

# THE LEGALITY OF THE USE OF FORCE AGAINST IRAQ\*

Filipa Delgado

*Assistant Professor, Faculty of Law, University of Macau*

## CHAPTER I

### 1. Introduction

On 19 March 2003, the United States (US) and its allies began the Operation Iraqi Freedom with a series of missile attacks on Baghdad. More or less three weeks later, the American troops entered in Baghdad and took control of the city within the following two days. However, it was only on 2 May that US President George W. Bush formally announced the victory of the Coalition forces. According to the American President, the *battle of Iraq is one victory in a war on terror that began on 11 September 2001, and still goes on*<sup>2</sup>. The Coalition's leaders also said that the war will improve the lives of the Iraqi people and will create an environment where Iraqis could determine their own fate peacefully and democratically<sup>3</sup>.

The purpose of this paper is to determine if the war against Iraq whether or not complied with the law of the use of force in international law (*jus ad bellum*).

In the consideration of the legality of the use of force against Iraq it is

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<sup>2</sup> George W. Bush in Karen De Young, "Bush proclaims Victory in Iraq: Work on Terror is Ongoing, President Says", *The Washington Post* (Washington DC, US), 2 May 2003, A1, cited by Alex J Bellamy, *International Law and the war with Iraq*, Melbourne Journal of International Law, Vol. 4, 2003, p. 498.

<sup>3</sup> Tony Blair and George W. Bush, "Joint Statement by President Bush, Prime Minister Blair on Iraq's Future" (Hillsborough castle, Northern Ireland, UK, 8 April 2003), cited by Alex J Bellamy, *ibid*.



necessary to recall that, pursuant to art. 1 (1) of the Charter of the United Nations, the primary purpose of the United Nations *is to maintain international peace and security*. For that, the art.2 (4) of the UN Charter *prohibits the use of the force by one state against another*. But the Charter also admits two exceptions of this general rule. One is in article 42 which allows the Security Council *to take such action... as may be necessary to maintain or restore international peace and security*. The other exception is in article 51 which confirms the right of the States of self-defense<sup>4</sup>.

Although the US and its allies attempted to manipulate the law for their own strategic benefits, they failed, as this work tries to demonstrate, to persuade the vast majority of the international community to accept their arguments.

We will analyze the two main arguments advanced by the US and its allies to justify the war and we will demonstrate that, for us, they were not valid under the current international law of the use of force.

The first argument advanced was that the use of force was authorized by the existing resolutions of the United Nations Security Council.

The second argument was that the use of force was justified pursuant to the legal doctrine of self-defense.

We will also try to show that the customary international law and the Charter of the United Nations law are relatively clear about this issue and that none of the exceptions to justify the use of force had been satisfied. Therefore it should be recognize that the invasion of Iraq was illegal and illegitimate.

It follows from this conclusion that whilst the power of rules may not prevent the world's superpower from acting to pursue its own interests, this case provides a common framework for others to evaluate the legitimacy of that behavior and to revise their actions accordingly<sup>5</sup>.

Anyway, we have to recognize that the threat of weapons of mass destruction (WMD) and terrorism, as well as the changing values of the international community, are precipitating a paradigm shift in international law which may in time result in a broadening of the notion of imminent threat as it applies to the law of self-defense. Which means that probably a similar type of war may be legal in the future but not in the situation under consideration.

## 2. The limits of the use of force in the international law

<sup>4</sup> Radinber Singh QC and Alison MacDonald, Matrix Chambers, Public Interest Lawyers On behalf of Peacerights, Opinion on *The legality of the use of force against Iraq*, Opinion, Gray's Inn, London WC1R 5LN, 10 September, 2002, p. 6-7.

<sup>5</sup> See Alex J Bellamy, *International Law and the war with Iraq*, *Melbourne Journal of International Law*, Vol. 4, 2003, p. 501.

Until 1945, there was no customary prohibition on unilateral use of force if circumstances warranted it. For signatories of particular instruments, if certain preliminary procedures had been exhausted, states reserved the right to resort to force.

Nowadays, International law of use of force is framed, but not limited, by the United Nations Charter<sup>6</sup>. Almost all States of the world are parties of this Treaty, including the United States, its allies and Iraq. The UN Charter introduced a radically new notion, a general prohibition of the unilateral resort to force by states.

The Charter emphasizes that peace is its fundamental aim, and is to be preserved if at all possible. The preamble UN Charter expresses a determination “*to save succeeding generations from the scourge of war*”, “*to practice tolerance and live together in peace with one another as good neighbors*”, “*to unite our strength to maintain international peace and security*”, and to ensure “*that armed force shall not be used, save in the common interest*”.

Article 1 of the Charter sets out the United Nations purposes, the first one is: “*To maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace*”. The other provisions of the Charter must be interpreted in accordance with this aim<sup>7</sup>.

The Charter goes on to set out two fundamental principles on article 2 which are (3) “*all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered* and (4) *all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations*”.

The prohibition on the use of force contained in Article 2(4) is a principle of customary international law, having the status of *ius cogens*, a peremptory international law norm from which no derogation is permissible<sup>8</sup>. The effect of Articles 2(3) and

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<sup>6</sup> As Christine Gray says, the United Nations Charter provides *the first expression of the basic rules*, but these *are brief and cannot constitute a comprehensive code*. See Christine Gray, *International Law and the Use of Force* (2000) 2-3.

<sup>7</sup> See the 1969 Vienna Convention on the Law of Treaties, Article 31, which provides that a treaty must be interpreted in accordance with its objects and purposes, including its preamble.

<sup>8</sup> Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States*), Merits [1986] ICJ Reports 14, at parag. 190.



2(4) is that the use of force can *only* be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN's purposes<sup>9</sup>.

The Charter authorizes the use of force in the situations set out in Chapter VII. Article 42 states that, if peaceful means have not succeeded in obtaining adherence to Security Council decisions, it “*may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security*” In fact, this means that States need to require a UN Security Council resolution in order to use force against another State (subject to Article 51: see below). The use of force is only justified where there are no peaceful means available for resolving the dispute. We stress that, in our view, where Members believe that another State has breached a resolution of the Security Council, they do not have a unilateral right under Article 42 to use force to secure adherence to it or to punish that State. What action should be taken is a matter for the Security Council.

Article 51 of the Charter reserves the State's right to self-defense. This right is additional to the provisions of Article 42. A State does not need to require a Security Council resolution in order to defend itself by force, but even the right of self-defense is subject to action by the Security Council, as is clear from the terms of Article 51: “*Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*”. (Emphasis added)

Therefore, according to the Charter, there are only two situations in which a State can lawfully use force against another:

Pursuant to a UN Security Council resolution; and

In individual or collective self-defense (a right under customary international law, which is expressly preserved by Article 51 of the Charter)<sup>10</sup>.

Finally there are many who claim that humanitarian intervention is also a legal exception of the use of force<sup>11</sup>. To justify it they cite the purposes of the UN Charter.

<sup>9</sup> See Radinber Singh QC and Alison MacDonald, Matrix Chambers, Public Interest Lawyers on behalf of Peacerights, opinion on “*the legality of the use of force against Iraq*”, 10 September 2002, p. 5-7.

<sup>10</sup> See Radinber Singh QC and Alison MacDonald, op. cit, p. 7.

