The Gulf Conflict 2003:
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Table of Contents

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Introduction

The Gulf Crisis emerged as the first major crisis of the new epoch, seen by many as marking a new role for the Security Council (SC) and the start of a new legal order.[1] For the first time since 1945, the SC was able to revitalise the collective security scheme devised in the United Nations Charter (Charter)[2] and establish itself as the foremost decision-making organ of the international community.

The current conflict in Iraq constitutes a turning point in the structure and functioning of the international legal system and the law of the United Nations (UN). This system was constructed under three essential foundations: the system of war prevention comprised by the proscription of the use of force; a collective security system to secure that prohibition and to deal with threats and aggressions that endanger the international peace and security; and by the obligation to resort to peaceful means for the settlement of disputes.

The Gulf Conflict has its origins back in 1990 when Iraq invaded Kuwait and was repealed by the Coalition Forces under operation "*Desert Storm*". Though, after the withdrawal of the Iraqi military forces from Kuwait, the problem developed into a crude humanitarian crisis and a continuous struggle to enforce several UN Security Council Resolutions (UNSCR), that obliged Iraq *inter alia* to bring to an end the development of any new nuclear, biological, or chemical weapons and to disarm under the supervision of an international commission.

Thirteen years have elapsed and numerous incidents have taken place between Iraq and the Coalition Forces led by the United States (US) and the United Kingdom (UK) primarily. However, after the terrorists' events in New York, Washington and Pennsylvania on September 2001, the US foreign policy shifted and focused on a new military offensive against terrorist groups and States sponsors of terrorism. The first actions were conducted against the terrorist group Al Qaeda and the

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[1] **Gray, Christine**, *"International Law and the Use of Force"*, Oxford University Press, 2000, p. 85

[2] **Fassbender, Bardo,** *"Uncertain Steps Into A Post-Cold War World: The Role And Functioning Of The UN Security Council After A Decade Of Measures Against Iraq"*, EJIL 2002, 13 p. 273-274

Afghanistan's Taliban regime. A few months later, President Bush brought his case against Iraq before the UN, and subsequently UNSCR 1441 was unanimously adopted by the Council.

Since then, the inspections regime resumed (given that they were interrupted back in 1998) and a final opportunity to disarm and comply with the will of the SC was given to Iraq. The world was suddenly divided discussing the means to resolve this crisis. On the one hand, Russia, France, China and a large number of countries favoured the continuation of inspections and the substantial strengthening of their human and technical capabilities; on the other the US, UK, Spain, Australia and a few other countries anticipated that the only way to deal with Saddam was by the use of force. But were the latter that unilaterally launched Operation "*Iraqi Freedom*" and build the case to use force against Iraq outside the UN umbrella alleging its right to enforce UNSC Resolutions, implied authorisation and self defence.

In this context, under a deductive methodology, this essay is structured in two chapters. The first part comprises an analytical approach to the background of the Conflict. It considers the legal framework of the use of force and subsequently is focused on the practice. The approach to the different incidents departs from the legal justifications put forward by the Coalition Forces: firstly, the cases that encompass legal justifications under the authority of the UNSC; and secondly the events where the use of force was justified under self-defence.

The second chapter begins with a succinct reference to the environment of the actual conflict and then describes the facts of the hostilities. Once the framework is settled, a detailed analysis on the legal justifications put forward mainly by the US and the UK is developed. This study includes an examination of the UNSCR 1441, the anticipatory self-defence and the polemic Bush Doctrine. The final part of this chapter embraces remarks and conclusions on the legality of the use of force against Iraq and its implications under international law.

The use of force in international relations can be studied from two different thresholds. The one that comprise when to use force and its consequent legality (*ius ad bellum*); and the one focused on how to use force (*ius in bello*) where the conduct of hostilities must meet the requirements of international humanitarian law. However, this dissertation is confined only to *ius ad bellum* questions.

Chapter I
The Background

A. Legal Framework of the Use of Force

The international legal system built in 1945 was founded under the essential proscription on the threat or use of force in international relations. This principle that has been long recognized as part of customary international law and as a rule of *jus cogens* binding all States, is contained in Article 2(4) of the Charter and was reinforced by a system of collective security measures included in Chapter VII of the same Charter. Indeed, there is general conformity on the main principles that comprise the law on the use of force and its two recognized exceptions: the collective use of force by the UN and the individual or collective self-defence by member states.

1. Collective Security

The collective use of force by the UN has been established as an institutional exception whereby the SC, acting on behalf of the UN under its powers conferred in Chapter VII of the Charter, executes its primary responsibility for the maintenance of international peace and security.[3] For that purpose, Article 39 of the Charter empowers the SC to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations, or decide what measures shall be taken to maintain or restore international peace and security.[4] Moreover, within the context of Article 39, the SC can use its power to deal with actual or even imminent threats. The allusion to "threat to the peace" reveals that the SC can use a preemptive action to enforce the regime of collective security created by the Charter. Throughout the years the SC has conferred the exercise of its

[3] See Article 24 of the Charter

[4] These measures are contained in Articles 41 and 42 of the Charter. While the former comprise measures not involving the use of armed force (these may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations); the latter includes measures involving the use of force (these may include action by air, sea, or land forces as may be necessary to maintain or restore international peace and security).

powers to member states. Even though, no state can take military action to maintain or restore international peace and security without an express authorisation by the SC. Thus, in the absence of such endorsement, only the right to act in self-defence remains.

2. Self-Defence

The self-defence exception pre-exists the Charter as a customary law right but has been preserved by Article 51 of the Charter where the conditions for its exercise are detailed.[5] Under the Charter, this inherent right can be implemented individually or collectively by any State or group of States whenever an actual armed attack occurs against them; and its exercise is not subject to any requirement of prior authorisation by the UNSC because this right is widely recognized as an aspect of the sovereignty of the State.[6] However, State practice and *opinio juris* confirm that the right of self-defence can be also exercised to prevent imminent armed attacks; this kind of self-defence is known as anticipatory or preemptive self-defence. Three instances are suggestive of State recognition of a wider right of self-defence: the US blockade against Cuba during the 1962 missile crisis, the 1967 six-day war between Israel and the Arab States, and the Israel's raid on the Iraqi nuclear reactor in 1981.

Notwithstanding, in the actual Gulf Crisis the US Government has gone further and proclaims an ample Doctrine of preemptive strikes which intends to adapt and expand the concept of anticipatory self-defence to comprise alleged threats that might materialise at some time in the future. This doctrine known as the Bush Doctrine has been widely rejected; however, this subject will be studied in the second chapter of this paper.

These two exceptions to the ban on the use of force contained in the Charter have come together in the current Iraq crisis. The US, the UK and Australia among other governments, are attempting to widen these exceptions rather than trying to create new ones, "a difficult feat when faced with a prohibition that is recognised as *jus cogens.*"[7] Conclusively, the preemptive power of the SC is much broader than the

[5] Article 51 does not, however, state all of the requirements for a lawful use of force in self-defence, for it is commonly accepted that, to be lawful, the use of force must not surpass what is necessary and proportionate in self-defence.

[6] See **Greenwood, Christopher,** "*International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*", San Diego Int'l L.J. 7, 2003, p 11.

[7] **White, Nigel D.,** "*Self-Defence, Security Council Authority and Iraq*", Essays in Honour of Hilaire McCoubrey, J. Morris and N.D. White (eds) (Forthcoming) 2003

power of individual States to take action by way of self-defence against threats of armed attack.

B. The Use of Force against Iraq since 1990.

Through the development of the Gulf Conflict diverse arguments have been suggested to justify the threat and the use of force against Iraq. Therefore, to reveal the legal foundation of these incidents it will be necessary to analyse the different claims that have been put forward, as well as the content and interpretation of diverse UNSC Resolutions which comprise the view and mandate of the UN vis-à-vis the conflict.

The 13 years conflict is unquestionably linked in facts and motives; still, the legal arguments put forward are diverse and differ in time and circumstance. While the use of force by the Coalition in 1991 has been accepted as lawful in that it was expressly authorised by the SC, "that does not mean that all subsequent threats and uses of force against Iraq are lawful - the system is loose and decentralized, but there are clear limits to it."[8] Consequently, to understand the context and legal framework of the actual crisis, the conflict has to be considered since its origins back in 1990.

1. The Use of Force under the authority of the UN Security Council

a. Operation "*Desert Storm*"

On August 2nd, 1990, Iraq invaded Kuwait motivated by severe financial pressures and after a dispute between both countries over oil pricing and production levels as well as over Iraqi debts to Kuwait. The incursion by Iraq's armed forces and its further military occupation of Kuwait as an annexed territory triggered the UNSCR 660 (1990),[9] which determined the existence of 'a breach of international peace and security', and demanded immediate and unconditional withdrawal of the Iraqi forces.[10] After that, the Council imposed economic sanctions (Resolution 661)[11] and even a blockade (Resolution 665).[12]

Iraq presented varying and inconsistent arguments to support its armed aggression against Kuwait; initially it seemed to imply that it had intervened in support of an indigenous 'Provisional Free Kuwait Government'; other claims were related to

[8] **White, Nigel D., "***The Legality of the threat of force against Iraq*", Security Dialogue, 1999, 30 (1), p. 76
[9] S/RES/660 (1990) of 2 August 1990
[10] **Dinstein, Yoram,** *'War Aggression and Self-Defence',* Cambridge University Press, 2001, p. 242
[11] S/RES/661 (1990) of 6 August 1990
[12] S/RES/665 (1990) of 25 August 1990

territorial or border disputes and an attempt to linkage the invasion with the Arab-Israeli conflict.[13] Nevertheless, Iraq's aggressive policy, its international discredit and its defiance to the aforementioned resolutions provoked a strong condemnation and response by the international community.

On 29 November, the SC approved UNSCR 678 (1990), the effect of which was to authorise the use of military force against Iraq if its forces had not been withdrawn from Kuwait by mid-January 1991. The resolution presented Iraq an ultimate opportunity to comply with the demands of the SC or the UN member states were authorised to co-operate with the Government of Kuwait to 'use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area'.[14] Therefore, when it became obvious that Iraq would respond neither to the UN Security Council resolutions nor to other diplomatic initiatives, enforcement action was executed under UN authorisation by the coalition led by the US, the UK and France.[15]

The interpretation of Resolution 678 and the application of the exception on the use of force by the coalition forces has generated dissimilar opinions among commentators. The approach to this topic depends on the perception of the text of Resolution 678, its connection to the facts, and the preceding debate in the SC. On the one hand, some analysts assert that the use of force to liberate Kuwait involved not self-defence but, rather, the interpretation and application of a UNSCR.[16] On the other, some affirm that while the SC abstained from deploying a veritable UN force as an instrument of collective security, it gave its blessing in advance to the voluntary exercise of collective self-defence by the members of the coalition.[17] In other words, the coalition required and obtained from the Council consent for the exercise of collective self-defence against Iraq well before the projected military collide.[18] However, it is suggested that "Operation *'Desert Storm'* against Iraq was an action taken in collective self-defence only during the initial phase of the crisis as they gathered their forces in Saudi Arabia and the Gulf region, after the Security Council

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[13] **Norton, John**, "*Crisis in the Gulf: Enforcing the Rule of Law*", Oceana Publications, 1992, pp. 189-251

[14] S/RES/678 (1990) of 29 November 1990

[15] About 40 nations contributed the Coalition, the US, UK and France providing the largest military contingent, Arab contingents came from the countries of the Gulf Co-operation Council and from Syria, Egypt and Morocco. *See* "*Britain and the Gulf Crisis*", Aspects of Britain, HMSO Publications Centre, London, 1993, p. 20

[16] **Carnahan**, "*Protecting Nuclear facilities from Military Attack: Prospects after the Gulf War"*, 86 AJIL 524, 527 (1992)

[17] **Dinstein,** supra 10 at 244

[18] Ibid

had imposed sanctions under resolution 661 of August 1990 but before it had authorised the use of force in resolution 678 of November 1990."[19] As a result, once resolution 678 was voted, the operation to liberate Kuwait was certainly an UN-authorised operation. According to Professor White, "air strikes and threats of such subsequent to the cease fire in 1991 and purportedly taken within the ambit of the UN collective security system can be justified only if sanctioned by a provision within a Security Council resolution."[20]

Thereafter, following a brief and successful campaign, the coalition forced an Iraqi withdrawal from Kuwait and hostilities were suspended at the end of February. The SC determined a cease-fire formally ending the armed conflict[21] by imposing upon Iraq the requirement to unconditionally accept two vital terms: to eliminate weapons of mass destruction (WMD) and to allow verification by the UN Special Commission (UNSCOM) and the International Atomic Energy Authority (IAEA) teams to monitor and verify Iraq's compliance.

b. The Aftermath of the Gulf Conflict (1990-2003)

This period was distinguished by more than a decade of economic sanctions and continuous diplomatic and military confrontations between Iraq and the Coalition Forces. It also evidences the immense difficulty over the implementation of the post-conflict regime imposed by the Council because of Iraq's continuous obstruction of the weapons inspectors[22] and its noncompliance with its disarmament obligations. In addition, the on-going quarrel caused a gradual polarisation in the composition of the allied group that virtually isolated the American and British positions by 2002.

