (asserting that "[i]t is, of course, true that resolution 678 was not intended to remain in force indefinitely," though without explaining why he thought this to be the case, especially in light of the language "remain valid" in Resolution 686).

merely leaving Kuwait.[118] At the time of Resolution 686, Iraq had already been expelled from Kuwait by the 100-hour portion of Operation Desert Storm that involved ground combat.[119] Yet, the Security Council still saw fit to extend the authorization under Resolution 678 until Iraq met certain requirements, which was within its prerogative to do as an enforcement action under U.N. Charter Chapter VII. Regardless of whether Resolution 686 represented an expansion of the requirements or a limitation to the core requirements originally imposed on Iraq,[120] it unequivocally represents an extension of the validity of the authorization to use force of Resolution 678 beyond the end of the 1991 Gulf War.

While it might be true that none of the Security Council members that adopted Resolution 678 contemplated in November 1990 (when that resolution was adopted) that this authorization would be used to bomb Iraq into compliance with a then-nonexistent weapons inspection regime,[121] the same cannot be said for Security Council members that adopted Resolution 686. Indeed, Resolution 686 expressly extended the authorization provided by Resolution 678 beyond the ouster of Iraq from Kuwait and gave coalition members considerable latitude in dealing with Iraq's noncompliance in the future.[122] At the same time, Resolution 686 imposed on Iraq an obligation to "[p]rovide all information and assistance in identifying . . . any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of member states cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in the adjacent waters," among seven other requirements.[123] The fact that the United States might have used the perceived limitations of Resolution 678 to cut short the coalition's drive to Baghdad to remove Saddam Hussein in 1991 should not be taken as a

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118. Greenwood makes a similar point, but not specifically, in the context of Resolution 686. *See* Greenwood, *supra* note 9, at 170.

119. Therefore, Resolution 686 could not have been "designed to ensure the retreat of Iraq from the territory of Kuwait." Krisch, *supra* note 16, at 69.

120. *See* Murphy, *supra* note 25, at 191.

121. *See* Lobel & Ratner, *supra* note 32, at 140; *see also* MURPHY, *supra* note 15, at 149-50 (pointing out that Under-Secretary-General and U.N. Legal Counsel Carl-August Fleischhauer asserted that Resolution 678 would not allow the elimination of Iraq's military capability and leadership because Resolution 678 "authorized the use of force to implement the Security Council's Resolution 660, which demands only that Iraq withdraw immediately and unconditionally its forces from Kuwait," though Murphy also points out the counter-arguments).

122. Only a few commentators have noted this feature of Resolution 686, even though it seems obvious from the "remain valid" language in that resolution. *See* Weller, *supra* note 91, at 33; R. Lavalle, *The Law of the United Nations and the Use of Force, Under the Relevant Security Council Resolutions of 1990 and 1991, To Resolve the Persian Gulf Crisis*, 23 NETH. Y.B. INT'L L. 3, 52 (1992).

123. S.C. Res. 686, *supra* note 13, ¶ 3(d).

definitive interpretation of what the Security Council had intended in its authorization,[124] especially given the broad, potentially indefinite extension of that authorization under Resolution 686. Indeed, it is entirely unclear from Resolution 678 that the ultimate goal of its authorization to use force was to liberate Kuwait.[125] On the contrary, the language of Resolution 678 indicates a much broader authorization. After all, paragraph 2 of Resolution 678 talks of "restor[ing] international peace and security in the *area*"[126] and not merely in Kuwait, which could conceivably include the removal of Saddam Hussein from power if that were needed to restore peace and security in the *area*. Moreover, the United States had numerous reasons for not pushing on to Baghdad, some of which likely were a desire to maintain the support of Arab coalition members, a belief that Iraqis themselves eventually would rise up against Saddam Hussein,[127] and a stinging recollection of Vietnam. Just as with the other nonresolution statements of participating states, the Secretary-General, and eminent legal scholars, this Article heavily discounts these nonresolution statements in establishing the intent of the Security Council as a whole when it originally adopted its resolutions, since such a perceived intent would seem to run contrary to the unambiguous wording of the actual authorization within the resolution.

An example of the type of interpretation that this Article seeks to avoid is found in Gray's analysis of the 1991 Gulf War, in which she seems to dismiss the clear language of Resolution 686 and instead focuses on whether any sponsor of Resolution 686 made any "express statement" that acknowledged the extension of the authorization to use force under Resolution 678 beyond Kuwait's liberation.[128] Gray

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124. *See* KENNETH M. POLLACK, THE THREATENING STORM: THE CASE FOR INVADING IRAQ 46-47 (2002); Norman G. Printer, Jr., *Establishing an International Criminal Tribunal for Iraq: The Time Is Now*, 36 UWLA L. REV. 27, 35 (2005); Lobel & Ratner, *supra* note 32, at 140 (citing the Testimony of Assistant Secretary of State John Kelley and Assistant Secretary of Defense Henry Rowen before the Europe and Middle East Subcomm. of the House Comm. on Foreign Affairs). *But see* Christine Gray, *After the Ceasefire: Iraq, the Security Council and the Use of Force*, 65 BRITISH Y.B. INT'L L. 135, 137 (1994) (asserting that the decision not to destroy Saddam Hussein's regime when the coalition had the opportunity in 1991 "has never been fully explained by the USA and its allies").

125. *See also* Frowein, *supra* note 56, at 101 (making this same point).

126. S.C. Res. 678, *supra* note 7, ¶ 2 (emphasis added).

127. *See* Lobel & Ratner, *supra* note 32, at 140 (citing several statements by coalition members that saw the mandate as limited to ousting Iraq from Kuwait); Malanczuk, *supra* note 3, at 117 (describing the expectation that the Iraqi people would overthrow Saddam Hussein); Printer, *supra* note 124, at 36 (same).

128. *See* Gray, *supra* note 124, at 138-39.

concludes that none of the sponsors made such an acknowledgment,[129] thus implying that Resolution 686 must not have continued Resolution 678's authorization to use force. Such an approach to interpretation essentially sees the tail as wagging the dog, so to speak. Furthermore, Gray's assertion appears incorrect. As the U.S. Permanent Representative to the United Nations, Ambassador Pickering, declared after Resolution 686's adoption:

> Today, the Kuwaiti flag and flags of Kuwait's friends fly again in Kuwait City. . . .
>
> Now the Council turns its attention to the *restoration of peace and security in the area, as resolution 678 (1990) recognized would be required. The present resolution points the way*. We seek as soon as possible a definitive end to hostilities. This is the first priority. The resolution sets out the measures which Iraq must take and the arrangements which must be put in place to bring this about. . . .
>
> . . . Until it is clear that Iraq has complied with [the eight requirements of Resolution 686], the provisions of resolution 678 (1990) authorizing Kuwait and those cooperating with Kuwait to use all necessary means to ensure Iraqi compliance with the United Nations resolutions clearly will remain in effect.[130]

Likewise, the French Permanent Representative to the United Nations, Ambassador Blanc, acknowledged that the authorization to use force under Resolution 678 continued beyond the liberation of Kuwait, although in a slightly more guarded manner than the United States:

> We take note of Iraq's acceptance of all the resolutions adopted by the Security Council on behalf of the entire international community. That acceptance is a *prerequisite* for the re-establishment, on a sound and lasting basis, of stability in the region.
>
> In that connection, resolution 686 (1991), which we have just adopted and of which France was a *sponsor*, is an indispensable *step*. That resolution—the first since the liberation of Kuwait—charts the course for a final cessation of hostilities, which we hope can be announced soon. Peace begins when weapons are silenced, but it must then be confirmed and consolidated as quickly as possible.[131]

Although it depends on one's definition of "express," these statements come too close to be dismissed outright. Belgium might also be added to this group, because it acknowledged this extension by pointing out that Iraq had to abide by the requirements of paragraphs 2 and 3 in order for

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129. *See id.*

130. U.N. SCOR, 46th Sess., 2978th mtg., at 42-43, U.N. Doc. S/PV.2978 (Mar. 3, 1991) [hereinafter U.N. Doc. S/PV.2978] (emphasis added).