<sup>11</sup> Antonio Cassese, *Ex iniuria ius oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* (1999), 10 European Journal of International Law 23, p. 29.



Article 1 (3) states that a purpose of the UN is “*to achieve international co-operation...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*”. Indeed the Charter’s preamble reaffirms “*faith in fundamental human rights*”. Article 13 (1) (b) empowers the General Assembly to assist in the realization of human rights”, and Article 55 (c) calls on the UN “*to promote universal respect for, and observance of, human rights and fundamental freedoms*”. Article 62 (2) empowers the Economic and Social Council to “*make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all*” and Article 68 enables the Council to “*set up commissions (...) for the promoting of human rights*. In light of those provisions, it is clear that the UN Charter is concerned with the protection of human rights and its certainly justifiable that, in certain cases, humanitarian intervention is consistent with the objectives of the Charter<sup>12</sup>. Although humanitarian intervention was also invoked by the US to justified the war against Iraq we will not analyze it in our work<sup>13</sup>.

In spite of the complexity of the law of use of force in the international community, state practice and *opinio juris* suggest that the UN Charter’s basic rules constitute customary international law. As Christine Gray has pointed out, *states almost always agree on the content of applicable law, it is on the application of the law to particular facts or on the facts themselves that the states disagree*<sup>14</sup>. These basic rules shaped the debate about the legality of the use of force in Iraq. The US did not disregard international legal principles and did not attempt to rewrite legal rules unilaterally. Instead, it offered an interpretation of the applications of the law to the facts of its case. The first argument was that the existing Security Council resolutions provide enough authority for the war; the second was that the war represented a continuation of the war against terror and was therefore legal because it constituted a legitimate act of self-defense. Those two arguments will be discussed in the chapters below.

<sup>12</sup> Anthony Arend, *International Law and Rogue States: The Failure of the Charter Framework* (2002) 36 New England Law Review, 735, p. 748.

<sup>13</sup> About the doctrine of humanitarian intervention as a US justification for the use of force against Iraq see Ronly Sifiris, *Operation Iraqi Freedom: United States v. Iraq – the legality of the war*, *Melbourne Journal of International Law*, Vol. 4, 2003, pp. 544-558.

<sup>14</sup> See Christine Gray, *International Law and the Use of Force*, op. cit., p. 6.



## Chapter II

### Use of force authorized by the UN Security Council

#### 1. The role of the UN Security Council

As described above, the Security Council can authorize the use of force. But when it does so it must comply with the constitutional principles of the United Nations, and with the objectives and purposes of the Charter.

Chapter VII of UN Charter confers on the Security Council the duty of determining the existence of any threat to peace, breach of peace, or act of aggression, and the duty of deciding which action should be taken to maintain or restore international peace and security (Article 39).

Article 41 gives the Security Council the power to take peaceful measures to give effect to its decisions, and by Article 42, where the Security Council considers that those measures would be, or have proven to be, inadequate it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

Chapter VII<sup>15</sup> originally envisaged that the Security Council would carry out such enforcement action itself using the armed forces of Member States<sup>16</sup>. As a consequence there is no explicit authority for the Security Council to delegate competence to carry out enforcement action under their own command and control to Member States<sup>17</sup>.

The only expressed reference in Chapter VII to the use of force by Member States acting alone is in Article 51. However a practice has arisen to authorize Member States to carry out enforcement action on the Security Council's behalf. Nonetheless, it is important to notice that there is no expressed authority in the UN Charter for Member States to carry out actions under Article 42 under their own command and control either with or without a Security Council Resolution.

Anyway, the US and its allies had argued that there was sufficient authority in existing Security Council resolutions to justify the use of force against Iraq. On 10 November 2002, US Secretary of State, Collin Powell insisted that "*the US believes that because of past material breaches, current material breaches and new material breaches there is more than enough authority for it to act*"<sup>18</sup>.

<sup>15</sup> See Articles 43-49.

<sup>16</sup> See Jules Lobel and Michael Ratner "*Bypassing the Security Council: Ambiguous Authorizations to use Force, Cease-fires and the Iraqi Inspection Regime*", [1999] AJIL 124 at 126; Danesh Sarooshi, *The United Nations and the Development of Collective Security*, (Oxford, 1999), at pp. 142-3.

<sup>17</sup> See Danesh Sarooshi, above, (Oxford, 1999), at p.143.

<sup>18</sup> Toby Harden and Andrew Sparrow, *We are ready to attack, US warns Saddam*, Daily Telegraph



The legal argument in favor of an action by the US was that the current resolutions themselves authorize the use of force. As the Security Council has not passed a resolution expressly authorizing the use of force against Iraq since Resolution 678, passed at the start of the Gulf War, the US argue that the current Security Council resolutions *implicitly* authorize the use of force by Member States as Iraq's persistent non-compliance with the existing resolutions. Further, as Iraq's failure to comply with the cease-fire requirements set out in Resolution 687, which brought to an end military action against Iraq during the Gulf War, and amplified subsequently, justify the renewed use of force under Resolution 678, without further authorization from the Security Council.

## 2. Resolutions relating to Iraq

To understand this issue well I think it is important to have a brief chronological description of the main resolutions relating to Iraq adopted by the Security Council since the invasion of Kuwait in 1990. The main resolutions are the following.

Resolution 678, paragraph 2, authorized Member States “*to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.*”<sup>19</sup>.

Resolution 660 had the sole aim of restoring the sovereignty of Kuwait. After that had been achieved, Resolution 687 imposes a formal cease-fire, amongst other conditions, prohibits Iraq from supporting terrorism, developing or acquiring WMD, and from obtaining ballistic missiles with warhead activated ranges greater than one hundred and fifty kilometers<sup>20</sup>.

Shortly after the cease-fire, Resolution 688 dealt with the humanitarian issues arising from the situation in Iraq. It called upon Iraq to allow access to international humanitarian organizations. It is important to note that this resolution was *not* passed under Chapter VII of the Charter, and did not authorize the use of force to achieve its objectives. However, the United States, the United Kingdom and France used Resolution 688 as authority to establish “*safe havens*” for Kurds and Shiites, and then to establish no-fly zones over Iraq<sup>21</sup>. The United Kingdom and the United States have argued that Resolution 688 implicitly authorized Member States to respond to Iraq's actions, including the establishment of no-fly zones, and thereafter to defend those zones by force. They argued that these zones were essential for humanitarian

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(London UK), 11 November, 2002, 1, cited by Alex J Bellamy, *International Law and the war with Iraq*, above n.º 1, p. 502.

<sup>19</sup> SC Res 678, UN SCOR, 45<sup>th</sup> sess, 2963<sup>rd</sup>, mtg, UN Doc S/RES/678 (1990).

<sup>20</sup> SC Res 687, UN SCOR, 46<sup>th</sup> sess, 2981<sup>st</sup>, mtg, UN Doc S/RES/687 (1991).

<sup>21</sup> These developments are set out in detail in Christine Gray, *International Law and the Use of Force*, (Oxford, 2000) pp. 191-192.



purposes and to monitor Iraq's compliance with the Security Council's requirements. Christine Gray convincingly rejects these arguments in the following terms: "*In fact there did not seem to be any adequate legal basis for the establishment of the safe havens by the coalition forces. Resolution 688, although referred to at the time by the States involved, clearly does not authorize forcible humanitarian intervention. It was not passed under Chapter VII and did not expressly or implicitly authorize the use of force. The USA, UK and France did not expressly rely on a separate customary law right of humanitarian intervention in any Security Council debates or in their communications to the Security Council at the time of the establishment of the safe havens. Such a right is notoriously controversial; since the Second World War it has always been more popular with writers than with States*"<sup>22</sup>.