The post-conflict raised new legal dilemmas regarding the legality of the 'no-fly' zones and the interpretation of the UNSC resolutions. Hence, the legal strategy followed by the US and the UK was usually tailored by the circumstances rather than by the rules of international law; claims of implied authorisation, 'material breach' of SC resolutions, humanitarian intervention, self-defence and preemptive self-defence

[19] **White,** supra 8 at 76
[20] *See* Ibid at 76
[21] S/RES/687 (1991) of 3 April 1991
[22] Iraqi authorities blocked access to suspicious facilities, prevented installation of monitoring devices and taking of aerial photographs, destroyed documents, hauled incriminating equipment away from locations scheduled for inspection, and refused to comply with demands for the destruction of proscribed facilities and weapons components.

had been put forward repeatedly to justify the recurrent strikes perpetrated against Iraqi military objectives.

An assortment of clashes between Iraq and the coalition forces took place in 1991 and 1992; they escalated in 1993 when the coalition forces mounted a major operation against Iraqi missile sites and again in 1996, 1998 and repeatedly till 2003 when a long series of confrontations occurred.

c. Legal Justifications under UNSC Resolution 688 (1991)

The Kurds and Shiites Crisis (1991)

During Operation '*Desert Storm*', the Kurds and Shiites were encouraged by the coalition states to rebel against the Iraqi government. Therefore, the Shiite population in the south and the Kurdish in the north rose in revolt. Once the operation to drive Iraqi forces out of Kuwait was over, the government of Iraq turned on the Kurds and Shiites.[23] Initially the members of the SC considered this an internal affair for Iraq; however, after gross violations of human rights and impious slaughters of entire Kurdish and Shiites populations by the Iraqi regime, which provoked massive flow of refugees towards and across international frontiers as well as cross-border incursions,[24] the SC finally recognized the threat to international peace and security,[25] and came back to the matter calling on Iraq to end the repression of its civilian population as well as to allow access to international humanitarian organizations.[26]

On 3 April 1991, the SC passed Resolution 687 setting out the terms of a full ceasefire in the Gulf. Two days later, UNSCR 688 was adopted and accepted the crisis constituted a 'threat to the peace' thereby recognizing that the emergency was a 'Chapter VII' issue; however, "in doing so it failed to authorise any action under Chapter VII – indeed, it did not even mention Chapter VII".[27]

Despite the fact that the Coalition lacked an express authorisation from the SC, it decided to intervene to protect the Kurds and Shiites in Iraq. To achieve this

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[23] **Gray**, supra 1 at 28

[24] By April 2nd over a million Kurds had fled Iraq (approx. 800,000 Kurds in Iran, 300,000 in south-eastern Turkey and another 100,000 along the Turkish/Iraq border. By the first week of April, 800 to 1,000 people, mostly the very young and the very old, were dying each day. Available at: http://www.globalsecurity.org/military/ops/provide_comfort.htm

[25] *See*, **Franck, Thomas M.,** '*Recourse to Force, State Action against Threats and Armed Attacks*', Cambridge University Press, 2002, p. 152-153

[26] S/RES/688 (1991) of 5 April 1991

[27] **White,** supra 8 at 77

commitment, they proclaimed the creation of a 'safe haven' supported by the imposition of a 'no-fly' zone requiring Iraq to cease all military activity north of the 36th parallel. In addition, the Coalition launched Operation '*Provide Comfort*' to afford relief to the refugees, and to enforce the security of the refugees and the humanitarian effort. The Coalition did not offer any explicit legal justification for their action before the SC; however, the operation was not condemned by the SC or even the General Assembly.

Subsequently, in August 1992, without express authorisation by the SC the Coalition created an additional 'no-fly' zone south of the 32nd parallel[28] in an attempt to counter Iraqi air power and forestall any further persecution of the Shiite and Marsh Arabs in the south of Iraq. It seems that this apparent attempt to bring their action within an implied authorisation by UNSC Resolutions in the absence of any express authorisation provided a pattern that was to be followed in the future.[29] The coalition forces have interpreted resolution 688 as evidence that the SC may adopt measures under Chapter VII concerning an internal situation if a massive violation of human rights amounts to a threat to or breach of the peace, in spite of Article 2 (7) of the Charter. It is difficult to assert that an 'implied authorisation' exists in Resolution 688 since it does not provide for enforcement.[30] As a result, it cannot be contended that an express or implied authorisation to use force derives from Resolution 688. Even though, this did not stop the US and the UK from claiming that their actions in the continuing clashes with Iraq over the no-fly zones were 'consistent with', 'supportive of', 'in implementation of' and 'pursuant to' resolution 688.[31]

In this context, the US and the UK relied initially on an 'implied authorisation' argument, however, the latter moved gradually towards an expression of the doctrine of humanitarian intervention as the excuse for the actions in Iraq.[32] Although the 'humanitarian intervention' claim was never put forward officially before the SC,

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[28] *Keesing's Record of World Events*, 1992, Vol. 38, no. 7-8, p. 39068; See, **Adleman**, "*Humanitarian Intervention: The Case of the Kurds*", 1992, 4 Int.J. Refugee L. p. 4

[29] **Lobel and Ratner**, "*Bypassing the Security Council: ambiguous authorisation to use force, cease-fires and the Iraqi inspection regime"*, 93 AJIL (1999) 124

[30] *See*, **White,** supra 8 at 84

[31] For example, S/PV 3105; 64 BYbIL (1993) 728; 65 BYbIL (1994) 683; See, **Gray, Christine**, "*From Unity to Polarization: International Law and the Use of Force against Iraq*", EJIL, 13 (2002), at 9; Although a few years later the UK accepted that the legitimacy of its actions for the patrolling of the no-fly zones does not rest on UNSCR 688.

[32] **Gray**, supra 1 at 29

diverse statements and publications in the UK revealed the British position.[33] The military intervention in Iraq to protect the Kurdish and Shiites refugees can be accepted from a purely moral and humanitarian point of view;[34] however, its legality is dubious under the actual structure of international law where a new rule allowing humanitarian intervention is unwanted and objectionable for that could provide a pretext for abusive intervention.[35]

Operation '*Desert Strike'* (1996)

In 1996 Iraq moved 40,000 troops into northern Iraq to support the Kurdish Democratic Party in a conflict against the other main Kurdish militia group, the Patriotic Union of Kurdistan. Iraq's actions against elements of the Kurdish minority seemed to constitute a clear violation of Resolution 688; therefore, the coalition forces launched Operation '*Desert Strike*', a coordinated cruise missile attack against the Iraqi air defence infrastructure. Additionally, the US declared unilaterally the expansion of the southern 'no-fly' zone 'to the southern suburbs of Baghdad' in order to 'restrict Iraq's ability to conduct offensive operations in the region.'[36] When reporting the incident before the SC, the US 'strikingly offered no specifically legal argument.'[37] However, the Clinton administration 'claimed the extension of the 'no-fly' zone was permissible to enforce UNSCR 688, which calls for the protection of the Kurdish areas north and south of Baghdad.'[38]

The international reactions to the raids were adverse to the US. Basically, just the UK, Germany, Canada, and Japan were the only SC members to offer general support for the action.[39] While France and Spain considered the US 'acted too hastily' or 'should have sought a political solution', the Russian Foreign Minister Yevgeny Primakov stressed that 'the unilateral use of force by any country is

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[33] The Foreign and Commonwealth Office held that 'international intervention without the invitation of the country concerned can be justified in cases of extreme humanitarian need' *"UK Materials on International Law"*, 63 BYIL (1992) 824; "In terms of humanitarian justification, we are entitled to patrol the no-fly zones to prevent a grave humanitarian crisis. That is the legal justification in international law." House of Commons Hansard, Debates, 26 February 2001

[34] *See*, **Malanczuk, Peter, "***The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*", EJIL, 2, 1991, p. 114

[35] **Malanczuk,** supra 34 at 126; See also, **Schachter, Oscar**, "*UN Law in the Gulf Conflict*", 85 AJIL, 1991, 452 et seq., at 469

[36] Letter Dated 3 September 1996 from President Bill Clinton addressed to the President of the Security Council, UN SCOR, Annex, UN Doc. S/1996/711 (1996)

[37] **Gray,** supra 31 at 10

[38] **Boileau, Alain E.**, "*To the Suburbs of Baghdad: Clinton's Extension of the Southern Iraqi No-Fly Zone*", ILSA Journal of International and Comparative Law, at 888 (1997)

[39] Ibid at 890

absolutely impermissible'[40] and criticised the US for seeking to supplant the SC and for violating international law.[41] France refused to participate in the patrolling of the new expanded zone and eventually withdrew from patrolling the no-fly zones entirely.

In this perspective, to justify the US 1996 air strikes and the 'no-fly' zone extension as legally mandated by SC resolution 688 seems quite unfeasible since that resolution does not provide for enforcement and is short of explicit Chapter VII reference. Therefore, "this resolution clearly does not entitle states to use force or threaten it, for there is no express authorisation to do so".[42]

Legality of the no-fly zones

Resolution 688 has been used since 1991 as the legal basis to establish, maintain, extend and police the no-fly zones over northern and southern Iraq. Notwithstanding, even there is a finding of a threat to the peace in that Resolution, it was not voted under Chapter VII and 'does not provide for enforcement'.[43] In simple words: it did not authorise the use of force. As a result, it can not be argued that an express or implied authorisation to use force originates from Resolution 688.