131. *Id.* at 52-53 (emphasis added).

there to be a definitive end to the hostilities and that the Security Council retained the unfinished task of restoring peace and security in the region—something that Resolution 678 authorized states to use force to do.[132] The same is true for the United Kingdom, which declared that Iraq's "rapid and formal compliance with provisions of this resolution . . . will then enable [the Security Council] to meet again in the near future and to take the *next steps* towards the restoration of international peace and stability in the area."[133] This last reference to restoring stability in the area is a clear indication—at least to this Author—that the United Kingdom considered that peace and security in the area had not yet been restored, thus keeping active the authorization under paragraph 2 of Resolution 678 to use force to "restore international peace and security in the area" beyond Kuwait's liberation. The United States, France, Belgium, and the United Kingdom were four of the seven sponsors of Resolution 686.[134] Opponents of Resolution 686, Yemen and Cuba, strongly protested Resolution 686's extension of Resolution 678's authorization to use force beyond the liberation of Kuwait,[135] indicating that this issue clearly was on the table at that time. In particular, Cuba complained that "the text submitted to [the Security Council] thrice reiterates with almost sick emphasis that resolution 678 (1990) remains in effect and the provisions set forth by the Security Council, which relinquish its fundamental obligation, remain in effect."[136] Cuba then went on to say:

> In a previous version of the text, the meaning of the language of paragraph 4 was somewhat less hidden. But in any case, in our view, the consequences are clear enough.[137]

Those consequences were that Resolution 686 constituted "a continuation and derivation of resolution 678 (1990)."[138] As Part II.A

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132. *See id.* at 56-58.

133. *Id.* at 72 (emphasis added). Other portions of the U.K. delegate's statement imply a similar understanding of Resolution 686. *See, e.g.*, *id.* at 71 ("[Resolution 686] deals with the immediate future and the next phase, which we hope will be a short one and will lead to the winding down of hostilities. Much, of course, will depend on the Government of Iraq."); *see also* U.N. SCOR, 46th Sess., 2981st mtg., at 112, U.N. Doc. S/PV.2981 (Apr. 3, 1991) [hereinafter U.N. Doc. S/PV.2981] ("Now the military action to liberate Kuwait is complete, and we face the far more difficult task of securing the peace—in the words of resolution 678 (1990), of restoring international peace and security in the area.").

134. *See* U.N. Doc. S/PV.2978, *supra* note 130, at 3-5.

135. *See id.* at 26-27, 31-35; Gray, *supra* note 124, at 139 (quoting some of Yemen's protests but not Cuba's); *see also* Weller, *supra* note 91, at 33 (making this same observation).

136. U.N. Doc. S/PV.2978, *supra* note 130, at 32.

137. *Id.*

explained above, these extra-resolution statements are of secondary importance with regard to interpretation when the key language of the resolution is as unambiguous as that of Resolution 686. Regardless, it provides a poignant example of how commentators have misconstrued Resolution 686.

This Part analyzed how Resolution 686 helped the authorization to use force under Resolution 678 remain valid past the end of the 1991 Gulf War. As will be explained in the following Part, the authorization that was to "remain valid" actually did so until 2003, as the Security Council neither overrode nor modified Resolution 686—as is required for the limitation of an open-ended authorization—and Iraq never fulfilled the requirements provided in Resolution 686 for the authorization to be terminated.

IV. RESOLUTION 686 REMAINED VALID UNTIL 2003

Resolution 687 stands as the major threat to this Article's thesis. Other resolutions also pose a threat, though to a far less extent. Once over the significant hurdle posed by Resolution 687, the way is relatively clear for Resolution 678's authorization, via Resolution 686, to remain valid through to the 2003 invasion.

A. The Lifespan of an Open-Ended Authorization To Use Force

It must be noted that resolutions with open-ended authorizations to use force continue until the specified time limit is met or until another resolution modifies the earlier authorization. Yoo asserts that when the Security Council authorizes force, it does so "either by expressly terminating the prior authorization or by setting an up-front time limit on the authorization."[139] The fact that the Security Council neither provided a sunset clause nor otherwise expressly terminated or modified Resolution 686 is the most persuasive argument for why the authorization continued until at least 2003.

Murphy would counter this assertion by arguing that of the first two Security Council authorizations for the use of force (regarding Korea and

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138. *Id.* at 31-32. Assuming Cuba and Yemen's fears were well founded, as the text of Resolution 686 would itself indicate, it remains a mystery why the United States and the United Kingdom did not rely on this language in 2003, as the language appears to have been inserted for just such situations of Iraqi noncompliance as that preceding the 2003 invasion.

139. Yoo, *supra* note 95, at 567; *see also* José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 881 (2003) (asserting that once the Security Council has provided open-ended authorization, the authorization "can be limited only by further Council action").

Southern Rhodesia), neither had a sunset provision nor were expressly terminated, yet their authorizations still ended.[140] Murphy's point is well taken, even though it is possible that the Korean War technically never ended. Although the United Nations adopted an Indian proposal for an armistice in 1953, the continuing North-South face-off along the demilitarized zone evidences the impermanence of that solution.[141] Indeed, the United Nations, through General Assembly Resolution 3390B (XXX), even acknowledged the precarious situation that resulted from this armistice when it stated that "a durable peace cannot be expected so long as the present state of armistice is kept as it is in Korea."[142] In addition, it appears that all authorizations since Resolution 678 have clearly included a sunset provision or have been expressly terminated,[143] suggesting that that authorization would continue until terminated. Finally, peacekeeping operations occasionally remain on the list of active operations for decades after most significant activities cease. Perhaps the best example is the United Nations Military Observer Group in India and Pakistan (UNMOGIP), which was established in May 1948 and continues today, but receives relatively insignificant financial and military support from the United Nations—a paltry $8.37 million gross

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140. *See* Murphy, *supra* note 25, at 186-87 n.48.

141. *See* ALAN J. LEVINE, STALIN'S LAST WAR: KOREA AND THE APPROACH TO WORLD WAR III 276-86 (2005); WILLIAM STUECK, RETHINKING THE KOREAN WAR 171 (2002). *But see* Lobel & Ratner, *supra* note 32, at 145 ("[N]o one would seriously claim that member states of the UN command would have the authority to bomb North Korea pursuant to the 1950 authorization to use force if in 1999 North Korea flagrantly violated the 1953 armistice."). The Korean armistice agreement, dated July 27, 1953, appears not to have been properly filed and recorded by the United Nations Secretariat, thus bringing into further question whether one can say that the Korean War ever technically ended. *See* Lavalle, *supra* note 122, at 63.

142. G.A. Res. 3390B (XXX), pmbl., U.N. Doc. A/RES/3390 (XXX) (Nov. 18, 1975). However, one must also note that the General Assembly simultaneously stated in Resolution 3390A that "the Armistice Agreement remains indispensable to the maintenance of peace and security in the area," thus demonstrating that the United Nations sometimes acts in an intentionally ambiguous, if not contradictory, manner in an effort to reach consensus among disagreeing states. *See* Byers, *supra* note 53, at 170.

143. *See, e.g.*, S.C. Res. 1080, ¶ 8, U.N. Doc. S/RES/1080 (Nov. 15, 1996) (establishing the Canadian-led operation in Eastern Zaire and limiting it to March 31, 1997 at the most); S.C. Res. 1031, ¶ 21, U.N. Doc. S/RES/1031 (Dec. 15, 1995) (establishing Peace Implementation Forces (IFOR) in Bosnia and limiting the mission to "one year after the transfer of authority from [the United Nations Protection Force] to IFOR"); S.C. Res. 929, ¶ 4, U.N. Doc. S/RES/929 (June 22, 1994) (establishing Operation Turquoise in Rwanda and limiting the mission to two months unless the Secretary-General made a certain determination); *see also* S.C. Res. 919, ¶¶ 1-2, U.N. Doc. S/RES/919 (May 25, 1994) (terminating the action against South Africa); S.C. Res. 1506, ¶ 1, U.N. Doc. S/RES/1506 (Sept. 12, 2003) (terminating the action against Libya); S.C. Res. 944, ¶ 4, U.N. Doc. S/RES/944 (Sept. 29, 1994) (terminating the enforcement action against Haiti, where Security Council Resolution 940, U.N. Doc. S/RES/940 (July 31, 1994), did not provide a clear end date for the action).

appropriation and 44 military personnel in 2005.[144] This emphasizes the view that open-ended authorizations continue until terminated.