After Resolution 688, Iraq's obligations were further amplified in a series of Resolutions such as Resolutions 707, 715, 1051 and 1060 all related to the international monitoring and inspection systems established to ensure compliance with the cease-fire agreement<sup>23</sup>. For instance, in Resolution 707, the Security Council noted Iraq's "*flagrant violation*" and "*material breaches*" of resolution 687. It considered that these constitute a "*material breach of the relevant provisions of that resolution which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region*" (para. 1).

In Resolution 949, it stressed again that "*Iraq's acceptance of resolution 687 (1991) adopted pursuant to Chapter VII of the Charter of the United Nations forms the basis of the cease-fire*" and that "*any hostile or provocative action directed against its neighbors by the Government of Iraq constitutes a threat to peace and security in the region*", while "*underlining that it will consider Iraq fully responsible for the serious consequences of any failure to fulfill the demands in the present resolution*". These include, at paragraph 5, full co-operation with the Special Commission. This demand was repeated in Resolutions 1051, 1060, 1115, 1134, 1137 and 1154.

Resolution 1154 provides that the Security Council is "*determined to ensure immediate and full compliance by Iraq without conditions or restrictions with its obligations under resolution 687 (1991) and the other relevant resolutions*". Significantly, the Security Council also "[s]tresses that compliance by the Government of Iraq with its obligations, repeated again in the memorandum of understanding, to

<sup>22</sup> Christine Gray, *After the Ceasefire: Iraq, the Security Council and the Use of Force* [1994] BYIL 135, at 162.

<sup>23</sup> SC Res 707, UN SCOR, 46<sup>th</sup> sess, 3004<sup>th</sup>, mtg, UN Doc S/RES/707 (1991); SC Res 715, UN SCOR, 46<sup>th</sup> sess, 3012<sup>th</sup>, mtg, UN Doc S/RES/715 (1991); SC Res 1051, UN SCOR, 51<sup>st</sup> sess, 3644<sup>th</sup>, mtg, UN Doc S/RES/1051 (1996); SC Res 1060, UN SCOR, 51<sup>st</sup> sess, 3672<sup>nd</sup>, mtg, UN Doc S/RES/1060 (1996).



*accord immediate, unconditional and unrestricted access to the Special Commission (UNESCO) and the International Atomic Energy Agency (IAEA) in conformity with the relevant resolutions is necessary for the implementation of resolution 687 (1991), but that any violation would have severest consequences for Iraq*". The Security Council also decides, *"to remain actively seized of the matter, in order to ensure implementation of this resolution, and to secure peace and security in the area"*<sup>24</sup>.

On 5 August 1998, Iraq suspended co-operation with the Special Commission and the IAEA. In resolution 1194, the Security Council stated that this *"constitutes a totally unacceptable contravention of its obligations under [resolution] 687(...)"* This condemnation was repeated in resolution 1205, which also demands that Iraq co-operate fully with the Special Commission, and in which the Security Council again remains *"actively seized of the matter"*<sup>25</sup>.

Resolution 1284 establishes the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) to replaced UNSCOM<sup>26</sup>.

Finally in November 2002 the Security Council passed the Resolution 1441 which *"decides (...) to afford Iraq (...) a final opportunity to comply with its disarmament obligations"*. This resolution also states that the Security Council has repeatedly warned Iraq that breaches of its obligations will attract *"serious consequences"*<sup>27</sup>.

It is clear from the description above that, at the time of US invasion, Iraq was in material breach of several Security resolutions.

### **3. Did existing resolutions authorize the use of force?**

It has been argued that where there has been a material breach of a Security Council resolutions, the use of force is authorized as a response to that breach. The majority of those who supported the use of force was a response to that breach relied on the notion that the authorization to use force of Security Resolution 678 had not expired<sup>28</sup>. According to this view, the authorization for the use of force contains no time limitations and has not been expressly or impliedly withdrawn by the Security Council<sup>29</sup>. This idea is based on the premise that *"what exists is not a*

<sup>24</sup> SC Res 1154, UN SCOR, 53<sup>rd</sup> sess, 3858<sup>nd</sup>, mtg, UN Doc S/RES/1154 (1998).

<sup>25</sup> SC Res 1194, UN SCOR, 53<sup>rd</sup> sess, 3924<sup>th</sup>, mtg, UN Doc S/RES/1194 (1998); SC Res 1205, UN SCOR, 53<sup>rd</sup> sess, 3939<sup>th</sup>, mtg, UN Doc S/RES/1205 (1998).

<sup>26</sup> SC Res 1284, UN SCOR, 54<sup>th</sup> sess, 4084<sup>th</sup>, mtg, UN Doc S/RES/1154 (1999).

<sup>27</sup> SC Res 1441, UN SCOR, 57<sup>th</sup> sess, 4644<sup>th</sup>, mtg, UN Doc S/RES/1441 (2002).

<sup>28</sup> Bill Campbell and Cris Moraitis, Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq (2003) 4 Melbourne Journal of International Law 178 [14]-[18], cited by Ronli Sifris, *op. cit.*, p. 526.

<sup>29</sup> *Ibid.*, (15).



*series of disconnected events but a continuous series of events starting from the Gulf War and continuing until today. These events are governed by the same law and the same legal concepts*<sup>30</sup>. Therefore, according to this argument, and as there was a material breach of the pre-conditions of cease fire, Resolution 678 still allows Member States to use “*all necessary mean*” to ensure the compliance.

Resolution 1441, expressly states that Iraq was in material breach of its obligations under Resolution 687 (the cease-fire) and threatened with “*serious consequences*” when failing compliance. Consequently, US argued that Resolution 1441 itself authorized the use of force as it has given a final opportunity to Iraq to comply, and when it threatened with “*serious consequences*” it was understood that military force was a possible consequence of non-compliance.

There were some who argued that Resolution 678 was not confined to ensuring Iraq’s withdrawal from Kuwait but extends that authorization to implement “*all subsequent resolutions and to restore international peace and security to the area*”<sup>31</sup>. This was interpreted as authorizing future use of force when necessary for the restoration of international peace and security. Thus supporters contend that the war against Iraq was authorized in the name of restoring the peace and security<sup>32</sup>.

That kind of arguments implies that the decision to use force is to be made by individual States, and that the Security Council only needs to endorse that decision.

As we will try to show this position ignores the constitutional position of the United Nations as a forum for collective decision-making. Jules Lobel and Michael Ratner argue convincingly that, “*if the Security Council is dysfunctional or paralyzed by the exercise of the veto, as arguably occurred during the Cold War, the case for implied authorization might be stronger. However, Council practice since the Cold War simply does not support any greater need for a flexible reinterpretation of the Charter to support the actual behavior of States. Five times*<sup>33</sup> *in the past eight years the Security Council has authorized the use of force to address threats to world peace*”<sup>34</sup>.

<sup>30</sup> Michael Matheson in Michael Glennon (Chair), *the Challenge of Non-State Actors: Legal Authority for the possible Use of Force against Iraq* (1998), American Society of International Law: Proceedings of 92<sup>nd</sup> Annual Meeting 136, 137 cited by Ronli Sifris, above, p. 527.