This turns the circle back to the legality of the no-fly zones. The explanations provided by the Coalition for the creation of the no-fly zones are based on their interpretation of UNSCR 688.[44] However, this resolution neither creates no-fly zones nor authorises the members to 'enforce the demand that Iraq cease its repression of civilians.'[45] As stated above, it only appeals to the 'Member States and to all humanitarian organisations to contribute to these humanitarian relief efforts.'[46] In this context, if the SC had intended for the Coalition to directly enforce its resolution, it would have certainly included in the resolution a 'specific invocation of Chapter VII authority, an authorisation of Member State's action, and the use of the term all necessary means to indicate authority to use force,' as it had in Resolution 678.[47] Therefore, even though Resolution 688 was designed to serve humanitarian ends

[40] **Boileau** supra 38 at 891
[41] S/1996/712; UNYB (1996) 238
[42] **White,** supra 8 at 84
[43] Ibid
[44] **Mcilmail**, Timothy P., "*No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq*", 17 LOY. LA Int'l & Comp. L.J. 35, 83 (1994) at 50-53
[45] Ibid at 50
[46] S/RES/688 (1991) of 5 April 1991
[47] **Boileau,** supra 38 at 883

and the no-fly zones were set up as a means of protecting the Iraqi Kurds and Shiites,[48] it is evident that the no-fly zones had no explicit basis in the resolutions of the SC.[49]

d. Legal Justifications under UNSC Resolution 687 (1991)

Bombing raids against Iraq (1993)

On January 7th, 1993, Iraq notified UNSCOM that it could no longer use the Habbaniyah airfield, preventing short-notice inspections. In addition, Iraq began incursions into the de-militarized zone with Kuwait, and increased its military activity in the no-fly zones. In response, the President of the SC denounced the action as an "unacceptable and material breach of the relevant provisions of resolution 687 (1991) which established the cease-fire and provided the conditions essential to the restoration of peace and security in the region."[50] Subsequently, after the SC warned Iraq that "serious consequences" would flow from "continued defiance"[51] several airstrikes were perpetrated by the US, UK and France against military objectives in southern Iraq on 13 January 1993.[52]

This incident was carried out without a new resolution authorizing the use of force. The White House spokesman, Marlin Fitzwater, stated that '[t]he government of Iraq should understand that continued defiance of UN Security Council resolutions will not be tolerated' and if the cross-border raids continued, 'there would be further attacks without warning.' On the other hand, the UK Secretary of State for Defence argued self-defence of allied aircraft enforcing the no-fly zones.[53] The arguments used by the Coalition relied again in 'implied authorisation', self-defence and even humanitarian intervention.

The only express authorisation given by the Council since 1991 is found in UNSCR 678 (1990). The Coalition was permitted to 'use all necessary means to uphold and implement UNSCR 660 and all subsequent resolutions and to 'restore international peace and security in the area'. However, UNSCR 678 cannot be applied as the legal

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[48] **Symes, Gavin A.,** "*Force without law: Seeking a legal justification for the September 1996 U.S. Military intervention in Iraq*", Michigan Journal of International Law, 1998. pp. 581-622

[49] See **Murphy, Sean D.**, "*The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War*", 32 Columbia Journal of Transnational Law, 201, 210 (1994), at 234

[50] Statement by the President of the SC concerning UN flights into Iraqi territory, UN Doc. S/25081 (1993)

[51] Note by the President of the SC, UN Doc. S/25091 (1993) 11 January 1993

[52] Several strikes were also aimed at Iraqi threats to the no-fly zones in April, July and August 1993. *See*, **Wedgwood, Ruth,** "*The enforcement of Security Council resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction*", AJIL, vol. 92, 1998, p. 727

[53] **Weller, Marc,** "*Iraq and Kuwait: The Hostilities and their Aftermath*", Cambridge, 1993, pp. 736-737

justification for threats or uses of force subsequent to the formal ceasefire in resolution 687, given that Resolution 678 is no longer effective; it applied only to the initial military action against Iraq in 1991 but the delegation of authority to the Coalition ended with the formal ceasefire in resolution 687.[54]

Regarding the self-defence argument, it can be legally acceptable only if those warplanes had the right to be there in the first place;[55] but as stated above, the no-fly zones were imposed outside the framework of the collective security system. In addition, it seems difficult conceptually to justify the use of force without prior SC authorisation, even when such action is taken to enforce human rights or humanitarian values. So, a state using military force without SC authorisation claiming "humanitarian intervention" is in consequence engaging in an action for which the Charter text provides no apparent legal authority. In this order of ideas, there are no legal grounds to sustain that the raids of January 1993 were consonant with international law.

Operation '*Desert Fox*' (1998)

The action in the 'no-fly' zones soared significantly from 1998 when Iraq's regime ended all pretence of cooperating in any way with UNSCOM, forcing its inspection teams to leave that country.[56] In comeback, the US and UK, threat Iraq by proposing airstrikes in February and November 1998; and finally, on 16 December 1998 under Operation '*Desert Fox*' commenced a four days preemptive attack targeting suspected chemical and biological weapons facilities 'aimed to degrade Iraq's capability to build and use weapons of mass destruction and to diminish the military threat Iraq poses to its neighbors'.[57] Before the SC, the representative of the US Peter Burleigh stressed that coalition forces were acting under the authority provided by SC resolutions (UNSCR 678, 687, 1154 and 1205).[58]

While many governments supported the military action,[59] some of the harshest criticism came from Russia and China. The Russian representative stated that no

[54] **White,** supra 8 at 84
[55] Ibid
[56] **Gray**, supra 1 at 192
[57] S/PV.3955 SC 3955th Meeting, 16 December 1998
[58] S/RES/687 (1991) of 3 April 1991; S/RES/1154 (1998) of 2 March 1998; and S/RES/1205 (1998) of 5 November 1998. S/PV.3955 SC/6611, 3955th Meeting, 16 December 1998
[59] Among the countries that support the strikes were Australia, Austria, Canada, Czech Republic, Finland, Germany, Japan, New Zealand, Norway, Poland, South Korea, Spain and Netherlands. "*World reaction mixed; Russia, China harshly criticize U.S.*", *CNN.com*, 17 December 1998

one could act independently on behalf of the United Nations or assume the functions of a world policeman.[60] The Chinese Foreign Ministry spokesman condemned the action, and stated '[t]he United States has not received permission from the UN Security Council and took unilateral action in using force against Iraq, violating the UN Charter and international principles.'[61]

Once again, the US and UK used the doctrine of implied authorisation and the argument of 'material breach' of the cease-fire regime in Resolution 687 to justify the threat (February and November incidents) and the use of force (December) against Iraq.[62] But the threat or the use of force depends on SC authorisation; 'where there is no authorisation, there is no legal basis.'[63] Then, to assume the arguments put forward by the US and UK are legitimate, it is necessary to find out if there was an authorisation to use force at all.

As analysed before, the only express authorisation to use force was that in Resolution 678 that was suspended with the cease-fire agreement in resolution 687, then it seems difficult to consider that the coalition had implied authorisation to act. Unfortunately, the SC has used a vague language and a complex method of authorising individual member states or regional organisations to use force on behalf of the UN. This 'contracting out' mode leaves individual states with broad discretion to use 'ambiguous, open-textured resolutions to exercise control over the initiation, conduct and termination of hostilities.'[64] However, all resolutions adopted amid 687 (1991) and 1205 (1998) which have condemned Iraqi noncompliance on the disarmament provisions of Resolution 687 have not authorised the use or threat of force.[65] Even expressions such as 'serious consequences' or 'severest consequences' used in the resolutions and statements condemning Iraqi defiance of resolution 687 are not clear enough as to give them a patent legal basis.[66] Besides, a vast majority of states and Council members, including China, Russia and recently France, had continuously rejected the view that a tacit authorisation exists to enforce SC

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[60] S/PV.3955, SC 3955th Meeting, 16 December 1998

[61] "*World reaction mixed; Russia, China harshly criticize U.S.*", *CNN.com*, December 17, 1998

[62] US and British officials argued that Resolution 678 of 1990, which empowered the US and other states to use force against Iraq, still governed and continued to provide authority to punish Iraq for cease-fire violations. This position assumed that Resolution 678's authorisation to use force remained valid, albeit temporarily suspended. "*USIA Foreign Press News Briefing*", Federal News Service, March 3, 1998 available at www.lexis.com; See also, **Lobel and Ratner**, supra 29 at 125

[63] **White,** supra 8 at 80

[64] **Lobel and Ratner**, supra 29 at 125

[65] UNSC Resolutions 707 (1991), 715 (1991), 1060 (1996), 1115 (1997), 1134 (1997), 1137 (1997), 1154 (1998) and 1194 (1998);

[66] S/RES/1154 (1998) of 2 March 1998; See also **Weller,** supra 53 at 736-737

resolutions. As a final point, since the adoption of resolution 687 (1991), the SC has remained as a whole in charge of the situation, with no further delegation to states. In these circumstances, the threats of force against Iraq in February and November 1998, as well as the use of force under Operation '*Desert Fox*' had neither legal basis in SC resolutions or in international law.

2. The Use of Force in Self-Defence

a. Attack on Iraqi Intelligence Headquarters (1993)

On 26 June 1993, the US launched a missile attack against the Iraqi Military Intelligence Headquarters situated just outside Baghdad, in response to the alleged assassination attempt against former President George Bush during his visit to Kuwait in April 1993. The US argued that it was acting independently of any mandate of the UN to use force, and that it was exercising its sovereign right of self-defence against Iraq.[67]

The Permanent Representative of the US to the UN, Ambassador Madeleine Albright, reported the incident before the SC, and provided a legal justification for the American action. The plot was measured as a 'direct attack on the US, an attack that required a direct US response';[68] it also claimed that the air strike 'had been made only after having concluded that there was no reasonable prospect that new diplomatic initiatives or economic pressure could influence the Iraqi government to cease planning such attacks against Americans and that the target had been carefully chosen to minimise risk of collateral damage.'[69] Yet, Quigley contends that this is the language not of self-defence, but of reprisal.[70]

Immediately after de attacks, Iraq condemned the raids[71] supported by Muslim nations including former US allies in Operation *"Desert Storm"* that include Egypt, Turkey, Saudi Arabia and the Arab League.[72] So far, unilateralism sits uncomfortably in a multilateral world.[73] Nevertheless, there was widespread sympathy for the US action. The SC generally understood and appreciated the decision of the US to

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[67] **Kritsiotis, Dino**, "*The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law*", International and Comparative Law Quarterly, Vol. 45, 1996, p. 163
[68] **"***Excerpts from UN Speech: The Case for Clinton's Strike***",** *New York Times*, 28 June 1993, p. A5
[69] 1993 UNYB, 431
[70] *See*, **Quigley, John,** "*Missiles with a Message: The Legality Of The United States Raid On Iraq's Intelligence Headquarters*", Hastings International and Comparative Law Review, 1994, pp. 241-274
[71] UN Doc. S/26004 (27 June 1993), p. 2
[72] *See,* **Kritsiotis,** supra 67 at 164
[73] **Wedgwood,** supra 52 at 726

resort to the use of force;[74] UK Prime Minister John Major declared that the strike was a justified measure of self-defence and that Iraq's "deliberate and premeditated attempt to assassinate the former president of the USA" allowed the US legitimate recourse to the use of force.[75] While Russia and Germany expressly supported the legality of the US action, China condemned the attack.[76]