The Author is aware that this Part might raise some controversial issues. For example, one question that arises under this line of thinking is whether any former coalition member involved in the prior conflicts in Korea or Southern Rhodesia now unilaterally can rely on those initial authorizations to recommence using force against either of those states. Admittedly, such an arrangement would lead to serious instability in the international community. While this might appear analogous to the 2003 invasion of Iraq, one must not forget the "remain valid" language that made the authorization continue until certain conditions were met, whereas such explicit language did not exist in these prior authorizations. Therefore, in the end, Murphy's general point that authorizations eventually peter out over time likely is correct, although not in the context of Resolution 686, for such a point would run contrary to Resolution 686's clear "remain valid" language. If stability issues arise from such a perpetual authorization, the Security Council should have considered this when it adopted this particular language, or it should now adopt a resolution terminating or superseding that problematic authorization.

With these points in mind, Parts IV.B through D question whether certain Security Council resolutions interrupted the authorization to use force that Resolution 686 kept valid.

B. The Hurdle from Resolution 687

Interpretations of Resolution 687 vary widely. Some commentators see it as "affirm[ing] the continuing validity of 678,"[145] while others see it as rescinding 678.[146] Upon close inspection of Resolution 687, it is unclear exactly what impact it has on Resolution 678. More important for this Article's thesis, it does not appear to supersede Resolution 686. This section discusses the language of Resolution 687 as it relates to Resolution 686 and explores whether its establishment of a formal cease-fire necessarily affects Resolution 686.

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144. U.N. PEACEKEEPING OPERATIONS, BACKGROUND NOTE: 31 MARCH 2005 (2005), *available at* http://www.un.org/peace/bnote010101.pdf.

145. Wall, *supra* note 95, at 165 n.2.

146. *See* Gray, *supra* note 124, at 155 n.119; Lobel & Ratner, *supra* note 32, at 148-49; *see also* Colin Warbrick, *The Invasion of Kuwait by Iraq—Part II*, 40 INT'L & COMP. L.Q. 965, 969 (1991) ("[Resolution 687] set the conditions for suspending the authorisation for States to use force against Iraq under Resolution 678.").

1. The Language of Resolution 687

Resolution 687 often is noted for its extreme length and complexity.[147] With much patience and care in reading the resolution, however, it can be concluded that Resolution 687 did not explicitly modify or terminate Resolution 686. The first preambular paragraph is encouraging for this Article's thesis; it recalls thirteen resolutions, including Resolution 686,[148] although this simple reference is not conclusive in any way. However, the first operative paragraph of Resolution 687 "[*a*]*ffirms* all thirteen resolutions noted above, except as expressly changed below to achieve the goals of the present resolution, including a formal cease-fire."[149] The question arises whether Resolution 687 *expressly* changes Resolution 686. A close review of Resolution 687 shows that it only *expressly* changes Resolution 661; paragraphs 20 to 23 of Resolution 687 remove certain "foodstuffs" and "materials and supplies for essential civilian needs" from the Resolution 661 prohibitions against the sale or supply to Iraq of commodities or products other than medicine and health supplies and other matters relating to the importation of goods and certain financial transactions.[150] Interestingly, the French delegate essentially acknowledged that, at the time of Resolution 687's adoption, its immediate impact on prior resolutions was limited to Resolution 661.[151] Paragraph 24 of Resolution 687 essentially reaffirms paragraph 3(c) of Resolution 661, though perhaps broadening it slightly by prohibiting states from selling or transferring to Iraq matériel of all types, but especially WMDs, missiles, and related technology.[152] Paragraph 28 of Resolution 687 provides that the Security Council would review its decisions in paragraphs 22 to 25 in the future, "taking into account Iraq's compliance with the resolution and general progress towards the control of armaments in the region."[153] However, it is difficult to see how any of these paragraphs impact Resolution 686 even marginally.

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147. *See, e.g.*, Greenwood, *supra* note 9, at 175; Lawrence D. Roberts, *United Nations Security Council Resolution 687 and Its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy*, 25 N.Y.U. J. INT'L L. & POL. 593, 595 (1993).

148. S.C. Res. 687, pmbl., U.N. Doc. S/RES/687 (Apr. 3, 1991).

149. *Id.* ¶ 1.

150. *Id.* ¶¶ 20-23.

151. *See* U.N. Doc. S/PV.2981, *supra* note 133, at 94 ("That is why the resolution we have just adopted lifts with immediate effect—subject to notification—all the prohibitions set forth in resolution 661 (1990).").

152. S.C. Res. 687, *supra* note 148, ¶ 24.

153. *Id.* ¶ 28.

Where Resolution 687 might be said to be expressly modifying Resolution 686, it actually is reaffirming Resolution 686. One might argue that paragraph 30 of Resolution 687 implicitly changed Resolution 686 by requiring Iraq to

> extend all necessary cooperation to the International Committee of the Red Cross by providing lists of such persons, facilitating the access of the International Committee to all such persons wherever located or detained and facilitating the search by the International Committee for those Kuwaiti and third-State nationals still unaccounted for,[154]

whereas paragraph 2(c) of Resolution 686 had required that Iraq "[i]mmediately release" these individuals to the ICRC or other humanitarian organizations.[155] However, the beginning of paragraph 30 of Resolution 687 indicates that its requirement is "in furtherance of its commitment to facilitate the repatriation of all Kuwaiti and third-State nationals,"[156] suggesting that paragraph 30 was not modifying the requirement of paragraph 2(c) of Resolution 686. Notably, paragraph 2(c) is the only prior place where Iraq was required to repatriate all Kuwaiti and third-State nationals, thus indicating at least that this requirement of Resolution 686 remained alive beyond Resolution 687.

Finally, paragraph 34 of Resolution 687 states that the Security Council "[*d*]*ecides* to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region."[157] Frowein interprets this paragraph as stating that only the Security Council can take such implementing action,[158] though this is to read "only" into paragraph 34 where it does not originally exist. None of the language in paragraph 34 can be considered an express change to Resolution 686 or the other affirmed resolutions. Therefore, Resolution 686 continues to exist in its entirety beyond Resolution 687. The following Subpart discusses some remaining ambiguities within Resolution 687.

2. Troubling Ambiguities in Resolution 687

The issue remains about the meaning of "including a formal cease-fire" at the end of paragraph 1 of Resolution 687. It is possible that the changes to Resolution 661 discussed in the preceding paragraph were needed in order to achieve the goal of establishing a formal cease-fire.

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154. *Id.* ¶ 30.
155. S.C. Res. 686, *supra* note 13, ¶ 2(c).
156. S.C. Res. 687, *supra* note 148, ¶ 30.
157. *Id.* ¶ 34.
158. *See* Frowein, *supra* note 56, at 107.

There is no indication in the public record of the Security Council suggesting that Iraq made this demand or that the terms of cease-fire were anything but dictated by the Security Council, although the Security Council could have been anticipating that Iraq would continue to fight if its citizens were denied essential foodstuffs and other supplies. Again, there is no indication in the record that supports such reasoning.

Critics might try to construe the mysterious language at the end of paragraph 1 of Resolution 687 as referring to paragraph 6 of that same resolution. Paragraph 6

> [*n*]*otes* that as soon as the Secretary-General notifies the Council of the completion of the deployment of the United Nations observer unit, the conditions will be established for the Member States cooperating with Kuwait in accordance with resolution 678 (1990) to bring their military presence in Iraq to an end consistent with resolution 686 (1991).[159]

These critics might try to argue that, as soon as the Secretary-General notified the Security Council of the full deployment, Resolutions 678 and 686 would be overridden. Admittedly, the Security Council established the United Nation Iraq-Kuwait Observation Mission (UNIKOM) on April 9, 1991,[160] and the Secretary-General notified the Security Council on June 12, 1991, that UNIKOM was "established and fully able to carry out the tasks assigned to it by the Security Council," apart from not yet being in its headquarters at Umm Qasr.[161] However, one must look at exactly what this notification triggers. Under paragraph 6 of Resolution 687, the notification indicates that the *conditions* are *ripe* for coalition forces to leave Iraq.[162] It does not order coalition forces to leave Iraq, and it does not expressly terminate Resolution 678's authorization to use force, which express reference would appear to be required for a change, at least according to the first operative paragraph of Resolution 687 and its use of the word "expressly."[163] At a minimum, paragraph 6 of Resolution 687 indicates that Resolution 686 remained valid beyond Resolution 687 as it implies that the conditions would not be ripe for coalition forces to leave Iraq until the Secretary-General provided the requisite notification at some future date beyond the adoption of Resolution 687.

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159. *Id.* ¶ 6.

160. *See* S.C. Res. 689, U.N. Doc. S/RES/689 (Apr. 9, 1991).

161. The Secretary-General, *Report of the Secretary-General on the United Nations Iraq-Kuwait Observation Mission*, ¶ 19, U.N. Doc. S/22692 (June 12, 1991).