<sup>31</sup> Bill Campbell and Cris Moraitis, above 18.

<sup>32</sup> Michael Matheson cited by Ronli Sifris, above 20.

<sup>33</sup> Those occasions were: SC Res 678, authorizing the use of ‘all necessary means’ to liberate Kuwait; SC Res 794, authorizing ‘all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’, SC Res 940, authorizing ‘all necessary means to facilitate the departure from Haiti of the military leadership’, SC Res 929, authorizing France to use ‘all necessary means’ to protect civilians in Rwanda, SC Res 770, authorizing states to take ‘all measures necessary’ to facilitate humanitarian assistance and enforce the no-fly zone in Bosnia.

<sup>34</sup> Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to use Force, Cease-fires and the Iraqi Inspection Regime* [1999] AJIL 124, at 127.

The International Court of Justice, has also stated that “*the language of a resolution of the Security Council should be carefully analyzed (...) having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences*”<sup>35</sup> This has been described by Michael Byers as “*one of the very few authoritative guides to the interpretation of Security Council resolutions*”<sup>36</sup>.

We don't think that the above resolutions implicitly allow the use of force. The wording of resolutions relating to the Gulf War shows that, when the Security Council intends to authorize the use of force, it does so in clear terms. As we saw above only Resolution 678 referred to the use of “*all necessary means*”, phrasing which does not appear in any subsequent Resolutions relating to Iraq. The phrase “*all necessary means*” has also been used when the Security Council authorized the ensure of implementation of measures under Article 41, as in military interventions in Bosnia (1992), Haiti (1994), Rwanda (1994) and Somalia (1998)<sup>37</sup>.

Resolution 686, para 4, which marked the provisional cessation of hostilities, expressly preserved the right to use force under Resolution 678. However, Resolution 687, which marked the permanent ceasefire, didn't use such terms. This demonstrates a clear recognition that the right to use force requires expressed terms if it is to be continued. The absence of any clear terms in any resolution after Resolution 686 leads us to the conclusion that no such use of force was authorized.

Further, Resolution 687 states that the Security Council “[*d*]ecides to remain actively seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region”. This clearly contemplates that the Security Council remains seized to the matter and will decided what further steps may be required for the implementation of that resolution.

The Secretary General of the United Nations has made it clear that Resolution 678 was directed at a unique and specific situation: “*The Iraqi invasion and occupation of Kuwait was the first instance since the founding of the Organization in which one Member State sought to completely overpower and annex another. The unique demands presented by this situation have summoned forth innovative measures which*

<sup>35</sup> In the *Namibia Advisory Opinion* (1971) ICJ Reports 15, 53.

<sup>36</sup> Michael Byers, *Terrorism, The Use of Force and International Law after 11 September* (2002) 51 ICLQ 401, at 402.

<sup>37</sup> See, SC Res 770, authorizing states to take ‘**all measures necessary**’ to facilitate humanitarian assistance and enforce the no-fly zone in Bosnia, SC Res 940, authorizing ‘**all necessary means** to facilitate the departure from Haiti of the military leadership’, Res 794, authorizing ‘**all necessary means** to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’, and SC Res 929, authorizing France to use ‘**all necessary means**’ to protect civilians in Rwanda (Emphasis added).



have given practical expression to the Charter's concepts of how international peace and security might be maintained"<sup>38</sup>. Those unique demands relating to the invasion and occupation no longer existed. The Secretary General's remarks underline how exceptional the United Nations considers the use of force, and how dependent the decision to use force was on the fact that Iraq had actually *invaded* another Member State. No such action has been taken by Iraq since then<sup>39</sup>.

Further, shortly after the end of the Gulf War, US officials gave evidence to the House Committee on Foreign Affairs that the military incursions into Iraq were authorized only because they were "*pursuant to the liberation of Kuwait, which was called for in the UN resolution*", and the United Kingdom declared that the sole purpose of the operation was to liberate Kuwait<sup>40</sup>.

So, the better view is that the basic UN Charter principles of peaceful resolution of disputes and Security Council control over the use of force dictate that, absent explicit words in contrary, an authorization to use force expires once a permanent cease-fire is in place<sup>41</sup>. Which means that, once a cease-fire is in place, the Article 2 (4) about the prohibition against the use of force applies again and for the use of force to be legal a new resolution that authorized it will be necessary.

In the case of Iraq, Resolution 678 was a specific response to the invasion of Kuwait by Iraq. The force was authorized at the time as a necessary measure to deal with that situation. The use of force by the US and its allies against Iraq was clearly not a response to a similar type of situation.

Further, Resolution 686, which sets the terms of the provisional cease-fire states that Resolution 678 remains valid as regards to the enforcement of certain terms of provisional cease-fire until Iraq complies with the terms<sup>42</sup>. However Resolution 687, which sets out the terms of permanent cease-fire contains no such statement which indicates that whereas the use of force remained authorized when the provisional cease-fire was in place, it had expire upon Iraq's acceptance of the permanent cease-fire. The word *acceptance* is crucial in this context, as resolution 687 provides for a cease-fire predicated upon Iraq's acceptance of the terms of that resolution, and not Iraq's *compliance* with those terms<sup>43</sup>. As Iraq accepted the terms

<sup>38</sup> The United Nations Blue Book Series Vol IX, *The United Nations and the Iraq-Kuwait Conflict 1990-1996* (1996), at 3, cited by Radinber Singh QC and Alison MacDonald, above, p. 24-25.

<sup>39</sup> Radinber Singh QC and Alison MacDonald, Public Interest Lawyers On behalf of Peacerights, p. 25.

<sup>40</sup> Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, (1999) 93 American Journal of International Law 124, p. 140.

<sup>41</sup> Jules Lobel and Michael Ratner, above, pp. 148-149.

<sup>42</sup> SC Res 686, UN SCOR, 46<sup>th</sup> sess, 2978<sup>th</sup>, mtg [1], [4], UN Doc S/RES/686 (1991).

<sup>43</sup> Resolution 687, cited, [33].

of the cease fire<sup>44</sup>, it means that the authorization contained in resolution 678 expired at that time<sup>45</sup>.

Moreover, resolution 687 sets out the UN Security Council's decision to remain seized of the matter and to take further steps as may be required for the implementation of the present resolution and to secure peace and security in the region<sup>46</sup>. Which clearly means that it was for the Security Council, and not for a member state, to determinate what steps were required to ensure Iraq's compliance with its obligations and secure peace and security in the area<sup>47</sup>. This resolution was an agreement between Iraq and the United Nations and it did two things. Firstly, it brought the Gulf War to a permanent end. Secondly, it sets out a series of obligations to Iraq. The cease-fire was conditional on Iraq's *acceptance of* those terms. And, in fact, Iraq accepts those terms. So, from the moment of ceasing hostilities, there was a situation of peace, in which the obligation under Article 2(4) of not to use force applies again in full. For instance, I think that no one would seriously claim that member states of the UN command would have the authority to bomb North Korea pursuant to the 1950 authorization to use force if in 2004 North Korea flagrantly violated the 1953 armistice<sup>48</sup>.

For us, there is no doubt that it would be contrary to the Charter's objectives if, once the Security Council authorizes the use of force, that authorization constitutes a permanent mandate to Member States to use force as and how they determine it to be necessary. Statements made at the time of other cease-fires directly contradict this argument<sup>49</sup>.