It is clear that one of the reasons of the missile strike was to deter a repetition of this sort of activity in the future, consequently, part of American claim to the right of self-defence relied upon the notion of anticipatory self-defence. Following the threshold set by the *Caroline Case* regarding anticipatory self-defence,[77] the strikes could be justified only if there was a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation' - and if nothing 'unreasonable or excessive' was done. Developing this idea, Kritsiotis assess that the US attack combined elements of an immediate retribution with a projected application of its right of self-defence.[78] Teplitz considers the attack on Baghdad was legal under international law since the response satisfied the requirements for the legitimate use of force in self-defence under customary international law: the US action was necessary, in response to an imminent threat, proportionate, and taken after the exhaustion of peaceful means.[79] Despite the fact, Kritsiotis thinks that the reliance on the right of self-defence by the US to justify its action does not "conform to any conventional understanding of the concept of self-defence, and, to this extent, it is difficult to reach the conclusion that the American missile strike was in strict compliance with international law. The retaliatory nature of the strike, and the context of the events in which it took place, strongly suggest that it was a de facto forcible reprisal which would ordinarily have no basis in international law".[80] Though, the vast international support given to the action, the lack of condemnation by the SC and the fact that the US defined and justified the strike as one of self-defence

[74] **Fletcher and Macintyre**, "*UN Accepts Clinton Evidence that Iraq Plotted to Kill Bush*", *The Times* (London), 29 June 1993, p. 13
[75] **Sherman**, "*Labour Questions the Legality of US Attack*", *The Times,* (London), 28 June 1993, p. 1
[76] **Whitney**, "*European Allies are giving strong backing to US raid*", *New York Times*, 28 June 1993, p. A5
[77] **Jennings, R.Y.**, "*The Caroline and Mcleod Cases*", AJIL, Vol. 32, No. 1, (1938), p. 89
[78] **Kritsiotis,** supra 67 at 165 et seq
[79] **Teplitz**, **Robert**, "*Taking Assassination Attempts Seriously: Did The United States Violate International Law In Forcefully Responding To The Iraqi Plot To Kill George Bush?*" 28 Cornell Int'l L.J.569, p. 617
[80] Ibid at 174-175

under an old recognised customary rule of self-defence endued the use of force with legitimacy.[81]

b. Bombing raids against Iraq (1999-2003)

Subsequent to Operation '*Desert Fox*' (1998), the US and the UK were involved in a continuous confrontation with Iraq to enforce the controversial no-fly zones.[82] These actions have been repeatedly justified under arguments of implied authorisation, material breach by Iraq of the ceasefire regime, humanitarian intervention, and also self-defence. Diverse statements by British and American officers clearly illustrate their position. For instance, regarding the 1999 raids, the UK declared before the SC that 'its operations were purely reactive and not aggressive', and that 'the no-fly zones were necessary both to limit Iraq's capacity to oppress its own people and to monitor its compliance with obligations'.[83] Later, while President Bush alleged about the February 2001 airstrikes that 'a routine mission was conducted to enforce the no-fly zone'[84], Geoff Hoon, the British Defence Secretary, stressed that the raids were 'a proportionate response to a recent increase in the threat to aircraft carrying out legitimate humanitarian patrols in the southern no-fly zone.'[85] In addition, American officers have also affirmed that their actions are in accordance with the 'rules of engagement', which provide for self-defence following aggressions by Iraqi military assets.[86] However, the February 2001 strikes were condemned by a number of the United States' closest allies in the Middle East and Europe.[87] One year later, after several attacks against Iraq, the US Central Command, argue that those raids were in 'retaliation for a hostile act by the Iraqis'.[88] In contrast, Iraq had repetitively

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[81] See, **Surchin, Alan D.,** "*Terror and the Law: The Unilateral Use Of Force And The June 1993 Bombing Of Baghdad*", Duke J. Comp. & Int'l L. 457, (1995), 457-496; See also, **Teplitz,** supra 79

[82] Incessant airstrikes took place in-between January 1999 and February 2003. See for instance: "*Us Top Guns Fire On Iraqi Planes*", **Mark Dowdney**, *The Mirror*, 6 January 1999; "*British planes attack Iraq sites*" **Ian Black**, *The Guardian*, 1 February 1999; "*Bombing in Iraq*", **Richard Norton –Taylor**, *The Guardian*, 11 November 2000; "*US and British Aircraft Bomb Iraqis*", **Mary Dejevsky**, *The Independent*, 17 February 2001; "*RAF in fresh Iraqi airstrikes*", **Michael Evans**, *The Times* (London), 15 August 2001; and "*Latest American airstrikes pave way for an invasion*", **Michael Evans**, *The Times* (London), 12 November 2002

[83] "*Contemporary Practice of the United States Relating to International Law*", 93 AJIL, 1999, 470 at 478

[84] "*Allied Planes bomb Baghdad*", **Richard Norton-Taylor**, *The Guardian*, 17 February 2001

[85] Ibid

[86] **Cornwell, Michael L.,** "*A Decade Of Failure: The Legality And Efficacy Of United Nations Actions In The Elimination Of Iraqi Weapons Of Mass Destruction*", Connecticut Journal of International Law, 2001, Westlaw

[87] Turkey, Egypt and France were among the more vocal critics, along with Russia, China, and the Secretary General of the Arab League. **Byers, Michael**, "*The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*", EJIL, 2002, 13 no. 1, at 30

[88] "*Latest American airstrikes pave way for an invasion*", **Michael Evans** *The Times*, 12 November 2002

condemned the attacks and insisted that UN weapons inspectors would not be allowed back in that country.[89]

Even with various attempts to frame the raids as a defensive measure to protect allied patrols over the no-fly zones from Iraqi anti-aircraft batteries, the matter has been perceived inside the SC as an attitude by the US and the UK to invoke "international law" to reinforce their position;[90] a unilateral action that has been widely condemned.[91] The legal justifications put forward by the US and the UK, assumed the legality of the no-fly zones;[92] they said that their pilots had the right of self-defence to cover action against Iraqi planes and missile sites. However, to assume that the self-defence argument is legally acceptable depends on the legality of the 'no-fly' zones, which as stated above, were imposed outside the rubric of SC resolutions. For that reason, the enforcement of the unilaterally proclaimed no-fly zones has thus come to be seen as illegitimate, despite UK protestations of humanitarian necessity.

[89] "*British planes attack Iraq sites*" **Ian Black**, *The Guardian*, 1 February 1999
[90] **Bilder and Malone**, "*Iraq: No Easy Response to 'The Greatest Threat'*", AJIL, January 2001
[91] Russia and China condemned the use of force in the no-fly zones by the US and UK aircraft, *See* S/PV.4008 SC 4008th Meeting of 21 May 1999
[92] **Gray**, supra 1 at 30

Chapter II
The Gulf Conflict 2003

A. General Framework

The preamble of the actual conflict developed under particular circumstances that differ significantly from those which framed the conflict since 1990. Fourteen years after the end of the cold war, the US has positioned as the only superpower with worldwide hegemony. The US actually spends as much on defence as the 20 next top-spending nations combined,[93] but the American dominance is not simply military. The US economy is as large as the next three – Japan, Germany and Britain – put together.[94] On September 11th, 2001, the world witnessed a shaking episode which altered the international context and shifted dramatically the American approach against terrorism and its relations with its alleged enemies.[95] Despite the lack of connection between these attacks and Iraq, the context of the US-Iraq confrontation was transformed. The debate rose about Iraqi weaponry, its continuous defiance of SC Resolutions, as well as about its probable involvement in terrorists' activities.

On 12 September 2002, President Bush brought his case against Iraq to the UN General Assembly and challenged the UN to take action against Baghdad for failing to disarm: 'We will work with the UN Security Council for the necessary resolutions,'[96] but he warned that he would act alone if the UN failed to cooperate.[97] However, America is virtually alone, never has so many of its allies been so resolutely opposed to its policies; its manners have provoked public opposition, resentment and mistrust. In fact, 'while the US has the backing of a dozen or so governments, it

[93] 400,000 US troops are deployed abroad "*The Cost of Empire*", *Newsweek* July 21, 2003, at 23

[94] With 5 percent of the world's population, the US accounts for 43 percent of the world's economic production, 40 percent of its high-technology production and 50 percent of its research and development. "*The Arrogant Empire*", **Fareed Zakaria**, *Newsweek* 24 March 2003, at 25

[95] The new policy to terrorism was manifest in the US intervention in Afghanistan in 2001 where under self-defence attacked both Al Qaeda forces and the Taliban regime that supported them.

[96] Remarks by the President in Address to the United Nations General Assembly New York, September 12, 2002, available at http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html

[97] See, "*Why the Security Council Failed*", **Michael J. Glennon**, *Foreign Affairs*, May/June 2003

has the support of a majority of the people in only one country in the world, Israel.'[98]

B. Operation 'Iraqi Freedom'

A year after Operation '*Desert Fox*', the SC convened under Resolution 1284[99] to replace UNSCOM by the creation of a new arms monitoring body called the UN Monitoring, Verification and Inspection Commission (UNMOVIC), headed by Hans Blix. However, Iraq rejected the new weapons inspections proposals and continued its policy to refuse inspections inside its territory.

After including Iraq as part of the 'axis of evil', alongside North Korea and Iran,[100] and addressing the UN the case for war against Iraq,[101] President Bush obtained authorisation of both Houses of Congress to employ force to defend the national security of the US against the threat posed by Iraq as well as to enforce all relevant UNSC resolutions regarding Iraq.[102]

Meanwhile in Britain, in an effort to strengthen the case for the use of force against Iraq, the British Government published a dossier that claimed *inter alia* that Iraq continued to produce chemical and biological agents, was developing missiles with a range of 750 miles - capable of attacking British troops in Cyprus - and had been seeking nuclear materials from Africa.[103]

Subsequently, in November 2002, the UNSC unanimously passed Resolution 1441, which found Iraq in 'material breach' of prior resolutions, set up a new inspections regime, and warned Iraq of 'serious consequences' if it did not comply. Iraq accepted the terms of the resolution and UNMOVIC resumed its operations on 27 November 2002. Thereafter, on January 27th, February 14th and March 7th, 2003, the inspectors returned to the SC to report that they had discovered no evidence of WMD in Iraq. The Director-General of the IAEA, Mr. ElBaradei, detailed that after three months of intrusive inspections, the Agency had found no evidence or plausible indication of the revival of a nuclear weapons programme in Iraq; he added that there is no indication that Iraq had attempted to import uranium since 1990 or that it had

[98] "*The Arrogant Empire*", supra 94 at 24
[99] S/RES/1284 (1999) of 17 December 1999
[100] The President's State of the Union Address, The United States Capitol, Washington, D.C., available at http://www.whitehouse.gov/stateoftheunion/2002/index.html
[101] Remarks by the President in Address to the United Nations General Assembly New York, September 12, 2002, available at http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html
[102] "*Authorisation for the Use of Military Force Against Iraq*", October 2, 2002, available at http://www.whitehouse.gov/news/releases/2002/10/iraq/20021002-2.html
[103] "*Iraq's Weapons of Mass Destruction - The assessment of the British Government*", 24 September 2002, available at http://www.pm.gov.uk/output/page271.asp

attempted to import aluminium tubes for use in centrifuge enrichment.[104] A critical debate that followed these briefings highlighted the main divergent views on how to proceed with disarming Iraq of banned weapons. On the one hand, France, Russia and China said that the time had not come for military action; they pressed for more time and strengthened inspections, aimed at Iraq's peaceful disarmament. On the other, the US, the UK and Spain insisted that Iraq had not made the strategic decision to comply and that recent disarmament measures had occurred only as a result of the imminent threat of military force.[105] The US Secretary of State, Colin Powell claimed that "Iraq was still refusing to offer immediate, active and unconditional cooperation, [as a consequence] the consequences of Saddam Hussein's continued refusal to disarm would be very, very real."[106]

In this context, the US, UK and Spain pressed for a new resolution authorising military action against Iraq, but were deterred by France, Russia and China announcing they would veto any subsequent resolution authorising the use of force against Saddam; once again, "in the face of a serious threat to international peace and stability, the Security Council fatally deadlocked."[107]

On March 17, the UK's ambassador to the UN stressed that the diplomatic process on Iraq was over;[108] and President Bush set an ultimatum to Saddam and his sons to leave Iraq within 48 hours or face war.[109] The UN inspectors were evacuated immediately and during the evening of 19 March 2003, the US President Bush and the UK Prime Minister Blair announced the commencing of the military Operation '*Iraqi Freedom*' to overthrow Saddam Hussein, free Iraqi people and disarm Iraq of WMD. The beginning of the armed conflict provoked a torrent of criticism from world leaders, including those of France, Russia and China;[110] in addition, massive public demonstrations against the use of force across the world and a deep academic debate on the legality of such actions flourished.