162. *See* S.C. Res. 687, *supra* note 148, ¶ 6.

163. *Id.* ¶ 1.

The continuing validity of Resolutions 678 and 686 is supported by the fact that the first preambular paragraph of Resolution 687 and the first and ninth preambular paragraphs of Resolution 1441 recalled Resolutions 678 and 686, among others[164]—something the Security Council likely would not have done if it had already terminated or superseded them. Mere reference to Resolutions 678 and 686 is not dispositive of the continuing validity of these resolutions. However, one need not rely on such inconclusive language to reach a conclusion as to the continuing nature of the authorization within Resolution 678. Rather, such language supports the textual analysis of Resolution 686 provided in Part II.B above regarding "remain valid."

Still, the mystery remains concerning "including a formal cease-fire" at the end of paragraph 1 of Resolution 687. Nothing in Resolution 687 expressly changes another resolution in order to achieve the goal of establishing a formal cease-fire, so this language can be classified as ambiguous based solely on an analysis of the four corners of Resolution 687. It would be unwise to jump to the conclusion that Resolution 687 replaced Resolutions 678 and 686, especially because paragraph 1 of Resolution 687 requires an express change for one to occur. The key language in paragraph 1 of Resolution 687 hardly can be considered obligatory, because the phrase is appended in an inclusive manner, so undue weight ought not to be given to it. Following this advice, the following Subpart looks at the temporary-permanent relationship between Resolutions 686 and 687 that many commentators take for granted.

3. Temporary Versus Permanent Cease-Fires

The fact that Resolution 687 did not expressly change Resolution 686 has not stopped commentators from portraying Resolution 686 as temporary and Resolution 687 as permanent. Lobel and Ratner, as well as many others, call Resolution 686 a provisional cease-fire.[165] Even

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164. S.C. Res. 1441, *supra* note 20, pmbl., ¶ 9; S.C. Res. 687, *supra* note 148, pmbl.

165. *See* Lobel & Ratner, *supra* note 32, at 148-49; *see also* Condron, *supra* note 95, at 118; Krisch, *supra* note 16, at 69 (asserting that Resolution 686 "warranted" an interpretation of Resolution 687 that showed the "intention of the allied states to bring their military presence in Iraq to an end"); Patrick McLain, Note, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE J. COMP. & INT'L L. 233, 251 (Winter 2003); Murphy, *supra* note 25, at 200; Saul, *supra* note 93, at 303-05. *But see* Gregg Easterbrook, *Sweet Surrender* (July 5, 2004), http://www.tnr.com/doc.mhtml?i=express&s=easterbrook070204 (asserting that the 1991 Gulf War stopped because "Iraq signed a formal surrender agreement," which would appear to be referring to the March 3 cease-fire agreement between General Schwarzkopf and Lieutenant General al-Jabburi because it is the only agreement that might accurately be described as a surrender agreement).

Wedgwood, one of the stronger voices in the pro-invasion camp, views Resolution 686 as "imposing initial demands on Iraq," although this is different than saying that Resolution 686 was temporary or provisional.[166] Gray acknowledges that, "whether under Resolution 686 or under Resolution 678, the USA and the other coalition States clearly retained their right to use force without specific Security Council authorization, as during Operation Desert Storm against Iraq."[167] However, she would limit this right to use force until Resolution 687 superseded Resolution 686's authorization on April 3 or 11,[168] thus emphasizing the temporary nature of Resolution 686. There ostensibly is nothing in Resolution 686, any other resolution, the Official Record of the Security Council, or the Provisional Verbatim Record of the Security Council for the discussions involving the relevant resolutions that expressly ascribes such a temporary nature to Resolution 686.[169] Within all of these instruments and records, there is only one assertion that Resolution 687 trumps Resolution 686.[170] The commentators that assert otherwise tend to cite no provision or official dialogue that directly supports their characterization, but rather revise the events surrounding the resolutions to suit their argumentation. Gray cites to paragraph 33 of Resolution 687 after

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166. *See* Wedgwood, *supra* note 95, at 726 n.17.

167. Gray, *supra* note 124, at 141.

168. *See id.* at 139-41; *see also* Lavalle, *supra* note 122, at 52 (asserting that Resolution 686 was the legal justification for the two instances of the use of force before the adoption of Resolution 687, thus implying that Resolution 686's authorization to use force was temporary).

169. Granted, Botswana welcomed the meeting of coalition and Iraqi leaders in establishing a "permanent cease-fire." Letter Dated 5 March 1991 from the Permanent Representative of Botswana to the United Nations Addressed to the Secretary-General, at 2, U.N. Doc. S/22343 (Mar. 8, 1991). Furthermore, Nigeria asserted that President Bush's suspension of fighting and Iraq's acceptance of U.N. resolutions would lead to a "permanent cease fire." Note Verbale Dated 6 March 1991 from the Permanent Mission of Nigeria to the United Nations Addressed to the Secretary-General, at 2, U.N. Doc. S/22335 (Mar. 6, 1991). However, each is ambiguous as to whether they hoped for a more permanent solution than Resolution 686 or whether they hoped that the cease-fire under Resolution 686 would be permanent. Even if these statements were perfectly clear, they are irrelevant to defining the intent of the Security Council, as explained *supra* Part III.A.

170. The Indian delegate asserted at the time of Resolution 687's adoption that it was an improvement on Resolution 686 in that it established a formal cease-fire, whereas the cease-fire of Resolution 686 was open-ended based on certain conditions placed on Iraq. U.N. Doc. S/PV.2981, *supra* note 133, at 78-80. Please note, however, that such references in the Official Record or the Provisional Verbatim Record do not necessarily indicate Security Council intent to make Resolution 687 supersede or amend Resolution 686, as explained *supra* Part III.A. Similar to Resolution 686, Resolution 687 also placed conditions on Iraq for the cease-fire to come into effect. Also, the U.S. delegate referred to Resolution 687 as "lay[ing] the groundwork for the *permanent* cease-fire which all parties desire and for the withdrawal of coalition forces from Iraqi territory." U.N. Doc. S/PV.2981, *supra* note 133, at 83 (emphasis added). However, this is not the same as saying that Resolution 687 establishes a *permanent* cease-fire, but rather only that one is hoped for in the future.

asserting that Resolution 687 superseded Resolution 686,[171] although paragraph 33 only states that the resolution will establish a formal cease-fire once Iraq notifies the Security Council and the Secretary-General of its acceptance of Resolution 687, not that Resolution 687 would supersede Resolution 686. The fact that Lobel and Ratner repeatedly make this same assumption in their article does not *ipso facto* make it reality. Moreover, it is not necessarily true that the termination of Iraq's efforts to comply with Resolution 686's requirements meant that "the unilateral use of force provision of Resolution 678 would remain 'valid' only temporarily."[172] Indeed, the possibility existed at the time of Resolution 686's adoption that Iraq would never comply with these requirements, which ended up being the case.

Critics might further point to two parts of Resolution 686 to indicate the resolution's temporary nature. While Resolution 686 ended with the hope of a "rapid" end to hostilities, and referred to the coalition forces as being "present temporarily," it did not contain a sunset clause.[173] Indeed, the speed of the cessation of hostilities and the brevity of the coalition's presence depended entirely on Iraq's response to this resolution, as made clear by the seventh preambular paragraph, which underlines "the importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities."[174] Therefore, one ought not to conclude hastily that the Security Council intentionally designed Resolution 686 to be a temporary cease-fire, as certain commentators conclude,[175] even though it expressly hoped for a rapid conclusion of the hostilities. Although not entirely analogous, one might argue that it makes as much sense to read an implicit deadline for the use of force into "rapid" as to read it into the word "early" in paragraph 11 of Resolution 661—adopted some three-and-a-half months before Resolution 678's authorization of force—where the Security Council decided to "continue its efforts to put an *early* end to the invasion by Iraq."[176]

There are several positive indications that Resolution 686 was neither temporary nor overridden by Resolution 687. Again, the language of Resolution 1441 supports this analysis, as discussed in Part

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171. *See* Gray, *supra* note 124, at 139.

172. Lobel & Ratner, *supra* note 32, at 148.

173. S.C. Res. 686, *supra* note 13, ¶¶ 3(d), 8.

174. *Id.* pmbl.; *see also* U.N. Doc. S/PV.2978, *supra* note 130, at 43 (U.S. Ambassador Pickering pointing out that the burden is on Iraq to fulfill Resolution 686's requirements, which will bring about an end to hostilities).