As Professor Thomas Franck said "*by any normal construction drawn from the administrative law of any legal system, what the Security Council has done is occupy the field, in the absence of a direct attack on a member state by Iraq. The*

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<sup>44</sup> *Identical Letters Dated 6 April 1991 from the Minister for Foreign Affairs of the Republic of Iraq Addressed Respectively to the Secretary-General and the President of the Security Council*, UN Doc S/22456 (1991).

<sup>45</sup> Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, (1999) 93 *American Journal of International Law* 124, pp. 148-149.

<sup>46</sup> Resolution 687, cited, [34].

<sup>47</sup> Jules Lobel and Michael Ratner, cited, p. 150.

<sup>48</sup> Example give by Jules Lobel and Michael Ratner, op. cit., p. 145.

<sup>49</sup> When the Security Council imposed a cease-fire on the parties to the conflict between Israel and various Arab governments in 1948, Count Bernadotte, the UN mediator, instructed that the UN cease-fire resolution was to mean that: '(1) *No party may unilaterally put an end to the truce.* (2) *No party may take the law into its own hands and decree that it is relieved of its obligations under the resolution of the Security Council because in its opinion the other party has violated the truce.*' *The Security Council then reiterated that 'no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party*, cited by Radinber Singh QC and Alison MacDonald, *Public Interest Lawyers On behalf of Peacemights*, above, p. 34.



*Security Council has authorized a combined military operation; has terminated a combined military operation; has established the terms under which various UN agency actions will occur to supervise the cease-fire, to establish the standards with which Iraq must comply; has established the means by which it may be determined whether those standards have been met (and this has been done by a flock of reports by the inspection system); and has engaged in negotiations to secure compliance. After all these actions, to now state that the United Nations has not in fact occupied the field, that there remains under Article 51 or under Resolution 678, which authorized the use of force, which authorization was terminated in Resolution 687, a collateral total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 678, is to make a complete mockery of the entire system”<sup>50</sup>.*

Moreover, when the UN Security Council adopted resolution 1154 in 1998<sup>51</sup>, much reliance was placed, particularly by the United States and the United Kingdom. The warning of “*severest consequences*” in that Resolution was a clear reference to the use of force. Although, it was addressed to Iraq, not to the Member States, and was not worded as an authorisation. At the meeting, which led to the adoption of Resolution 1154, the issue of use of force was debated. The question arise was would the UN members, without more, have the right to use force if Iraq failed to comply with that Resolution? Niels Blokker, summarises the debate as follows: “*no agreement was reached on this issue. The US and the UK did not receive support for the view that UN members would have such an automatic right. The other members of the Council, including the other permanent members, emphasized the powers and authority of the Security Council and in some cases explicitly rejected any automatic right for members to use force. Sweden emphasised that “the Security Council’s responsibility for international peace and security, as laid down in the Charter of the United Nations, must not be circumvented.” Brazil stated that it was “satisfied that nothing in its [the Resolution’s] provisions delegates away the authority that belongs to the Security Council under the Charter and in accordance with its own resolutions.” And Russia concluded that, “there has been full observance of the legal prerogatives of the Security Council, in accordance with the United Nations Charter. The resolution clearly states that it is precisely the Security Council, which will directly ensure its implementation, including the adoption of appropriate decisions. Therefore, any hint of automaticity with regard to the application of*

<sup>50</sup> Thomas Franck, ASIL Proceedings, 1998, *Legal Authority for the Possible Use of Force Against Iraq*, at 139, cited by Radinber Singh QC and Alison MacDonald, Public Interest Lawyers On behalf of Peacerrights, above, p. 35.

<sup>51</sup> SC Res 1154, above.



*force has been excluded; that would not be acceptable for the majority of the Council's members*"<sup>52</sup>. (Emphasis added)

The intentions of the majority of States were clearer. Resolution 1154 didn't give to Member States authority to use force against Iraq in the event of non-compliance. The United States tried to persuade the Security Council to include an express authorisation of force and it failed, as the above analysis shows. Consequently, it could not be defended by any State that the correct interpretation of Resolution 1154 did after all authorise the use of force<sup>53</sup>.

The matter relating of implied authorization was further debated in the Security Council, following *Operation Desert Fox*, when the British and the American send a series of air strikes on Iraq in December 1998. In that situation, the United Kingdom and the United States argued that Resolution 1205 implicitly revived the authorization of the use of force contained in Resolution 678. The issue was debated at the Security Council and the majority of states argued that the use of force by the United Kingdom and the United States under the purported authorization of Resolutions 678, 1154 and 1205 was unlawful. At that debate, Boris Yeltsin, President of the Russian Federation, stated that "[t]he UN Security Council resolutions on Iraq do not provide any grounds for such actions. By use of force, the US and Great Britain have flagrantly violated the UN Charter and universally accepted principles of international law, as well as norms and rules of responsible conduct of states in the international arena (...) In fact, the entire system of international security with the UN and the Security Council as its centre-piece has been undermined." At the time,

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<sup>52</sup> Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'' (2000) 11 EJIL 541, cited by Radinber Singh QC and Alison MacDonald, Public Interest Lawyers On behalf of Peacerights, above, pp. 25-26.

<sup>53</sup> The potentially serious consequences of ignoring the clear intent expressed by Permanent Members of the Security Council have been highlighted by Dame Rosalyn Higgins, the British Judge on the ICJ. Writing in a different but related context – whether UN resolutions gave NATO the implied authorization to intervene in Kosovo – she states that: "One must necessarily ask whether [the implied authorization argument] is not to stretch too far legal flexibility in the cause of good. In the Cold War legal inventiveness allowed peacekeeping instead of collective security enforcement. Then, at the end of the Cold War, we saw enforcement by coalition volunteers instead of UN military action under Article 42 of the Charter. In our unipolar world, does now the very adoption of a resolution under chapter VII of the Charter trigger a legal authorization to act by NATO when it determines it necessary? If that is so, then we may expect that in the future Russia will again start exercising its veto in the Security Council, to make sure resolutions are not adopted, thus undercutting the possibility of useful political consensus being expressed in those instruments International Law in a Changing Legal System', at [1999] CLJ 78 at 94, based on the text of the Rede Lecture, delivered in the University of Cambridge on 22 October 1998, cited by by Radinber Singh QC and Alison MacDonald, Public Interest Lawyers On behalf of Peacerights, above, p. 27.



China also expressed the view that the actions in cause violated international law. And France ended its role in policing the no-fly zones. In fact, the French Minister for Foreign Affairs stated that France had ended its participation since the operation changed from surveillance to the use of force and he considered that there was no basis in international law for this type of action<sup>54</sup>.

We think those debates shows very clear that the majority of the Member States, including three of the Permanent Members, did not consider that the Resolutions could have the meaning argued by the United Kingdom and the United States, and consider that the proposed interpretation is incompatible with the framework laid down for collective decision-making. As one legal commentator said, the arguments advanced by the United Kingdom and United distorts the language and the meaning of the Security Council's resolutions. As he said "*it is no longer simply a case of interpreting euphemisms such as "all necessary means" to allow the use of force when it is clear from the preceding debate that force is envisaged; the USA, the UK and others have gone far beyond this to distort the words of resolutions and to ignore the preceding debates in order to claim to be acting on behalf of the international community*"<sup>55</sup>.