The armed conflict was initially conducted under striking aerial bombardments against military objectives across Iraq and then was followed by land warfare. By mid

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[104] S/PV.4692 SC 4692nd Meeting of 27 January 2003; S/PV.4707 SC 4707th Meeting of 14 February 2003; and S/PV.4714 SC 4714th Meeting of 7 March 2003

[105] S/PV.4714 SC 4714th Meeting of 7 March 2003

[106] Ibid

[107] "*Why the Security Council Failed*", supra 97

[108] Ibid

[109] Global Message, "*All the decades of deceit and cruelty have now reached an end*", President George W. Bush, March 17, 2003, available at www.whitehouse.gov/news/releases/2003/03/iraq/20030317-10.html

[110] "*War draws condemnation*", *The BBC News*, available at news.bbc.co.uk/1/hi/world/middle_east

April the US forces reached Baghdad and surprisingly straightforward took control over the capital. (Suggest: took over control of the capital surprisingly straightforwardly). The hostilities ended on 2 May 2003, after President Bush formally announced the conclusion of the operation in Iraq.[111] A few days later the SC revoked the economic sanctions imposed to Iraq since 1990.[112]

C. Legal Justifications

To justify its policy toward Iraq, the Coalition has relied on arguments of implied authorisation to use force and the right to enforce UNSC Resolutions due to the continuous 'material breach' by Iraq of its obligations under those resolutions. Moreover, it has also put forward a new "multifaceted strategic doctrine",[113] known as the 'Bush Doctrine', that advocates pre-emptive or preventive strikes against terrorists, states that support terrorists, and hostile states possessing weapons of mass destruction.[114]

1. Enforcement of Security Council Resolutions and Implied Authorisation

Resolution 1441 (2002) was adopted unanimously by the SC and provided that even though Iraq was still in "material breach" of its obligations under previous resolutions, the Council decided to afford it a "final opportunity to comply" with its disarmament obligations while setting up an enhanced inspection regime for full and verified completion of the disarmament process established by resolution 687.[115] In these circumstances, the SC ordered the resumed inspections to begin within 45 days, and also decided it would convene immediately upon the receipt of any reports from inspection authorities that Iraq was interfering with their activities, warning Iraq that it would face 'serious consequences' as a result of continued violations and non-compliance. In addition, it established that any false statements or omissions in the declarations submitted by Iraq and any failure to comply with or to cooperate fully in

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[111] Remarks by the President from the USS Abraham Lincoln, At Sea off the Coast of San Diego, California, available at http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html

[112] S/RES/1483 of 22 May 2003.

[113] **Mclain, Patrick,** "*Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force against Iraq*", Duke J. Comp. & Int'l L. 233 at 236

[114] President George W. Bush, Graduation address at the U.S. Military Academy (June 1, 2002), available at http:// www.whitehouse.gov/news/releases/2002/06/print/20020601-3.html; *See also*, "*The National Security Strategy of the United States of America*", September 2002, available at http://www.whitehouse.gov/nsc/nss.html

[115] S/PV.4644, SC 4644th Meeting of 8 November 2002

the implementation of the resolution will constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment.[116]

The UK and Australia relied entirely in this argument to justify its action against Iraq, evincing reliance for the use of force that can be justified under the UN collective security system rather than customary rights that are implemented unilaterally. Conversely, the US initially tried to square its claims under the basis of a UNSC resolution, probably motivated by a "lack of belief in the certainty displayed in the Bush Doctrine as to the existence of a wide right of preemptive defence."[117] Albeit, after realising the impossibility to achieve a second UNSCR expressly authorising the use of force, the US move forward to the legal justification under the basis of a precautionary self-defence doctrine.

The claim put forward by the UK emphasises that UNSCR 1441 recognises that Iraq has been in continuous 'material breach' of UNSC Resolutions, foremost important resolution 687, because Iraq has not fully complied with its obligations to disarm under that resolution. As a consequence, resolution 1441 has 'revived' the authority to use force under resolution 678.[118] It follows saying that in resolution 678 the SC authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area. Then, Resolution 687 which set out the ceasefire conditions after Operation '*Desert Storm*' imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Hence, "Resolution 687 suspended but did not terminate the authority to use force under resolution 678".[119] Finally, the argument goes that Resolution 1441 would in terms have provided that a further decision of the SC to sanction force was required if that had been intended, and thus, "all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force." This outline is shared by the Government of Australia and by Professors Greenwood and Wedgwood among others.[120]

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[116] S/RES/1441 of 8 November 2002

[117] **White**, supra 7 at 7

[118] "*Attorney general: war is legal*", *The Guardian,* March 17, 2003

[119] Ibid

[120] Memorandum of Advice on the Use of Force Against Iraq, provided by the Australian Attorney General's Department and the Department of Foreign Affairs and Trade, March 18, 2003, available at www.pm.gov.au See also **Greenwood,** supra 6 at 8-36; *See also,* **Wedgwood,** supra 52

To begin with, this analysis seems difficult to succeed since even though UNSCR 1441 was adopted under Chapter VII of the Charter, it does not provide any express authorisation to use force under the collective security umbrella. While the hazy term 'serious consequences' incites to confusion, the practice within the UN shows that the code for enforcement action widely recognised by the council members is the phrase: 'all necessary measures'. Furthermore, council members carefully explained their votes when adopting UNSCR 1441, to say that the resolution did not provide such an authorisation.[121] Even Ambassador Negroponte speaking on behalf of the US assured that the resolution contained no 'hidden triggers' and no 'automaticity' with the use of force.[122] Interpreting a resolution of the SC entails wary consideration of the text and the discussions that led up to it.[123] To infer the words of a resolution in a way that is obviously divergent to the consensus underlying the resolution would definitely dent the SC as a forum for achieving compromise.[124] For these reasons, any claim to attack Iraq based on an alleged authorisation in UNSCR 1441 would consequently be illegal.

Moreover, to claim that UNSCR 1441 recognises that Iraq had remained in material breach of the disarmament provisions of Resolutions from 687 (1991) to 1441 (2002), and as a consequence the authority to use force under UNSCR 678 is automatically revived by the suspension of the cease-fire in UNSCR 687, seems untenable since it is clear from the debates preceding the adoption of UNSCR 1441 that the purpose of the SC was not to authorise individual member states to enforce any material breach of those resolutions, but conversely the intention was that any response would come from the SC.[125] Resolution 687 does not afford for a right of unilateral intervention that vests upon a breach by Iraq nor is it silent on the issue of authority to enforce its provisions.[126] Conversely, the final paragraph of UNSCR 687 expressly endows that the SC remains seized of the matter and to take such further steps as may be required for the implementation of this resolution and to secure

[121] While Mexico, France, Russia, Bulgaria, Syria, Cameroon, Ireland and China spoke about the lack of the automatic right to use force in the resolution, Singapore, Guinea and Mauritius made statements that cannot be said to favour one interpretation over another. The non-acceptance of this position by the rest of the Council signified that the use of force has not been authorised by the SC as a reflection of its will. S/PV.4644, SC 4644th Meeting of 8 Nov 2002; See also **White** supra 7

[122] S/PV.4644, SC, 4644th Meeting of 8 November 2002.

[123] *Namibia* case, 1971 ICJ Rep. 15 at 53; See also **White**, supra 7 at 7; **Wood**, "*The Interpretation of Security Council Resolutions*", (1998) 2 Max Planck Yearbook of UN Law 73 at 74-75, 79, 95

[124] **White,** supra 7 at 7

[125] The claim by the UK, the US and Australia to enforce SC resolutions follows from practice in Kosovo (1999) and Iraq (1993 and 1998)

[126] **Mclain,** supra 113 at 249

peace and security to the area.[127] This means that Resolution 678 was revoked by Resolution 687 and that the SC holds the power to resolve how to deal with Iraq not individual member states acting unilaterally.[128]

In addition, it is commonly considered that SC authorisations of force are only for limited and specific purposes.[129] Thus, the authorisation to use force comprised in UNSCR 678 was concluded with the adoption of UNSCR 687. Resolution 678 was cited as the legal basis for the airstrikes of January 1993 and then was repeated in justifying the threatened enforcement of UNSCR 687 in 1998; but in both cases the argument has been widely rejected.[130] Another flaw rests in including UNSCR 687 in the group of 'subsequent resolutions' mentioned by UNSCR 678. Is important to recall that the use of force authorised in UNSCR 678 comprised military action to expel Iraq from Kuwait and then remedy the main breach of international peace and security. In other words, UNSCR 678 was clearly taking about resolutions adopted in-between 660 and 678. Therefore, UNSCR 678 cannot be applied as the legal justification for threats or uses of force subsequent to the formal ceasefire in UNSCR 687, since UNSCR 678 is no longer effective[131] and because it is implausible that such stipulation was intended to authorise force after the liberation of Kuwait for an indefinite period until Iraq complied with obligations that were not yet in existence.[132]

In this perspective, from the debates of the SC it can be implied that only a clear resolution instructing the use of force can permit military action to be undertaken under the collective security umbrella. Any claim of unilateral interpretation or a right of enforcement fails "for the simple fact that if the Council wants to authorise the use of force it will do so using clearly accepted language".[133] It is irrefutable that the only authorisation given by the Council to use force was that in UNSCR 678; a permission that is no longer in force. The collective security system is still dependent on SC authorisation to use force. As a result, the claim put forward by the UK and Australia lacks a lucid legal foundation under international law.