175. *See supra* text accompanying notes 165-166.

176. S.C. Res. 661, ¶ 11, U.N. Doc. S/RES/661 (Aug. 6, 1990).

III.B.2 above, in that it affirmed Resolution 686.[177] More importantly, the reference to Resolution 687 as a cease-fire agreement undermines the very notion that it superseded Resolution 686. Although Lobel and Ratner attempt to establish a pattern that temporary cease-fire agreements do not disturb authorizations of force but permanent cease-fire agreements terminate such authorizations altogether,[178] such a pattern is not reflected in the language of Resolution 686 or Resolution 687, nor is it particularly convincing. On the contrary, general armistice law posits that cease-fire agreements are not permanent solutions to conflict, regardless of whether they are classified as formal or informal, so the notion of a permanent cease-fire agreement would appear to be an oxymoron. Moreover, agreements to cease hostilities, as some classify Resolution 686, are not necessarily temporary. Indeed, as Yoo points out, Resolution 687 was "a formal cease-fire," which is most closely analogized as an armistice on account of it having suspended the military operations by agreement.[179] A formal cease-fire (as provided by Resolution 687) does not equate to "a definitive end to the hostilities" (as called for by paragraph 8 of Resolution 686), but rather a suspension of the hostilities.[180] Therefore, even after the establishment of a formal cease-fire by Resolution 687, the desire to achieve a definitive end was not extinguished. This point is supported by the fact that Security Council decided to "remain seized of the matter" in paragraph 34 of Resolution 687, thus implicitly acknowledging that the end of the hostilities had not yet fully arrived.[181]

All of this argumentation aside, one must not forget that Resolution 686 unequivocally makes the authorization to use force in Resolution 678 "remain valid" until Iraq complies with the eight requirements contained in Resolution 686—clear language that ought not to be disregarded lightly in favor of a tenuous interpretation of armistice law or Resolution 687. This Article now turns to later and less threatening resolutions to this Article's thesis—Resolutions 1154 and 1441.

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177. S.C. Res. 1441, *supra* note 20.

178. *See* Lobel & Ratner, *supra* note 32, at 144-49.

179. *See* Yoo, *supra* note 95, at 568-69 & n.38 (citing Regulations Annexed to the Hague Convention on the Law and Customs of War on Land, art. 36, Oct. 18, 1907, 36 Stat. 2277, 2305; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 50 (3d ed. 2001)).

180. Yemen made this same argument before the adoption of Resolution 687. *See* U.N. Doc. S/PV.2981, *supra* note 133, at 46 ("First, it is well known that the draft resolution before us aims at the formal declaration of a cease-fire—only a cease-fire. This means that the state of war will continue between Iraq and the forces of the alliance until a definitive end is put to the military operations and hostilities, in accordance with paragraph 8 of resolution 686 (1991).").

181. S.C. Res. 687, *supra* note 148, ¶ 34.

C. The Speed Bump from Resolution 1154

Resolution 1154 poses another potential stumbling block to this Article's thesis, though to a far lesser extent than Resolution 687. In 1998, tension between Iraq, the United States, and the United Kingdom began to escalate because of Iraq's repeated provocation of aircraft patrolling the no-fly zones and its general refusal to cooperate with U.N. weapons inspectors. In response, the United States and the United Kingdom began to shift military resources to the Gulf region in anticipation of further hostilities. Secretary-General Kofi Annan went to Baghdad to try to address the problems and left with a memorandum of understanding (MOU) that was later adopted by Resolution 1154.[182] In particular, paragraph 3 of Resolution 1154 threatened Iraq with "severest consequences" if Iraq continued to violate its obligations and the new MOU regarding how the inspections were to be carried out.[183] However, the MOU and resolution did not stop Iraqi provocation and non-compliance with U.N. weapons inspectors, which led to Operation Desert Fox.[184]

Although not specified in the text of the resolution, many members of the Security Council apparently believed that further authorization was required to implement these inspections.[185] This would suggest that those states did not see the authorization from Resolution 678 as continuing in validity. However, the significance of this point ought to be severely discounted, if not fatally so, when one tries to use it to prove the will of the Security Council as a collective entity. Indeed, members of the Security Council know full well that they are not bound by such statements, so such statements should be read with much suspicion. As pointed out in Part IV.D,[186] the same is true for statements by the Secretary-General when he speaks about Security Council actions. The argument in Part II.A is especially relevant here. With these points in mind and noting the fact that nothing in Resolution 1154 suggests that the authorization to use force under Resolution 678, via Resolution 686, had been terminated, these statements are respectfully dismissed for their lack of probative value when offered to prove the truth of the matter asserted.

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182. S.C. Res. 1154, U.N. Doc. S/RES/1154 (Mar. 2, 1998).

183. *Id.* ¶ 3.

184. *See* Wall, *supra* note 95, at 183-87 (discussing Iraqi provocation and U.S.-U.K. response between 1991 and 2001).

185. *See* Murphy, *supra* note 25, at 212 (citing U.N. SCOR, 53d Sess., 3858th mtg., U.N. Doc. S/PV.3858 (Mar. 2, 1998)); Frowein, *supra* note 56, at 110-11.

186. *See infra* text accompanying note 225.

D. Resolution 1441 and the Revival Theory

The language of Resolution 1441 is less of a problem for this Article's thesis than the theory of revival that arose around this resolution. This section first discusses the language of Resolution 1441 that is relevant to the discussion of Resolutions 678 and 686 remaining valid and then explores the revival theory.[187]

1. The Language of Resolution 1441

When analyzing Resolution 1441, one must keep in mind the likelihood that each side of the debate intentionally inserted ambiguous language into the text to support its argument without eliciting a veto from the other side. Drumbl suggests that ambiguous language in Security Council resolutions means that the members of the Security Council wanted to give themselves "interpretive latitude in deciding when force can be used."[188] As Byers asserts specifically in the context of Resolution 1441, the lawyers who drafted Resolution 1441 knew that other lawyers would interpret the ambiguous language in different ways, making it seem that they were agreeing to disagree when they drafted such language.[189] In light of these considerations, any conclusion drawn solely from the text of Resolution 1441 should be viewed with a healthy dose of skepticism. Still, this ambiguity did not deter the United Kingdom from basing the legality of its involvement in the 2003 invasion largely on the language of Resolution 1441.[190]

Just as with Resolution 687, the first preambular paragraph of Resolution 1441 recalls Resolutions 678 and 686, among others.[191] Again, critics will find their first ammunition shortly thereafter, with the fourth preambular paragraph "[*r*]*ecalling* that its resolution 678 (1990) authorized Member States to use all necessary means to uphold and implement its resolution 660 (1990) of 2 August 1990 and all relevant resolutions subsequent to resolution 660 (1990) and to restore international peace and security in the area."[192] Critics might be tempted to point to the past-tense "authorized" to attack this Article's thesis. In

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187. *See supra* Part II (discussing the basic provisions of Resolution 1441).

188. Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 42 n.147 (2002).

189. *See* Byers, *supra* note 53, at 166.

190. *See generally* Warbrick, *supra* note 1, at 814 (reprinting U.K. Attorney-General Lord Goldsmith's answer to a question from the House of Lords, which answer provides the legal bases for invading Iraq in 2003).

191. S.C. Res. 1441, *supra* note 20, pmbl.

192. *Id.*

response, the past tense used there is the preterite (simple past) form, where it is clear that an action happened in the past but is ambiguous as to whether the action continues in the present. Therefore, this reference to "authorized" goes to the action that occurred on November 29, 1990, with Resolution 678, though it is irrelevant to determining whether the action continues today. Another example of such a preterite verb in Resolution 1441 is found in the seventh preambular paragraph, which states that Iraq "ceased all cooperation with UNSCOM [United Nations Special Commission] and the IAEA [International Atomic Energy Agency] in 1998,"[193] yet the past-tense "ceased" does not, by itself, indicate that Iraq now cooperates with UNSCOM and the IAEA. As the rest of the resolution shows, the Security Council came to the opposite conclusion.[194] The same can be said about Resolution 678 having "authorized" the use of force. This Article posits that the effects of that authorization continued well beyond that date, and this provision does not necessarily contradict that position.