After the United Kingdom and the United States attacked Iraqi radar installations and command and control centers in and outside the no-fly zones in February 2001, the implied authorizations of the use of force was debated again. The UN Secretary-General stressed that only the Security Council could determine the legality of actions in the no-fly zones and that only the Security Council was competent to determine whether its resolutions were of such a nature and effect as to provide a lawful basis for the no-fly zones and the action taken to enforce them<sup>56</sup>. As Christine Gray said "*the enforcement of the unilaterally proclaimed no-fly zones has thus come to be seen as illegitimate, despite UK protestations of humanitarian necessity*"<sup>57</sup>.

Any way, it should be noted that the UN Secretary-General, in support of the United Kingdom's position in relation to air attacks carried out in January 1993 by the USA, the UK and France, directed at destroying Iraqi missiles in the no-fly zones, stated that "*the raid yesterday and the forces that carried out the raid have received a mandate from the Security Council according to Resolution 678, and the cause of the raid was the violation by Iraq of Resolution 687 concerning the ceasefire. So, as Secretary General of the United Nations, I can say that this action was taken*

<sup>54</sup> About this case, see Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq* (2002) 13 EJIL 1, at 22, and Constantine Antonopoulos, *The Unilateral Use of Force by States After the End of Cold War*, [1999] JACL 117, at 155.

<sup>55</sup> Christine Gray, *From Unity to Polarization...*, cited, p. 10.

<sup>56</sup> *Ibid.*, at 10.

<sup>57</sup> *Ibid.*, at 12.



and conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations”<sup>58</sup>. However, the Secretary General has always condemned the unilateral use of force before and since that statement. Anyway, we do think that his statement to the press cannot be determinative of the legality of that action, as the Secretary General has never again gave that kind of support to unilateral military action against Iraq. Which means, that his support on 1993 action was an isolated episode. Moreover, the Secretary General’s statement was also contrary to the views of the UN Legal Department which in relation to the attacks stated that “*the Security Council made no provision for enforcing the bans on Iraqi warplanes*”<sup>59</sup>.

A similar analysis applies to the resolution 1441. Whilst that gave Iraq a final opportunity to comply and warns of serious consequences in the case of non-compliance<sup>60</sup>, it was also clear that the Security Council was not authorizing the use of force. In fact, while resolution 678 authorizes member states to use all necessary means to ensure compliance, resolution 1441 hasn’t employed such terminology. Moreover, following the adoption of resolution 1441, three permanent members, China, France and Russia issued a joint statement asserting that the resolution 1441 *excludes any automaticity in the use of force*<sup>61</sup> (Emphasis added). The statement clarifies that, should it be reported that Iraq has failed to comply with its obligations, it will be then for the Council to take position on the basis of that report<sup>62</sup>. The consistent opposition of China, France and Russia to the use of force against Iraq makes clear that they would have exercised their right to veto to any resolution authorizing the use of force.

#### 4. First Conclusion

Although the US and its allies had advanced some arguments to support that the existing resolutions authorize the use of force, those arguments are, in our view, legally flawed. For us those arguments are incompatible with the fundamental principles of the UN Charter, one of which is to preserve peace as long as possible. Therefore clear terms must be required to authorize the use of force. There is a very strong argument that, bearing in mind the fact that ambiguities in interpretation should be resolved in compliance with the Charter’s objectives, the use of force is not justified until the Security Council says so in clear terms, and does it in terms

<sup>58</sup> *Ibid*, at 167.

<sup>59</sup> Quoted in Jules Lobel and Michael Ratner, *op. cit.*, at p. 133.

<sup>60</sup> SC Res 1441, cited, parag. [13].

<sup>61</sup> China, France and Russia, *Iraq-Join Statement by the People’s Republic of China, France and Russian Federation*, New York, US 8 November 2002 at <<http://www.info-france-usa.org/news/statements/2002/iraq11302.asp>> at 1 October 2003, cited by Ronli Sifris, above, p. 529.

<sup>62</sup> *Ibid*.



directed at the current situation. The Charter's overriding commitment to the use of force only as a last resort entails that explicit authorization be required, rather than seeking to make resolutions bear meanings clearly at odds with the intentions of large numbers of the States which drafted them, including Permanent Members of the Security Council.

The importance of the United Nations, and the constraints on interpretations of the relevant resolutions, are well expressed by Jules Lobel and Michael Ratner. As they says, "*to resolve these issues [whether the current Resolutions implicitly authorize the use of force], two interrelated principles underlying the Charter should be considered. The first is that force be used in the interest of the international community, not individual states. That community interest is furthered by the centrality accorded to the Security Council's control over the offensive use of force. This centrality is compromised by sundering the authorisation process from the enforcement mechanism, by which enforcement is delegated to individual states or a coalition of states. Such separation results in a strong potential for powerful states to use UN authorisations to serve their own national interests rather than the interests of the international community as defined by the United Nations*"<sup>63</sup>.

Further, the Gulf War ended with a Security Council commitment to remain "*actively seized*" of the situation. That statement strongly implies that the Security Council will apply their judgment *afresh* to any new proposals for the use of force. As Jules Lobel and Michael Ratner express it, "*it should not be presumed that the Security Council has authorized the greatest amount of violence that might be inferred from a broad authorization. For example, Resolution 678 clearly authorized force to oust Iraq from Kuwait, but the broad provision on restoring international peace and security ought to be read in the context of that purpose. It should not be interpreted to authorize an escalation of the fighting that would remove the Government or enforce weapons inspections*"<sup>64</sup>.

There was another specific argument advanced which involves the interpretation of cease-fire agreements specifically. That argument considers that a breach of the terms accepted by Iraq in the cease-fire resolution (Resolution 687) entitles Member States without further authorization to use force to end those violations. So, assuming that Iraq was in fact significantly in breach of the Security Council's requirements, raises two questions: (1) whether a material breach of requirements contained in a cease-fire agreement allows the use of force in response; and (2) whether Member States are entitled unilaterally to determine the existence of such a breach and to use force without Security Council authorization. As we saw

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<sup>63</sup> Jules Lobel and Michael Ratner, cited, p. 127.

<sup>64</sup> *Ibid.*, p. 129.



above it is very doubtful that material breaches of a cease-fire agreement authorizes in response the use of force. However, *if* such use of force could ever be justified, that is clearly a decision to be made by the Security Council. The constitutional arguments considered above apply with equal force in this context. If we have in mind the purpose of the system of collective decision-making, the emphasis by UN Charter on peaceful resolution wherever possible, and the Security Council's active management of the Iraqi situation to date, the better view is that neither the breaches of the cease-fire agreement or breaches of any other resolution authorize the unilateral use of force.

For us, it is clear that resolution 1441 does not expressly authorize Member States to use force in the event of non-compliance. The study of resolutions adopted by the Security Council, including Resolution 678, shows that the language used to authorize force is always bold and consistent. For example, the Security Council usually says in that kind of resolutions that Member States are "*authorized*" to "*use all necessary means*" or "*take all necessary measures*" to pursuit a specified goal.