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[127] S/RES/687 (1991), paragraph 34

[128] "*A talented lawyer arguing a weak case*", **Matthew Happold**, *The Guardian*, March 17, 2003

[129] Ibid

[130] In the 1998 threats and use of force against Iraq, the view that unilateral forcible responses to Iraqi violations were permitted was specifically rejected by the delegations of Brazil, China, Egypt, France, Gambia, Japan, Malaysia, Pakistan, Slovenia and Sweden. S/PV.6483, SC 3858th Meeting of 2 March 1998

[131] **White,** supra 8 at 1

[132] **Mclain,** supra 113 at 251

[133] **White**, supra 7 at 10

2. Self-Defence

The US has recently focused on a novel approach to the traditional right of self-defence. In the aftermath of the events of September 11th, 2001, the American foreign policy towards terrorism shifted radically and developed an argument under the assertion that the use of force can be used not only in response to existing violence but to prevent future attacks. This policy has been detailed in the National Security Strategy document issued by President Bush in September 2002, and asserts that the US has long maintained the option of preemptive actions to counter a sufficient threat to his national security; "[t]he greater the threat, the greater is the risk of inaction - and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively."[134] This polemic approach has been called the Bush Doctrine, and the question arise on whether international law permits the use of force not in response to an imminent threat or attack but as a precaution to deter future threats or attacks? To answer this question, is essential to consider the context of the traditional exception to the use of force under anticipatory self-defence, and the viability of the Bush Doctrine under international law.

a. Anticipatory Self-Defence

The foundational rule on the prohibition to the use of force comprised in Article 2 (4) of the Charter has been framed with two general recognised exceptions: the use of force under the authority of the UN as established in Chapter VII of the Charter, and the right of individual or collective self-defence embraced in Article 51 of the same Charter. In this context, the Bush Doctrine proposes to adapt and expand the concept of anticipatory self-defence to encompass new supposed threats against the security and even the survival of the US. While Article 51 acknowledges that the exercise of the inherent right of self-defence[135] will be lawful if an armed attack occurs against a Member of the UN, state practice and *opinio juris* illustrate that its exercise can be lawful even under a situation to be considered as equivalent to an

[134] "*The National Security Strategy*" supra 114

[135] In the French text of the article, the phrase 'inherent right' is rendered '*droit naturel*'. The choice of words has overtones of *jus naturale*, which appears to be the fount of the right of self-defence. However, it may be contended that the right of self-defence is inherent not in *jus naturale*, but in the sovereignty of States. See **Dinstein,** supra 10 at 162

armed attack;[136] in other words, as a preventive measure taken in 'anticipation' of an armed attack, and not simply in response to an attack that has actually happened.[137] Therefore, whenever a direct and overwhelming threat occurs against a State, the victim is not expected to wait until the attack has actually started; here comes into play the doctrine of anticipatory self-defence that has been long recognised as part of customary international law.[138]

The customary right of self-defence arose from the legal position expressed in the diplomatic correspondence between the British Minister at Washington, Mr. Fox and the US Secretary of State Daniel Webster, following the *Caroline Incident* in 1837 during the Mackenzie Rebellion against the British rule in Upper Canada. Webster concluded that such a right arises only when there is a "necessity of self defence… instant overwhelming leaving no choice for means and no moment for deliberation" and "the act justified by the necessity of self defence must be limited by that necessity and kept clearly justified within it."[139] In these circumstances, the use of force is considered lawful if used in response to an immediate and pressing threat which cannot be avoided by alternative measures and the force used to remove the threat is proportionate to the danger posed.

The right to anticipatory self-defence has remained a topic "hotly contested"[140] since the creation of the UN in 1945. The system was built under the basic foundation of the prohibition to the threat and the use of force comprised in the UN Charter; therefore, while some scholars think the right of anticipatory self-defence was made unlawful by the Charter,[141] on the contrary, the prevailing view argue that a right of anticipatory self-defence has always been recognised by general international law, even though the text of Article 51 refers to cases where an 'armed attack occurs'.[142]

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[136] **Bothe, Michael**, "*Terrorism and the Legality of Pre-emptive Force*", EJIL (2003), Vol. 14 No. 2, 227-240.

[137] **Dinstein,** supra 10 at 165-166

[138] In the Judgment in the Nicaragua case, in 1986, the International Court of Justice construed the expression as a reference to customary international law. According to the Court, the framers of the Charter thereby acknowledged that the self-defence was a preexisting right of a customary nature. "*Case Concerning Military and Paramilitary Activities in and Against Nicaragua*" (Merits), (1986), ICJ Rep. 14, 94

[139] Jennings called the *Caroline* Incident the '*locus classicus*' of the law of self-defence. **Jennings** supra 77 at 89

[140] **Kritsiotis,** supra 67 at 171

[141] Brownlie, Gray and Henkin, among others, have argued that there is no right of self-defence until an armed attack has actually commenced. **Brownlie,** "*International Law and the Use of Force by States*", (1963), p. 275; **Gray,** supra 1 at 112; **Henkin, Louis**, "*How Nations Behave*" 141-44 (1979); **Simma** (ed.), "*The Charter of the UN: A commentary*" 1994, p. 676

[142] See, **Frank,** supra 27 at 97-108; **Bowett,** "*Collective Self-Defence under the Charter of the UN*", (1955-1956) 32, BYbIL, p. 131; *See also,* **Schwebel**, "Aggression, Intervention and Self Defence in Modern International Law" (1972-II) p. 136; *See also,* **Greenwood,** supra 6 at 15

Another grand disagreement persists regarding the use of terminology in this subject. Some analysts distinguish between 'anticipatory' military action and 'pre-emptive' force. While the former is employed to describe military action against an imminent attack; the latter is usually applied to describe the use of force against a threat that is more remote in time.[143] The main difference between these two concepts is the degree of immediacy. However, to evade bewilderment, for the purpose of this paper the terms 'anticipatory' and 'preemptive' will be deemed as tantamount.

In this framework, the core element to analyse is the imminence of a threat posed against the security or even the survival of a State. To determine whether an attack is imminent, the magnitude of the threat and the means by which it would materialise in violence are significant factors "and mean that the concept of imminence will vary from case to case."[144] It is indisputable that the world and its societies have gone through a dramatic evolution in the development of new technologies; as a result, the international scenario has been shocked by crisis such as the Gulf Conflict where the uncertainty of the potential use of nuclear, chemical and biological weapons with its perplexing consequences has been constant. The imminence requirement is extremely problematic in the WMD context because such weapons have great potential to be used without ever revealing any evidence that an attack is imminent.[145]

The recent terrorists incidents in New York, Bali, Riyadh, Casablanca and Jakarta, illustrate how dangerous a terrorist group can become for the national security and integrity of a country, a continent and even the world itself; it is clear that these groups would not be dissuaded to use chemical, biological and even nuclear weapons to aim their commitments.[146] In this perspective, in its 1996' *Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict*, [147] the International Court of Justice "recognised the exceptional nature and logic of a state's claim to use means necessary to ensure its self-preservation."[148] Though,

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[143] **Greenwood,** supra 6 at 9

[144] **Ibid** at 37

[145] **Mclain,** supra 113 at 282

[146] Russia says it has foiled dozens of nuclear smuggling deals since the breakup of the USSR. However, intelligence officials believe enough nuclear material has left Russia to make a bomb. It's also known that groups like al-Qaeda have been seeking loose nukes since the mid-1990s. "*Weapons of Mass Destruction, An ominous new chapter opens on the twentieth century's ugliest legacy*", **Lewis M. Simons**, *National Geographic*, November 2002, p. 19

[147] **Franck,** supra 25 at 98

[148] *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, 1996, ICJ, 26 at 265, paragraph 105 (2) E

Bowett assumes that "no state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardise its very existence."[149]

Therefore, even though the right of anticipatory self-defence remains polemic, it has been adopted as a lawful exception to the proscription on the use of force under customary international law.[150] State practice and *opinio juris* confirms that the right of self-defence in the Charter era continues to include a right to use force to avert imminent armed attack.[151] Three instances may be indicative of State recognition of a right of anticipatory self-defence: the US quarantine against Cuba in the 1962 missile crisis, the 1967 conflict between Israel and the Arab States, and the Israel's raid on the Iraqi nuclear reactor in 1981.

However, it must be said that the legal argument proposed by the US to justify its use of force against Iraq goes faraway and "proposes to adapt this concept to new perceived threats in a way that would constitute an unacceptable expansion of the right of anticipatory self-defence."[152]

b. The Bush Doctrine

This policy was formulated in "The National Security Strategy of the United States of America" on 17 September 2002,[153] as a response to the events of 11 September 2001,[154] and proposes to adapt and expand the concept of anticipatory self-defence to comprise alleged threats. In this context, this doctrine of preemptive strikes is directed to the recent and continuing threat posed by "terrorist organisations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction or their precursors"[155] against the US, its allies and friends. Hence, the US is positioned to identify and destroy any threat against its interests by the exercise of its right of 'preemptive' self-defence.

This shift in the American foreign policy claims that the US can no longer solely rely on a reactive posture as it has in the past. The failure to stop a potential attacker, the

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[149] **Bowett, Derek,** "*Self-Defence in International Law*" at 185-186

[150] Indeed, many states support a right of anticipatory self-defence in certain situations, principally where there is strong evidence that an overwhelming attack is imminent. For further details see: **Franck,** supra 25**;** See also, **Mclain,** supra 113 at 266-271; **Greenwood,** supra 6

[151] See **Greenwood,** supra 6 at 13

[152] **Bothe,** supra 136 at 227

[153] "*The National Security Strategy*" supra 114

[154] The Security Council affirmed in that the September 11th attacks gave rise to a right of self-defence. S/RES/1368 (2001)

[155] See "*The National Security Strategy*" supra 114

immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. "We cannot let our enemies strike first".[156]

The first point to consider is the tremendous difficulty to square this proposition as a legal justification within the UN Charter system for the use of force; this may explain why the Bush administration failed to include any reference to the UN Charter when discussing its preemptive policy in the National Security Strategy.[157] It is clear that the policy's essential framework is founded under the scale of the threat and no longer on the imminence of the attack. This means that unlike the traditional right of anticipatory self-defence, the Bush Doctrine claims that the US is legally justified in exercising a right of self-defence to attack hostile 'rogue' states and states that harbour terrorists even if the US is not in danger of an imminent attack.[158]

The US has a long line of US Presidential doctrines going back to the Monroe Doctrine of 1823;[159] however, the Bush Doctrine "is an attempt to bring power and law together," it "not only constitutes a statement of political intent, it also constitutes an exposition on the conditions under which the US views the use of force as acceptable under international law."[160] The US is confident on the assumption that the right of anticipatory self-defence is widely recognised as a legal exception to the prohibition on the use of force; as a consequence, the adaptation of this inherent right is the foundation under which the Bush precautionary theory rests. The US is trying to adapt law to the new scenario he confronts, a scenario where politics are seeking despairingly to reshape international law.

In this framework, the Bush Doctrine attempts to weaken and revolutionise the order based on a norm generally accepted as *jus cogens*: the proscription on the use of force in Article 2(4). But even supposing that this dogma is recognised, does the Bush Doctrine in fact provide a satisfactory legal basis for military action in Iraq? In answering this question, the twofold approach (WMD and terrorism) developed by the US require evaluation.