In further defense of this thesis, the phrase "all relevant resolutions subsequent" in the fourth preambular paragraph of Resolution 1441 must be highlighted.[195] Apart from flipping the order of the words "relevant" and "subsequent," this wording is the same as paragraph 2 of Resolution 678.[196] This Article emphasizes this wording to argue that states were authorized to use force to implement subsequent resolutions dealing with Iraq. Contrary to Murphy's assertion that "all subsequent relevant resolutions" must be limited to resolutions before Resolution 678,[197] this does not change the fact that paragraph 1 of Resolution 678 refers broadly to "all subsequent relevant resolutions" and the preambular paragraph Murphy cites refers narrowly to "the *above-mentioned* subsequent relevant resolutions."[198] If the Security Council did not mean *all* when it said "all subsequent relevant resolutions" in paragraph 1 of Resolution 678, then it would not have used the word. Nor would the Security Council have repeated this exact language in the fourth preambular paragraph of Resolution 1441, but instead would have taken

193. *Id.*
194. *Id.*
195. *Id.*
196. S.C. Res. 678, *supra* note 7, ¶ 2. Interestingly, Yoo relies on this language to argue that states could use force under Resolution 678 to enforce all future resolutions up to and including Resolution 1441. *See* Yoo, *supra* note 95, at 567. While this Article might have adopted this approach to arguing that the authorization continued until 2003, it is the "remain valid" language of Resolution 686 that is particularly persuasive for this Author, which language is absent from Resolution 678.
197. MURPHY, *supra* note 15, at 181.
198. S.C. Res. 678, *supra* note 7, ¶ 2 (emphasis added).

the opportunity to clarify what it meant by the phrase. It did not do so, thus indicating that it meant exactly what it said: "all subsequent relevant resolutions," not just those before Resolution 678. Therefore, the eight requirements of Resolution 686 could also be enforced using "all necessary means," even assuming the absence of the phrase "remain valid" in Resolution 686.

Interestingly, a draft of what was to become Resolution 1441 was proposed by the United States and United Kingdom in 2002, which contained a provision that stated that Iraq's failure to comply with this draft resolution would authorize states to use all necessary means to restore international peace and security; France and others objected to this language authorizing the use of force, which ultimately was removed from the draft.[199] Such language in the draft resolution would suggest that the states proposing it did not consider the authorization of Resolution 678 as still valid. However, the ICJ has been reluctant to rely on rejected draft language to imply meaning in adopted language.[200] Moreover, and more specific to this case, this is not the necessary conclusion because the United States and the United Kingdom could have sought to reiterate the authorization of force or to bring it forward in time so that they did not have to look back to the early 1990s for such an authorization.[201] The United States even asserted on several key occasions between the ostensible end of the 1991 Gulf War and the beginning of the 2003 invasion of Iraq that the authorization to use force under Resolution 678 continued.[202] Ultimately, the United States and the United Kingdom showed their partial willingness to reach back to the 1990s for the requisite authorization while insisting on their own interpretation of Resolution 1441. This naturally leads the discussion to the revival theory.

Before doing so, however, this section provides a hypothetical situation to test the points made above relating to Resolution 1441. Assume, arguendo, that paragraph 1 of Resolution 1441 declared that

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199. *See* Murphy, *supra* note 25, at 217 (citing numerous newspaper articles that reported these developments).

200. *See supra* text accompanying note 37 (citing *Certain Expenses of the United Nations* advisory opinion).

201. Indeed, there would appear to be little legal significance in the United States and United Kingdom going to the Security Council a second time for an authorization to use force prior to the 2003 invasion.

202. *See, e.g.*, Frowein, *supra* note 56, at 106, 111 (citing, inter alia, James P. Rubin, U.S. Department of State Daily Press Briefing (Feb. 17, 1998), *available at* http://secretary.state.gov/www/briefings/9802/980217db.html ("Let's bear in mind that this action, if it's necessary, is an action authorized by the United Nations Security Council, pursuant to Resolution 687, and underlying that, Resolution 678.")).

Iraq *was in compliance* with its obligations arising from such resolutions as Resolutions 686 and 687, and not that "Iraq has been and remains in material breach of its obligations under relevant resolutions," as it actually reads.[203] The United States, or rather the Coalition of the Willing, likely would have found it difficult to rely on Resolutions 686 and 678 for the requisite authorization had it chosen to base its actions solely on these resolutions. If the United States maintained that Iraq was in material breach, despite this hypothetical resolution, and relied on Resolution 686 in conjunction with Resolution 678 for its authorization to use force, whether such an action was lawful likely would depend on an adjudicators' opinion of whether Iraq actually was in material breach. The ICJ asserted in *Nicaragua v. United States* that it will look past the assertions of parties and make its own determination on a particular issue,[204] and possibly could do so with regard to the language of this hypothetical resolution. If the ICJ determined that Iraq actually had not fulfilled the requirements of Resolution 686, then the use of force by the United States and other member states cooperating with Kuwait could be considered legal under Resolution 686. Still, the ICJ seems far more inclined to defer to Security Council decisions, as occurred in the *Lockerbie* case,[205] in which case such a justification for the use of force likely would have been deemed invalid. In the end, it is difficult to anticipate the likely result of a hypothetical set of facts using such counterfactual reasoning, though the probative value of such an exercise cannot be overlooked. Regardless, the actual Resolution 1441 declared Iraq to be in "material breach," which some Security Council members (notably the United States and the United Kingdom) have equated to an authorization to use force in the past.[206]

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203. S.C. Res. 1441, *supra* note 20, ¶ 1.

204. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97 (June 27) (providing, in part: "The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States.").

205. *See* Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 3, 14 (Order of Apr. 14). The Author acknowledges that there are many interesting issues concerning the relationship between the ICJ and the Security Council. *See* Kathleen Renée Cronin-Furman, *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship*, 106 COLUM. L. REV. 435 (2006). A discussion of these issues falls outside the narrow scope of this Article.

206. *See* Murphy, *supra* note 25, at 213.

2. The Revival Theory

The revival theory asserts that the authorization to use force contained in Resolutions 678 was revived, after a period of dormancy, with Resolution 1441 and its finding that Iraq was in material breach of Resolution 678 and other resolutions. This is problematic for this Article's thesis because even the George W. Bush Administration and the U.K. Attorney General adopted the theory and its implicit assertion that the authorization died at some point and then was resuscitated.[207] Lowe sees the revival theory as "[t]he only possible basis for a legal justification for the invasion of Iraq."[208] While he correctly points out that Resolution 1441 "quite patently does not authorise the use of force against Iraq and does not indicate that the authorization to the 1991 States acting in coalition with Kuwait could possibly be revived,"[209] he fails to see the possibility that the authorization never became dormant. Contrary to a point raised by Koh against the revival theory,[210] the likelihood that the 2002 members of the Security Council felt that the failure to get a second resolution after Resolution 1441 meant that their opinion did not matter does not change the open-ended language of Resolution 686 that extended the authorization to use force beyond the removal of Iraq from Kuwait. Nor does the time period between the adoption of Resolutions 678 and 686, on the one hand, and the 2003 invasion of Iraq, on the other, necessarily diminish the validity of that initial authorization, contrary to another of Koh's assertions.[211] As asserted in Part III.A above, Security Council-authorized peacekeeping operations continue to exist until termination or expiration as provided in the authorization, despite the passage of several decades since the peak in their activity. Likewise, the authorization from Resolution 678 continued in its validity through the 2003 invasion, with the language "remain

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207. *See* U.N. SCOR, 4726th mtg., at 25, U.N. Doc. S/PV.4726 (Resumption 1) (Mar. 27, 2003), *cited by* Murphy, *supra* note 25, at 175 n.12 ("Resolution 687 (1991) imposed a series of obligations on Iraq that were the conditions of the ceasefire. It has long been recognized and understood that a material breach of those obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990)."); Taft & Buchwald, *supra* note 26, at 562; Warbrick, *supra* note 1, at 814 (reprinting Attorney-General Lord Goldsmith's answer to a question from the House of Lords and pointing out that, had the Security Council meant that another resolution was needed for military intervention in Iraq, it would not have used the soft language "consider the matter").

208. Lowe, *supra* note 1, at 865.

209. *Id.*

210. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1523 (2003).

211. *See id.*

valid" in resolution 686 and in the absence of a sunset clause or a subsequent resolution that explicitly modified that authorization.