Instead, resolution 1441 provides at paragraphs 4, 11 and 12 that in the event of non-compliance the matter will be referred to the Security Council, which will convene to consider the need for full compliance with all of the relevant Security Council resolutions. This clearly contemplates that it is the Security Council that have to decide on any further action to be taken against Iraq. Paragraph 13 states that the Security Council "*recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations*". (Emphasis added). The words *in that context*, which appeared first in the 6 November draft, clearly indicate that any serious consequences that Iraq will face are to be decided upon in the context of the discussion by the Security Council envisaged by paragraph 12. In any event, it is clear that the phrase "*serious consequences*" did not itself authorize the use of force and it was a reference to previous warnings, which this part of the Resolution "*recalls*".

So, having failed to obtain an express authorization for the use of force, and to preserve the role of the Security Council, and having publicly agreed in their explanation of the vote for adoption of resolution 1441 that there was no such implied authorization for force, there was no basis for the claim that resolution 1441 could be interpreted as authority for the use of force without a further Security Council resolution.

The argument of implied authorization of force was in conflict with the fundamental objectives of the Charter set out in Articles 1 and 2 to preserve peace and to prohibit force save in specified circumstances. First, the fundamental nature of the prohibition against the use of force in Article 2(4) means that any ambiguities in interpretation should be resolved in favour of that prohibition. The Charter's overriding commitment to the use of force only as a last resort entails that explicit



authorization is required. Secondly, the power given to the Security Council alone under Chapter VII to decide to use force to restore peace is intended to ensure that any decisions on the use of force are reached collectively.

The implied authorization arguments advanced by the US and the UK permits states to make unilateral decisions about the use of force, which is precisely what Chapter VII and the Charter as a whole are designed to avoid.

Furthermore, as pointed out above, it is only the Security Council, which has the power under Article 39 to determine whether there has been a breach of the peace or threat to the peace and to decide whether to take action under Articles 41 and 42. Since the Security Council is exercising powers delegated to it by Member States under Article 24 of the UN Charter, powers which it must exercise in compliance with the purposes and principles of the United Nations, it cannot delegate its functions under Chapter VII to a Member State, and must retain effective authority and control over those functions which it does delegate<sup>65</sup>.

It is clear that a practice has grown up of delegating the carrying out of enforcement action to Member States, but it is also clear that in doing so the Security Council has increasingly sought to retain overall control of the operation with clear mandates, time-limited authorizations and reporting requirements<sup>66</sup>.

The implied authorization arguments point out by the US would undermine the control exercised by the Security Council which is an essential feature of lawful delegation under the Chapter VII. These arguments would effectively allow Member States to take unilateral decisions on the interpretation of resolutions, reading into them authorization to take action which does not appear clearly on the face of the resolution. This leaves the Security Council with little or no control of the functions it has delegated and unacceptably waters down the protections built into Chapter VII, which enshrine the principle of collective decision-making.

Finally, the limitations on delegation mean that the terms of a resolution that delegates Chapter VII powers are to be interpreted narrowly<sup>67</sup>.

In conclusion, there was no authorization (whether expressed or implied) for the US intervention. With the absent authority conferred by the Security Council on resolution 1441 the military action to enforce the terms of resolution 1441 was not compatible with international law and was a violation of the purposes of the UN Charter set out in Article 1 and in Article 2(4).

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<sup>65</sup> See Danesh Sarooshi, *The United Nations and the Development of Collective Security*, (Oxford, 1999), pp.154-5 and Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'*, EJIL 2000, Vol. 11, n.º 3, p. 552.

<sup>66</sup> See Niels Blokker, cited, at 561-5.

<sup>67</sup> See Danesh Sarooshi, cited, p. 44.



## CHAPTER III

### Self-Defense

#### 1. The doctrine of self-defense

In spite of the general prohibition of the use of force set out in Article 3 (4), the UN Charter does recognize the right of the States to use force in self-defense against an armed attack at Article 51<sup>68</sup>. The exact scope of the right of self-defense has been subject of ongoing debate and controversy.

The notion that self-defense is an inherent right is steeped in naturalist doctrine. Preservation of self-defense has long been viewed as a natural right of the state. However, this fact does not mean that self-defense is an autonomous right. In fact, the right does not exist outside the law and it is defined and limited by the law.

The expressed terms of Article 51 refer to the right of self-defense *if an armed attack occurs*. This expression is not defined in the UN Charter and is therefore the subject of much controversy and debate.

In the *Nicaragua* case<sup>69</sup> the ICJ held that the right of individual or collective self-defense is triggered only by acts grave enough to amount to an armed attack. The Court relied in part on the UN General Assembly's Definition of Aggression<sup>70</sup> to conclude that an armed attack triggering unilateral self-defense may include "*the sending by or on behalf of a State of armed bands, groups, irregulars mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to ... an actual armed attack conducted by regular forces (...)*". In this case, the Court was assessing the US claim that its use of force against Nicaragua was a lawful act of collective self-defense of El Salvador. The US argued that Nicaragua had used unlawful force in the first instance by providing weapons and supplies to El Salvador rebels. But the Court held that Nicaragua was not shown to be responsible

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<sup>68</sup> Article 51 of the Charter provides that "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*".

<sup>69</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits [1986] ICJ Reports 14, [194-95].

<sup>70</sup> G.A. Res.3314 UN, GAOR, 29<sup>th</sup> Sess, Supp., n.º 31, UN Doc. A/9631 (1974); see also *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of United Nations*, G.A. Res. 2625, UN GAOR, 25<sup>th</sup> Sess., Supp. n.º 28, UN Doc A/8028 (1970).



for providing weapons and supplies to Salvadorian rebels and further that even if it had done so, the supply of weapons was not the same as an armed attack. It is not entirely clear whether the Court intended to say that providing weapons and other supplies could never have amounted to an armed attack, or only that the level of weapons and supplies proved in that particular case itself had not amounted to armed attack. Moreover, El Salvador had not reported to the Security Council, or had invited the US to assist in its self-defense. So, if we have this case in mind we may conclude that when a state is threatened by force not amounting to an armed attack, it must resort to measures less than self-defense or it must seek Security Council authorization to do more.

On other hand, the States are limited by the principles of state responsibility, and the prohibition of armed reprisals. An armed reprisal is the use of force for revenge, punishment or general deference. In general, reprisals seek to impose reparation for a harm done, to compel a satisfactory settlement of dispute resulting from an illegal act by the other State or to compel the delinquent state to abide the law. Because of their nature, reprisals come after the event and when the harm has already been inflicted. The UN General Assembly has resolved that armed reprisals are unlawful and that states have a duty to refrain to use that<sup>71</sup>.

Force can be used in self-defense only against a state legally responsible for the armed attack. Normally, is not enough that the enemy attack is originating from the territory of a state. Rather, legal responsibility follows when a state has used its own agents to carry out the attack, or if it has controlled or supported the attackers<sup>72</sup>, and possibly in a situation that it has failed to control the attacks or when it has subsequently adopted the attackers as its own<sup>73</sup>.

The most well-know articulation of the main limits to the use of force in self-defense appear in the 1841 letter written by the US Secretary State Daniel Webster to Henry Fox, British Minister in Washington DC<sup>74</sup>. The letter was written following an incident during the Canadian rebellion, where the British attacked a docked US

71 The Declaration on Friendly Relations provides that ‘states have a duty to refrain from acts of reprisal involving the use of force’, above.