Firstly, was the action by the US and its allies a response to an imminent or at least plausible threat posed by Iraq's alleged possession of WMD? The US National

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[156] Ibid
[157] See **Mclain,** supra 113
[158] **Mclain,** supra 113 at 265
[159] See generally **McCoubrey** and **White**, "*International Law and Armed Conflict*", 1992, 26-30
[160] **White,** supra 7 at 1-21

Security Advisor Condoleezza Rice claims that "Saddam Hussein's regime posed a threat to the security of the United States and the world. This was a regime that pursued, had used and possessed weapons of mass destruction. He had links to terror, twice invaded other nations\; defied the international community and seventeen UN resolutions for twelve years and gave every indication that he would never disarm and never comply with the just demands of the world. That threat could not be allowed to remain unaddressed."[161] Is indisputable that Saddam's regime has been one of the cruellest and most tyrannical in recent history, its immeasurable ambition for power and markedly political intolerance positioned him as an arrogant dictator. It is also true, that he sought to acquire WMD in the past, and in several documented cases, he succeeded.[162] However, since UNSCR 687 imposed the inspection regime in 1991, there is no clear evidence that Iraq either developed or possessed WMD. And even if he possessed, the mere possession of a weapon that may be used or deployed in a matter of minutes does not, by itself, constitute an imminent threat[163] – it is obvious that intent is required. Then, does the fact that Saddam has used WMD in the past, necessarily means that he is willing to use them against America or its allies? The Bush administration believes he does, basically on the basis that Saddam has always try to acquire WMD. Evidence of Saddam Hussein's intention to use such weapons is usually put down to the fact that he already has, firing chemical shells at Iranian troops on several occasions in the Iran-Iraq war, and gassing Iraqi Kurd villagers at Halabjah. In addition, Saddam ordered the invasion of Kuwait and Iran and fired Scud missiles at Saudi Arabia and Israel during the 1991 Gulf Conflict.[164] Besides, the US and the UK argue that since the UN weapons inspectors left Iraq in 1998, Saddam has had plenty of time to replenish his stocks, especially if some equipment has remained hidden or unaccounted for.[165]

After the adoption of UNSCR 1441 (2002) and the subsequent resuming of inspections in Iraq, Mr. Blix and Mr Elbaradei reported repeatedly to the SC that

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[161] Dr. Condoleezza Rice Discusses Foreign Policy, August 7, 2003, available at: http://www.whitehouse.gov/news/releases/2003/08/20030807-1.html

[162] "*The Arrogant Empire*", supra 94 at 21

[163] If the simple possession of a WMD means an imminent threat, then Israel, India, Pakistan, China, Russia, Libya, Sudan, Egypt, Syria, Iran and even the United States constitute a permanent threat to the international peace and security. "*Weapons of Mass Destruction, An ominous new chapter opens on the twentieth century's ugliest legacy*", **Lewis M. Simons**, *National Geographic*, November 2002, p. 18

[164] "*War with Iraq*", **Simon Jeffery**, *The Guardian,* 4 October 2002

[165] "*The Case for War – Revisted*", **Leaders,** *The Economist*, 19 July 2003

there was no evidence of WMD in Iraq.[166] Notwithstanding, the US Government argues that Iraq had not afforded the kind of active cooperation that resolution 1441 requested: "no nation can possibly claim that Iraq has disarmed. And it will not disarm so long as Saddam Hussein holds power".[167]

The American government is also relying on the British dossier published in September 2002 that claimed that Iraq could deploy chemical weapons within 45 minutes, was developing missiles with a range of 750 miles and had been seeking nuclear materials from Africa.[168] Nevertheless, none of these arguments had been proved so far. The content of the dossier has remained controversial in the aftermath of the conflict since it presented information partially plagiarised from an academic thesis focused on evidence from the invasion of Kuwait 13 years ago.[169] Furthermore, a BBC report emphasises that the British Government had "sexed up" that dossier exaggerating the claim that Iraq had WMD that could be launched within 45 minutes to strengthen the case for war and obtain the support of the British population.[170] In the same context, President Bush is facing serious reproaches within the US claiming its Administration mishandled intelligence during the run-up to the armed conflict that misled the country about Iraq. In the State of the Union address, President Bush said that "the British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa,"[171] an assertion based on crudely forged documents from Niger that had been questioned by the CIA months before,[172] and also dismissed by the chief nuclear inspector El Baradei, who flatly contradicted the British intelligence's claims of attempted uranium smuggling by Iraq and said that the documents used to substantiate the British claim were 'not authentic'.[173] In addition, it seems significant that Colin Powell omitted any reference to the uranium when he briefed the UNSC just a week after Bush's speech. Indeed, the evidence presented by Mr. Powell to the SC was so suspect, that failed to persuade most members of

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[166] S/PV.4692, SC 4692th Meeting of 27 January 2003; S/PV.4707 SC 4707th Meeting of 14 February 2003; and S/PV.4714, SC 4714th Meeting of 7 March 2003

[167] "*President Says Saddam Hussein Must Leave Iraq Within 48 Hours*", 17 March 2003, available at: http://www.whitehouse.gov/news/releases/2003/03/iraq/20030317-7.html

[168] "*Iraq's Weapons of Mass Destruction - The assessment of the British Government*" available at http://www.pm.gov.uk/output/page271.asp

[169] "*The dossier that shamed Britain, Deception can only corrode public trust*", **Leader**, *The Observer*, 9 February 2003; See also, "*The war isn't over for Tony*", *The Economist*, 12 July 2003

[170] "*What did you do in the war, Alastair?*" *The Economist*, 5 July 2003

[171] "*The State of the Union",* President George Bush, 28 January 2003, available at http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html

[172] "*A Spy Takes the Bullet*", **Michael Isikoff** and **Tamara Lipper**, *Newsweek*, 21 July 2003 pp 20-21

[173] "*UK nuclear evidence a fake*", **Ian Traynor**, *The Guardian*, 8 March 2003

the Council regarding the threat posed by Iraq against its neighbors or western countries.

Both scandals continue raising as time elapses and many supporters of the use of force remain surprised by the fact that no biological or chemical weapons were used by Saddam Hussein during the conflict and, most controversially, by the fact that no stockpiles of WMD or at least significant quantities of either biological or chemical agents have yet been found in Iraq.[174] In this milieu, the problem for both governments is one of credibility since few believe that Iraq was about to launch a WMD attack against the US or the UK, less against its allies.

Second, is there sufficient evidence to link Saddam's regime to terrorist organisations? There is a general duty under international law for a state not to allow its territory to be used as a base for attacks on other states, whether by regular armed forces or terrorists.[175] The Bush Administration has unsuccessfully endeavored to claim that Iraq is involved in terrorism and linked with terrorists groups such as al Qaeda. They argue that this collusion constitutes a convincing threat that requires preemptive US action.

President Bush has remarked that over the years, Iraq has provided safe haven to terrorists such as Abu Nidal, Abu Abbas, and has continued to finance and assist terrorists groups that use terrorism to undermine Middle East peace. In addition, he affirmed that Iraq and al Qaeda have had high-level contacts that go back a decade. "Some al Qaeda leaders who fled Afghanistan went to Iraq. These include one very senior al Qaeda leader who received medical treatment in Baghdad this year, and who has been associated with planning for chemical and biological attacks. We've learned that Iraq has trained al Qaeda members in bomb-making and poisons and deadly gases."[176]

Terrorism seems to be a perennial subject in human history; it has often been employed as a tool to retaliate, deter and bluff.[177] However, little or no evidence

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[174] "*The Case for War – Revisted*", **Leaders**, *The Economist*, 19 July 2003; See also "*An Analysis of the US and UK decision to go to war in Iraq*", British American Security Information Council (BASIC), www.basicint.org

[175] Principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.

[176] "*President Bush Outlines Iraqi Threat*", 7 October 2002, Cincinnati Museum Center, Cincinnati, Ohio available at http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html

[177] **Dingli, Shen,** "*Terror, Counterterror and Nuclear Disarmament*", International Network of Engineers and Scientists against Proliferation, Bulletin 19, March 2002.

exists to imply that Iraq was aiding any terrorist group that will execute an imminent or credible attack against the US or the UK. What it seems more plausible is the American anxiety on the fact that Iraq could decide on any given day to provide a biological or chemical weapon to a terrorist group or individual terrorists. Mclain asserts that President Bush has intentionally blurred the distinction between the threat posed directly by Iraq and the threat posed by terrorists that might or might not strike at the US: "[t]error cells and outlaw regimes building weapons of mass destruction are different faces of the same evil. Our security requires that we confront both."[178] But as stated above, there is no indication that Iraq possessed or developed WMD after the inspections regime handled the situation in 1991 as to consider that Iraq was actually trying to use or to trade with those weapons.

It seems that the US is virtually isolated in arguing a connection between Iraq and terrorist groups. Even in Britain it's hard to find anyone in the government making the case that al Qaeda and the Iraqi regime are closely linked. An official British Intelligence Report recognised that while there has been contact between al Qaeda and Iraq's regime in the past, there is no evidence to establish current links between them.[179] According to most experts on Iraq, those ties barely exist, if they exist at all: Daniel Benjamin, former terrorism adviser to the US National Security Council affirms that "while there are contacts, have been contacts, there is no co-operation. There is no substantial, noteworthy relationship."[180] In addition, magistrates, prosecutors, police and intelligence officials who have been fighting al Qaeda in Europe alleged they are concerned about attempts by the Bush Administration to link Saddam Hussein to Osama bin Laden's terror network.[181]

On the other hand, even Iraq and some terrorists groups dislike the US this does not mean they strictly share their means and tactics to fight against that country. Experts point out that Saddam, a secular Iraqi nationalist who refuses to rule by the Muslim religious law of Sharia, is a natural enemy of Osama bin Laden; as for bin Laden, he

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[178] **Mclain,** supra 113 at 277; See also "*President Bush Outlines Iraqi Threat*", 7 October 2002, Cincinnati Museum Center, Cincinnati, Ohio available at www.whitehouse.gov/news/releases/2002/10/20021007-8.html

[179] "*Leaked report rejects Iraqi al-Qaeda link*", *The BBC News*, 5 February, 2003. available at: http://news.bbc.co.uk/1/hi/uk/2727471.stm

[180] "*Experts doubt Iraq, al-Qaeda terror link*", *The CBC News*, 1 November 2002 available at: http://www.cbc.ca/stories/2002/11/01/bushiraq021101

[181] Jean-Louis Bruguiere, the French judge who is the dean of the region's investigators after two decades fighting Islamic and Middle Eastern terrorists stressed "We have found no evidence of links between Iraq and Al Qaeda," and "we are working on 50 cases involving Al Qaeda or radical Islamic cells. I think if there were such links, we would have found them. But we have found no serious connections whatsoever." in "*Allies Find No Links Between Iraq, Al Qaeda*" **Sebastian Rotella**, *Los Angeles Times*, 4 November 2002, available at: http://www.latimes.com/la-fg-noqaeda4nov04,0,4538810.story

has vowed to topple Arab leaders like Saddam who don't embrace Islamic fundamentalism.[182]

In this perspective, with such inconclusive information to justify the use of force in response to alleged terrorists threats that are not imminent and may never become imminent, the precautionary self-defence theory goes far beyond the limits of international law. To assume that a doctrine of preemption is intended to refer to a broader right of self-defence to respond to threats that might materialise at some time in the future,[183] such a doctrine has no basis in law.

3. Legality of the use of force against Iraq and its implications under international law

The previous analysis shows how difficult for a present State is to assemble a legal case to justify an intervention against another nation whichever the circumstances. The US played a leading role in building the structure of the UN system to prevent war and to provide a legal basis for the use of force. Though, in our time the political and economic conditions have changed and so it seems that the US is committed with its practice and legal interpretation to reshape the foundations of the international legal system. However, this proposal appears unattainable; to modify any treaty rule or create new customary international law, the combination of state practice and the acceptance of the legality of that practice (*opinio juris)* must be recognised broadly by the international community, a condition that is clearly not attained in the current case.[184] The actual opposition to the use of force by the US and its allies is not only manifesting within the SC and the General Assembly,[185] but also by large worldwide public demonstrations;[186] these signs clearly show that the Bush Doctrine has received a negative reception. In this context, there is strong evidence that the majority of states will be resistant to such a large-scale extension of

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[182] "*Experts doubt Iraq, al-Qaeda terror link*", *The CBC News*, 1 November 2002 available at: http://www.cbc.ca/stories/2002/11/01/bushiraq021101

[183] **Greenwood,** supra 6 at 8-36

[184] A similar case is the Australian warning of preemptive action against terrorists in the wake of the Bali bombings of 12 October 2002. However, the claim to pre-emptive action was rejected by the states in the region. The *Canberra Times*, 2 December 2002

[185] The Security Council was called on to end the illegal aggression and demand the immediate withdrawal of invading forces, by an overwhelming majority of States. Speakers emphasized that the current war, carried out without Council authorisation, was a violation of international law and the United Nations Charter. See S/PV.4726 of 26 March 2003

[186] Protests unfolded in more than 350 cities around the world: From New York and other major cities in the US, to London, Berlin, Paris, Amsterdam, Brussels, Barcelona, Rome, Melbourne, Cape Town, Auckland, Seoul, Tokyo and Manila. "*From New York to Melbourne, Protest Against War on Iraq*", **Robert D. Mcfadden**, *The New York Times*, 16 February 2003, available at: www.nyt.com

the right of self-defence that allows a state to take military action based solely upon its perception of a threat.[187]

On the other hand, the argument of implied authorisation and material breach of SC resolutions repeats the formula built on the previous justifications put forward by the US and the UK for using force against Iraq to enforce its disarmament obligations since 1991 (mainly in January 1993 and December 1998); however these arguments have been repeatedly rejected in the SC where the debates confirm that only a clear resolution mandating the use of force is sufficient to enable military action to be undertaken under the authority of the UN.[188]

These collective security claims to use force are grounded on an individual interpretation by the Coalition forces of a series of UNSC Resolutions; however, according to the principle of effectiveness, this interpretation can only be legitimate if it reflects the views of the SC as a body.[189] Therefore, the "interpretative task is to ascertain what the text means to the parties collectively rather than to each individually".[190] Then, as explained above, there was no clear authorisation to use force in resolution 1441, and its clear from the debates preceding the adoption of that Resolution that it was not the intention of the SC to support that argument; moreover, it was up to the SC and not individual member states to decide measures in response to a material breach of the resolution. Therefore, there is no legal basis to affirm that an implied authorisation by the SC exists when the will and intention of that organ is manifestly against the use of force.