Critics will be tempted to point to the language of paragraph 12 of Resolution 1441 to argue that the erstwhile authorization had not been resurrected or else there would not be a need to meet again, where the Security Council decided to "convene immediately" after the receipt of certain information regarding Iraq's compliance "in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."[212] However, one must be careful not to read too much into this provision. Notably, it simply calls for a meeting at which the body would "consider the situation." At the time of Resolution 1441's adoption, U.S. Ambassador Negroponte and U.K. Ambassador Greenstock both underlined the point that, in case of further Iraqi breach, "the matter will return to the Council for *discussions* as required in paragraph 12,"[213] not for another vote. Even French Ambassador Levitte acknowledged that the obligation on the Security Council, should Iraq fail to comply with Resolution 1441, would be to "*meet* immediately to evaluate the seriousness of the violations and draw the appropriate conclusions," thus removing "all ambiguity on this point."[214] This comment from Ambassador Levitte suggests that even the strongest proponents of the two-stage approach recognized that another vote would not be necessary before the envisioned "serious consequences" could be implemented. Ambassador Negroponte went on to threaten that, "one way or another, Iraq will be disarmed," further implying a willingness to use unilateral action against Iraq.[215]

No amount of post hoc statements to the contrary from the individual Security Council members will change what the resolution says, so analyzing all of them would seem somewhat futile. Indeed, as Part II.A pointed out above, U.N. Charter article 25 binds states to "accept and carry out the *decisions* of the Security Council,"[216] not the sui generis interpretations of those decisions by its membership. The United States and the United Kingdom were correct in pointing this out, even though another resolution clearly would have helped improve the

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212. S.C. Res. 1441, *supra* note 20, ¶ 12.

213. U.N. SCOR, 57th Sess., 4644th mtg., at 5, U.N. Doc. S/PV.4644 (Nov. 8, 2002), at 5 (emphasis added).

214. *Id.* (emphasis added).

215. *Id.* at 3. Similarly, Ambassador Greenstock asserted that if Iraq did not comply, "the United Kingdom—together, we trust, with other Members of the Security Council—will ensure that the task of disarmament required by the resolutions is completed." *Id.* at 5.

216. U.N. Charter art. 25 (emphasis added).

appearance of the legitimacy of their actions for most other states. Moreover, even though there may have been an occasional hiatus in the reduced coalition's use of force against Iraq between the ostensible end of the 1991 Gulf War and the beginning of the 2003 invasion, as explained in the following Subpart, this should not affect the underlying authorization. This is especially true where the express conditions for the authorization's termination had not been met and no subsequent Security Council resolution expressly superseded that authorization.

3. The No-Fly Zones

In an attempt to skirt the issue of revival, some commentators point to the no-fly zones as keeping Resolution 678's authorization alive until 2003. There are two potential flaws in this approach. First, the United States and the United Kingdom do not appear to have asserted that the no-fly zones were authorized by Resolution 678, instead choosing to focus on the self-defense justification for enforcing no-fly zones that appear to have been presumed legal.[217] Yoo points to the 1993 and 1998 use of force by the United States against Iraq in enforcing the no-fly zones to argue that the United States has had a "consistent position . . . that Resolution 678's authorization continued" past 1991.[218] On the contrary, the United States asserted that these zones were "consistent with Resolution 688,"[219] which is different from saying that the zones were authorized by Resolution 688, let alone Resolution 678.[220] This is so despite the point that President George H.W. Bush was "*willing* to take military action to implement SC Res. 678's call for the restoration of

217. *See, e.g.*, Krisch, *supra* note 16, at 74.

218. Yoo, *supra* note 95, at 570; *see also* Rostow, *supra* note 95, at 24 (asserting, without providing any support, that the United States and the United Kingdom "arguably were acting on the continued authority of Resolution 678 (1990)").

219. *See* SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 198 (2001). Interestingly, the coalition apparently was already flying over Iraqi territory delivering humanitarian assistance to the Kurds before Resolution 688 was even adopted—acts that Iraq condemned as violations of its sovereignty. *See* Warbrick, *supra* note 146, at 972 (citing UNNS NS/14/91, at 1).

220. In fact, this appears to have been the legal position of the United Kingdom on these zones as well. *See* Robert Cryer & A.P. Simester, *Iraq and the Use of Force: Do the Side-Effects Justify the Means?*, 7 THEORETICAL INQUIRIES L. 9, 24 (2006); *see also* Krisch, *supra* note 16, at 75-76 (citing, inter alia, Press Release, U.K. Ministry of Defence, 334/98 (Dec. 30, 1998) (asserting that the no-fly zones "were set up *in support of* UN Security Council Resolution 688"); U.N. SCOR, 54th Sess., 3980th mtg., at 17, U.N. Doc. S/PV.3980 (Resumption 1) (Feb. 22, 1990) (similar wording)). However, Resolution 688 was altogether silent as to no-fly zones, the use of military force, and even lacked reference to U.N. Charter Chapter VII.

international peace and security to the region."[221] President Bush eventually came to see U.S. enforcement of the no-fly zones as being authorized by Resolution 687,[222] although Resolution 687 neither is Resolution 678, nor expressly authorizes such a use of force. President Clinton asserted that the 1998 missile and aircraft attacks against Iraq were consistent with and supported by such resolutions as 678 and 687,[223] which is not the same as claiming that such attacks were authorized by these resolutions. Admittedly, United Nations Secretary-General Boutros-Ghali asserted that the 1993 attacks to enforce these zones received "a mandate from the Security Council under resolution 678 (1991), and the motive of the raid was Iraq's violation of that resolution, which concerns the cease-fire."[224] However, Murphy and Gray are correct to question the authority of an unprepared response by the Secretary-General to a question at a press luncheon as representing the collective mind of the Security Council.[225]

Even if one were to assume that the enforcement of a no-fly zone could keep an authorization to use force alive, putting aside the legal basis for such a zone, there remains one potential problem: there might be a gap between the "formal cease-fire agreement" of Resolution 687 and the establishment of the northern no-fly zone. That zone was established after Iraq had accepted the formal cease-fire agreement of Resolution 687, adopted on April 6. The coalition's initial response to the Iraqi violence against the Kurds and Shiites after the formal cease-fire was to assert that it was an internal matter for Iraq.[226] The safety of those Iraqi minorities appears to have become a concern only gradually, which is most noticeable by the lack of any mention of their safety in Resolution 687. Indeed, according to the Official Record of the Security Council, Luxembourg appears to have been the first to show concern for

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221. Yoo, *supra* note 95, at 570 n.42 (citing Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 PUB. PAPERS 1164-65 (Sept. 16, 1991) (emphasis added)).

222. *See* Letter to Congressional Leaders Reporting on Iraq's Compliance With United Nations Security Council Resolutions, 2 PUB. PAPERS 2269 (Jan. 19, 1993); Krisch, *supra* note 16, at 71.

223. *See* Letter to Congressional Leaders on the Military Strikes Against Iraq, 2 PUB. PAPERS 2195-96 (Dec. 18, 1998).

224. Press Release, Secretary-General, Conference by Secretary-General Boutros Boutros-Ghali Following Diplomatic Press Club Luncheon in Paris on 14 January, U.N. Doc. SG/SM/4902/Rev.1 (Jan. 15, 1993).

225. *See* Gray, *supra* note 124, at 167; Murphy, *supra* note 25, at 206-07.

226. *See* Gray, *supra* note 124, at 160; Malanczuk, *supra* note 3, at 119 (asserting that China, the USSR, and the United States all opposed U.N. intervention there, at least at the beginning, for this reason).

their protection in the north of Iraq on April 4,[227] with Turkey's President expressing the need to protect the Kurds in Iraqi territory on April 7, the U.K. Prime Minister tentatively proposing a northern zone to protect the Kurds on April 8, and the U.S. government ordering the Iraqi government to stop all military activities north of the 36th parallel so that supplies could be sent to Kurdish refugees on April 10.[228] On April 16, this zone became an official no-fly zone by an announcement from President Bush.[229]

This becomes a problem for those commentators who see Resolution 687 as ending the authorization to use force under Resolution 678. The Security Council adopted Resolution 687 on April 3.[230] Iraq begrudgingly accepted the cease-fire terms on April 6,[231] as required by paragraph 33 of Resolution 687, which stated that the cease-fire would become effective "upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance."[232] Although the gap is at least three days and probably closer to ten days, this represents a gap between when the authorization of Resolution 678 clearly was valid, according to these commentators, and when the zones were established in theory. Nonetheless, if one considers that Resolution 687 could not conceivably have terminated the authorization until the Secretary-General notified the Security Council of the full deployment of UNIKOM as required by paragraph 6 of Resolution 687, which happened on June 12, 1991, then there is ample overlap between the establishment of the northern zone and the alleged date of termination for the authorization, thus making this argument plausible. However, reliance on Resolution 686 is a far more direct way to find authorization

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227. *See* Letter Dated 4 April 1991 from the Permanent Representative of Luxembourg to the United Nations Addressed to the Secretary-General, U.N. Doc. S/22443, at 2 (Apr. 4, 1991).