In this perspective, the absence of clear authorisation to use force by the SC and the unaccepted postulates of the Bush Doctrine results in an evident illegal military action by the US, the UK and its allies against Iraq.

The last and probably more enigmatic issue is related to the integrity and credibility of the SC and the international legal system after the crisis; the question arise on how much the system has been affected by the unilateral and illegal use of force by the coalition forces?

The first repercussion relies on the role of the SC to effectively deal with a crisis of this kind. The American and British perspective emphasises the inability of the SC

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[187] **White,** supra 7 at 7
[188] Ibid
[189] Ibid
[190] See **Johnstone, I.** "*Treaty Interpretation: The Authority of Interpretative Communities*", (1991) 12 Michigan JIL at 381

to agree on a process for handling the Iraq crisis and the failure to meet its responsibilities; this position questions the role of the SC to handle future conflicts. Conversely, the French, Russian and Chinese outlook seems to imply that the crisis strengthened the SC, by showing that it will not simply agree to the demands of the sole remaining superpower.[191]

The SC has a twofold intention, on the one hand is a forum for diplomacy and negotiation, on the other is an executive body for taking police action.[192] It was founded under the Charter and its practice reveals the complexity to exercise its role effectively since the application of law and justice has been selective and inconsistent, depending on the political configuration of the SC on any given issue.[193] For instance, its role was almost irrelevant to most Cold War crises (including arms control) when they involved direct confrontation between the US and the USSR; in addition, it failed to intervene effectively over the Rwandan genocide in 1994 and the invasion of the UN proclaimed 'safe haven' of Srebrenica in 1995. Unfortunately, the SC depends on the willingness of its members, foremost the five permanent.

Therefore, the actual crisis reveals the urgent necessity to bring up to date the structure and functioning of the SC. It is vital to confront the circumstances and step ahead of the challenge. The first issue to consider is the renovation on the Council's attitude towards its primary responsibilities. As stated before, the application of law by the SC has been markedly selective through out its history. It is time to deal indistinctly with every breach to the peace or act of aggression and propose resolutions and measures accord with the Charter and international law; but this aim can only be achieved if every permanent member upholds its implicit obligation to contribute to the maintenance of international peace and security, "rather than each being primarily concerned with threats to its peace".[194]

Another major challenge encompasses the scope of the veto. This sanction is a political expression of power reserved for the five permanent members and should be restricted to prevent its misuse. White clearly states that a radical reform of the veto may seem a hopeless quest given that amendment requires the consent of each permanent member.[195] However, is unreasonable that permanent members usually

[191] See **White, Nigel**, "*The Security Council: An impediment to international justice?*" (forthcoming)
[192] Inis Claude's remarks, in **Luard, E**. "*The Evolution of International Organizations*", (1966), 66 at 87-88
[193] See **White,** supra 191 at 2
[194] Ibid at 5
[195] Ibid at 2

veto a Chapter VII resolution for illegitimate reasons. A plausible solution seems to be to restrict the veto to proposed Chapter VII measures that truly affect the vital interests of a permanent member, and to compel that member to explain its foundations and motives before the SC. In addition, the use of the veto must not contravene the purposes and principles of the Charter. This measure will embrace the possibility to assess the use of the veto and to ensure that its exercise is compatible with the purposes and principles of the UN as well as with the fundamental principles of international law. Finally, a big step forward will be to attain an appropriate balance in the SC by imposing standards that would allow for some form of accountability for the use of the veto.[196]

Furthermore, the structure of the SC must be reshaped to include within its permanent members countries that hold a relevant regional role. In this context, Latin American, African and Asian countries will be in an enhanced position to contribute efficiently to the maintenance of peace and security in their regions. Another possibility rests in including within the SC political organisations such as the European Union. This proposal has been mentioned recently in European forums; however, this question seems to be more difficult to achieve in the short term.

The final point to assess involves the necessity to simplify and clarify the wording of the UNSC Resolutions. The analysis followed on this dissertation contends to ratify the role of the SC as a multilateral organ functioning within a common authority. Therefore, the will of the Council must be clearly reflected in the text of its resolutions. Ambiguity can only conduct to mishandled and bewildered enforcement actions. To consolidate the SC as a forum for securing agreement on a vast range of common issues, it is crucial to follow punctually the discussions of the members, its conclusions and final impressions that ultimately constitute the *ratio juris* of every resolution adopted under the scope of the SC.

The Council's demise has been announced on several occasions in the past. Although, if the actual tendency to act unilaterally outside the scope of the international law and contravening the basic proscription on the use of force continues, the UN is likely to be off the playing field and confined to the sidelines. On the contrary, if the amend is achieved and the SC responds successfully to the

[196] **White,** supra 191 at 5

demands of the new scenario, the role in maintaining peace and justice will be indisputably accomplished.

Conclusion

It seems that this conflict is the consequence of a very old rivalry between the American Government and Saddam Hussein. Some argue this conflict is about oil, or American economic interests, but the aim has been much more confused. What is certainly true is that the US has openly professed its desire to achieve a proactive regime change in Iraq. If this is the case, then is fair to suppose that this quarrel is not the result of a failure of diplomacy; not even a consequence of a flawed international law; neither a precautionary war against WMD or terrorism; nor about the liberation of the Iraqi people. Conversely, it appears to be the result of an unlimited policy whereby the US has decided to launch invasions against every potential enemy state across the globe. The premise is that the US needs to intimidate countries with its power and assertiveness, always threatening, always denouncing, and never showing weakness.[197] Back in 1992, the actual Deputy Defence Secretary Paul Wolfowitz, then a senior official in the first Bush Administration, drafted a Pentagon document that argued: "in an era of overwhelming American dominance, US foreign policy should be geared toward maintaining our advantage and discouraging the rise of other great powers."[198] Indeed, the US Defence Secretary Donald Rumsfeld often quotes a line from Al Capone: "you will get more with a kind word and a gun than with a kind word alone."[199]

In this context, we perceive breaches of international law by powerful democratic liberal states that attempt to change the legal order governing the use of force in international relations.[200] Thus, it is essential to strengthen the collective security system in order to endorse the rules governing the use of force and which constitute the cornerstone of the entire international system. Indeed no one can now charge the UN of being "America's rubber stamp."[201] Most of the opposition to the unilateral use of force was conducted within the UN and involved the role of the UN, from

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[197] "*Where Bush Went Wrong*", **Fareed Zakaria**, *Newsweek*, 24 March 2003
[198] "*The Way to Buck History*", **Fareed Zakaria**, *Newsweek*, 24 March 2003
[199] "*Where Bush Went Wrong*", supra 197
[200] **White**, supra 7 at 20
[201] "*The United Nations, Duct tape needed*" *The Economist*, 22 March 2003 at 28

weapons inspectors to SC. These reactions of state and public opinion are indicative that the majority of the world will not allow the UN to collapse. Even the UK and Australia had preferred to justify their actions within the scope of the collective security system comprised in the UN. This decision evidences their incredulity as to the legality on the American claim and its reliance on international law, although misinterpreted, but however within the framework of that system.

Therefore, it seems improbable to allow a principle that comprises the maintenance of international order by means of regular use and threat of force against sovereign states. To concede unilateral interpretations of UNSC resolutions and unilateral adaptations of customary international law will, if accepted, lead to the collapse of the legal order encompassed in the Charter.[202] The proscription comprised in Article 2(4) of the UN Charter "is not a one-sided provision that hampers only US policy; it applies to all members of the UN."[203] For that reason, an erosion of that prohibition permits not only the US, but also all other states to use force without restraint. In this context, the Bush Doctrine can only produce a spiral of violence that will lead to disturbing anarchy.

We must have in mind that the SC has the power to authorise States to use preemptive military force even against a threat to the peace in circumstances where an attack is not yet imminent; As a consequence, the possibility to attain a legitimate preemptive action under the collective security umbrella is broader than under the scope of the right of self-defence.

The Iraqi episode showed that the absence of SC authorisation reduces dramatically the support for the use of force and appeals its legitimacy into question. This means that in the absence of an armed attack or at least the existence of an imminent one, the world seeks to recognise preferably actions carried out multilaterally with the SC acquiescence.

However, again all depends on how much the US is willing to cede. One point is factual: if the UN intends to remain relevant as a forum for handling affairs of international peace and security, then the US should be deeply involved. But the US cannot run the world on its own, if the proclaimed 'war against terrorism' is to succeed, the only path runs through the UN. Terrorism is a worldwide problem that affects almost every region in the world. Then, this is not an exclusive threat against

[202] See **White**, supra 7 at 20
[203] See **Mclain,** supra 113 at 285-286

the US; instead of intervening everywhere unilaterally, the US should anticipate and collaborate to reinforce the collective security system to combat effectively this uncomfortable threat.

The public reaction has illustrated that States will be supported to fight evil dictators or terrorist groups only when the foundations and motives are grounded in accordance to the purposes and principles of the UN and the recognised principles of international law.

Conclusively, the world may concur that Saddam Hussein's regime was brutal, offensive and intolerant; that it was a menace to its own population and other states, mainly Israel. There is also agreement that Iraq's regime defied and disobeyed to comply with its obligations under the sanctions regime imposed by the UNSC resolutions after Iraq's invasion to Kuwait in 1990. Moreover, there was a worldwide consensus that the means to deal with this crisis where institutional and relied on the collective security system. When the US and the UK decided to take unilateral military action to deal with the problem, the international community reacted supporting the end but with clear disagreement regarding the means proposed. Ultimately, the Coalition Forces used force against Iraq, they overthrew Hussein's regime, but have not been able so far to demonstrate the existence of any WMD or any clear link between Iraq and terrorist groups as to reaffirm that the threat was compelling. With such unconvincing information and flawed legal arguments, this action cannot be regarded either legitimate or legal since the use of force has been widely condemned and has no clear basis in international law. This unfortunate situation evinces the imperative necessity to restructure the SC to become an effective apparatus to deal indistinctly with any act of aggression and unconventional threat against international peace and security.