228. *See* CHESTERMAN, *supra* note 219, at 197-98. This does not, however, rule out the possibility or likelihood that other states expressed concern for the safety of the Kurds prior to the adoption of Resolution 687. The point being made here simply is that the protection of the Kurds formally was not considered by the Security Council as a whole at the time of Resolution 687's adoption.

229. *See id.* at 198 (citing Remarks on Assistance for Iraqi Refugees and a News Conference, 1 PUB. PAPERS 378, 381 (Apr. 16, 1991)). Please note that another no-fly zone was added on August, 26, 1992, in southern Iraq to protect the Shiites and was also done pursuant to Resolution 688. *See* CHESTERMAN, *supra* note 219, at 199 (citing Remarks on Hurricane Andrew and the Situation in Iraq and an Exchange with Reporters, 2 PUB. PAPERS 1429, 1430 (Apr. 26, 1992)). However, the establishment of this no-fly zone is less important to this discussion of the revival theory.

230. S.C. Res. 687, *supra* note 148, ¶ 33.

231. *See* Identical Letters Dated 6 April 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, U.N. Doc. S/22456 (Apr. 6, 1991).

232. S.C. Res. 687, *supra* note 148, ¶ 33.

for the invasion, given the questions over the legal basis for these no-fly zones.

In the end, while U.S. and U.K. decision makers could have been clearer and more consistent on their legal bases for the no-fly zones, what is clear is that they saw them as justified by, or at least consistent with, Security Council resolutions. The international community appears to have balked at the opportunity to challenge this assertion at that time. Granted, United Nations Secretary-General Pérez de Cuéllar asserted that these no-fly zones were not supported by Security Council authorization,[233] but states appear not to have followed his lead. Although this supposed oversight does not necessarily estop states from making this argument now, one cannot help but question whether such arguments are a vain attempt to rewrite history. Such criticism might also be leveled against this Article, because the United States and the United Kingdom appear not to have relied on Resolution 686 to justify the 2003 invasion of Iraq. Still, this does not change the fact that Resolution 686 provided the surest footing for such action.

V. CONCLUSION

As Benjamin Franklin wrote in a letter in 1783, "There never was a good war or a bad peace."[234] Despite this fundamental truth, the international legal system currently allows the use of force in at least two circumstances—for self-defense and for collective-security purposes under the direction of the Security Council. The clear language of Resolution 686 made the authorization to use force against Iraq under Resolution 678 remain valid until Iraq met certain requirements. Iraq never met those requirements, nor did the Security Council terminate that authorization—two facts that compel this Author to conclude that the 2003 invasion was legal. In essence, the Security Council left it up to the coalition members to decide when further force was necessary when it failed to provide a sunset clause in the initial authorization or to pass a resolution expressly superseding Resolution 686. In other words, Resolution 686 authorized states involved in the 1991 Gulf War to auto-interpret (or more specifically auto-enforce) Resolution 678 as long as

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233. *See* Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 90 (Lori Fisler Damrosch ed., 1993) (citing, inter alia, Barton Gellman & William Drozdiak, *U.S. Troops Enter Northern Iraq To Set Up Camps*, WASH. POST, Apr. 18, 1991, at A1).

234. Letter from Benjamin Franklin to Joseph Banks (July 27, 1783), *reprinted in* 1 THE PRIVATE CORRESPONDENCE OF BENJAMIN FRANKLIN 132 (3d ed. 1818).

Iraq failed to meet Resolution 686's conditions for the termination of the authorization and the Security Council did not expressly modify that authorization.[235]

Critics might have a problem with this type of auto-interpretation that would allow any state to rely on the open-ended authorization of Resolution 686 to take actions against Iraq without a further determination by the Security Council. As Alvarez points out, this type of arrangement would seem to suit the policies of hegemonic powers, in that they can use unilateral action that can then be legitimized by citing the Security Council's prior authorization.[236] However, auto-interpretation (or the right of each state to interpret the law for themselves) flows from the positivistic, decentralized view of international law adopted by this Article and is seen as the default rule for international law.[237] After all, those who apply rules are those who interpret them.[238] As an old legal adage goes, "where the legislator does not distinguish, the interpreter must not not distinguish."[239] States are the entities responsible for applying such Security Council resolutions as Resolution 686, at least according to U.N. Charter articles 25 and 48.[240] Therefore, it makes sense that states engage in auto-interpretation of Security Council resolutions when the Security Council has not provided its own interpretation, although such auto-interpretation naturally would not bind other entities. Ultimately, the Security Council ought to have

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235. This Article is not alone in viewing Resolution 686 in this light. Indeed, prior to the adoption of Resolution 686, Cuba strongly protested against Resolution 686 for establishing a situation in which states could use force without further Security Council authorization. *See* U.N. Doc. S/PV.2978, *supra* note 130, at 31-35; *see also* U.N. Doc. S/PV.2981, *supra* note 133, at 46 (Yemen asserting that the end of the war unilaterally can be determined by the forces of the alliance under Resolutions 686 and 687, and declaring: "These are the forces that decided to wage the battle, using the authority of the Council, and these are the forces that will decide upon the cessation of the operation. This might take years, because it is related to the guaranteeing of peace and security in the region, let alone the guaranteeing of the boundaries between Iraq and Kuwait.").

236. *See* Alvarez, *supra* note 139, at 881.

237. *See generally* 1 LEO GROSS, ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 383-86 (1984); Joel P. Trachtman, *The Jurisdiction of the World Trade Organization: Remarks by Joel P. Trachtman*, 98 ASIL PROC. 139, 140 (2004) (discussing auto-interpretation as the default rule for international law).

238. *See* HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 839 (4th rev. ed., 2003). This does not necessarily mean that other entities do not have a role in interpretation, but only that states have a front-line position in interpreting such resolutions. Even when other entities are involved in interpretation, the primary manner of interpretation (the emphasis on the text to derive intent) ought not to change. *See* REUTER, *supra* note 70, at 95-96 (mentioning this point in the context of treaty interpretation).

239. JORGE CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 72 (Alba Amoia trans., 1969).

240. U.N. Charter arts. 25, 48.

used greater precision in drafting Resolution 686 if it wanted to reserve for itself the ability to determine when force could be used against Iraq again in the future, even though such precision might have made the resolution more difficult to adopt.[241] In the absence of such precision, auto-interpretation seems supported by the language of the resolution.

Critics might also assert that this Article unacceptably overlooks much of the state practice of the Security Council's members between Resolutions 687 and 1441—in particular, the general agreement that the Security Council, not any one member, was to decide when Iraq had failed to comply with Resolution 687 and what consequences would result. Admittedly, practice can amend U.N. documents—for example, practice allows the Security Council to reach substantive decisions even when the permanent members abstain, although U.N. Charter article 27(3) clearly requires their "concurring votes" for such a decision.[242] This being the case, one might legitimately ask why Security Council practice could not amend the authorization to use force contained in such a resolution as Resolution 686 (read in conjunction with Resolution 678). The crucial difference is that the practice of *most* states *most* of the time is insufficient to override the unambiguous language of a particular resolution.

This Article aimed to provide a new lens through which one can look at the legality of the 2003 invasion of Iraq. The analysis took into account some competing interpretations for the relevant resolutions regarding Iraq as they relate to Resolution 686. Most importantly, it attempted to anticipate likely criticisms so that the response to this Article, if any, can push past prior argumentation and be that much more lucid in explaining why the 2003 invasion of Iraq was illegal. However, under a textualist approach to interpreting Resolution 686's "remain valid," the "illegal" camp will be hard pressed to come up with a coherent interpretation of such clear language. For the sake of promoting peace over war, let us hope that the analysis provided here proves to be flawed.

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241. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 427, 455 (2000) (discussing the role of precision in limiting self-serving auto-interpretation); *see also* Byers, *supra* note 53, at 180; Jeffrey S. Morton, *The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law*, 9 ILSA J. INT'L & COMP. L. 75, 92 (2002) ("[T]he ambiguous nature of Council resolutions historically has given rise to the notion that authorization may exist despite the absence of an explicit Council authorization.").

242. U.N. Charter art. 27, para. 3.