72 See Definition of Aggression, supra, at art. 3.

73 In the Iran Hostages Case, the ICJ found that Iran was responsible for the hostage taking at the US Embassy because of the “failure on the part of the Iranian authorities to oppose the armed attack by militants” and “the almost immediate endorsement by those authorities of the situation thus created”. case Concerning United States Diplomatic and Consular Staff in Tehran (US. V Iran), 1980, ICJ, Rep. 3, 42.

74 *The Caroline (Exchange of Diplomatic Notes between United Kingdom of Great Britain and Ireland and the United States of America)*, Letter from Lord Ashburton to Mr. Webster (28 July 1842) (1841-42) 30 British and Foreign State Papers, cited by Ronli Sifris, above. Also available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>

ship thought to have supplied arms to Canadian rebels. Webster sated that it is for the state claiming self-defense must “*show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation*”<sup>75</sup>. Thus the requirements of necessity and proportionality were established.

Normally, the scholars defend that the right of self-defense is limited to the right to use force to repel an attack in progress, to prevent future enemy attacks following an initial attack or to reverse the consequences of an enemy attack, such as ending an occupation<sup>76</sup>. The state acting in self-defense may seek the destruction of an attacking enemy force if that is necessary and proportional to its own defense. The right also includes taking the defense to the territory of the enemy attacker, if that is necessary and proportional.

Any use of force in self-defense must respect the principles of necessity and proportionality. Necessity restricts the use of military force to attainment of legitimate objectives. Proportionality requires that possible civilian casualties must be weighed in balance. If the lose of innocent life or destruction of civilian property is out-of-proportion to the importance of the objective, the attack must be abandoned<sup>77</sup>.

The use of force can be delayed, after an unlawful armed attack, depending on the circumstances. Taking a reasonable amount of time to organize the defense is permissible. However, for the use of force to constitute self-defense, there must not be an undue time lag between the armed attack and the invocation of self-defense<sup>78</sup>.

The US used the doctrine of state responsibility to justify legally the use of force against Afghanistan (at the time ruled by Taliban regime) in response to the terrorist attacks of September 11. By establishing links between the Taliban and al-Qaeda, the US was able to claim that there had an armed attack by the Taliban against the US<sup>79</sup>. It should be noted that the September 11 attacks had been completed by the time the US used force against Afghanistan. Some have viewed the use of force in this case as an example of reprisal as opposed to self-defense. Others had regarded it as an act of anticipatory self-defense aimed at preventing future terrorist attacks<sup>80</sup>. But, even if conclusive evidence exists linking Hussein’s Iraq regime with Al Qaeda, in light of the amount of time that had passed between September 11

<sup>75</sup> *The Caroline*, Letter from Mr. Webster to Mr. Fox (24 April 1841) (1841-42) 29 British and Foreign State Papers, 1129, 1138, above.

<sup>76</sup> Mary Ellen O’Connell, *the Myth of Preemptive Self-Defense*, ASIL, August 2002, 7.

<sup>77</sup> Mary Ellen O’Connell, *supra*, at 7-8.

<sup>78</sup> Yoram Dinstein, *War, Aggression and Self-Defense* (3<sup>rd</sup> ed, 2002), p. 184.

<sup>79</sup> See Michael Byers, “*Terrorism, Use of Force and International Law after 11 September*” (2002) 51 International and Comparative Law Quarterly, 401, p 408.

<sup>80</sup> See Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq* (2003) 4 San Diego International Law Journal 7, p. 23.



attacks and the use of force against Iraq, it is difficult to argue that the uses of force was a response to those attacks. The use of force against Iraq was instead based on the fear of future terrorist attacks. Therefore, it is necessary to consider whether the use of force against Iraq was legally justified or not as anticipatory self-defense.

### 1. Anticipatory self-defense

The doctrine of anticipatory self-defense concerns the right of a state, in certain circumstances, to resort to force in self-defense before an armed attack has commenced. Before the UN Charter, anticipatory self-defense was permitted under international law. Indeed, the doctrine of anticipatory self-defense, which enables a state to act under certain circumstances before it is attacked, is not novel. It has historical roots in the early writings of Grotius, Vattel and other scholars<sup>81</sup>. Webster's famous declaration of the requirements of self-defense that we have analyzed above was actually made in reference to a case of anticipatory self-defense. This case is often cited for the proposition that a state has the right to resort to force when it faces an imminent threat that is otherwise unavoidable. Along with the traditional requirement that an exercise of self-defense be proportional, both imminence and necessity have become critical factors in assessing claims of anticipatory self-defense<sup>82</sup>.

However, Article 51 of the UN Charter does not express whether self-defense also includes the pre-emptive use of force, in addition to the use of force in response to an attack. The phrase *if armed attack occurs* has given rise to vigorous debate relating to the lawfulness of anticipatory self-defense.

In order to solve this problem, other conventional sources of international law must be used, including state practice and the works of learned writers on international law.

Some authors argue that anticipatory self-defense is not lawful and falls under the prohibition of force in Article 2(4) of the UN Charter. For them, a mere threat of attack does not warrant military action<sup>83</sup>. In their view, the actual wording of Article 51, *if armed attack occurs*, means that first the armed attack must begin for the use of force to be lawfully invoked<sup>84</sup>. According to Ian Brownlie, the ordinary meaning

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<sup>81</sup> Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* 173 (Francis W. Kelsey trans., 1925), “*danger must be immediate and imminent in point of time...but those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived others*”; Emmerich de Vattel, *The Law of Nations* 243 (Charles G. Fenwick trans., 1916, “*a nation has the right to prevent an injury when it sees itself threatened with one*”. Cited by Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defence*, AJIL, vol. 97, n.º 3 (Jul. 2003), p. 600.

<sup>82</sup> See the case at page 26, footnote 77.

<sup>83</sup> Ingrid Detter, *The Law of War*, Second Edition, (Cambridge, 2000), p. 86.

<sup>84</sup> Bruno Simma et al (eds), *The Charter of United Nations: A commentary* (1st ed, 1994), p. 676.

of the phrase precludes an action that is preventive in character<sup>85</sup>. Further, as the key objectives of the UN are to maintain international peace and security and to minimize the unilateral use of force, it stands to reason that self-defense, as an exception to the prohibition on the use of force, should be narrowly construed<sup>86</sup>. Indeed, the discussions that took place amongst the framers of the UN Charter indicate an intention to exclude anticipatory self-defense from the exception allowing for the use of force in self-defense<sup>87</sup>. For them, the intention of Article 51 was explicitly to limit the use of force in self-defense to those circumstances in which an armed attack has actually occurred. Under this logic, it would be unlawful to engage in any kind of preemptive actions. Which means that a eventual future victim would first have to become an actual victim before it would be able to use military force in self-defense. Even though Article 51 refers to inherent right of self-defense, they would argue that under the Charter, that inherent right could only be exercised by following a clear armed attack.

There are numerous examples of States claiming to have used force in anticipatory self-defense. Three events are often cited to demonstrate the legitimacy of anticipatory self-defense. In none of those cases, however, did a state successfully justify force solely on that basis. In fact, the international community has condemned it all.

In 1962, during the Cuban missile crisis, President Kennedy recognized that “*we no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril*”<sup>88</sup>. His administration, however, sought to justify quarantine of Cuba not on the basis of self-defense under article 51, but pursuant to a regional call for an action from the Organization of American States<sup>89</sup>. Nonetheless, during the course of council discussion of the quarantine, a number of Security Council members spoke about preemption. There was no clear consensus in support of such doctrine, but there was also no clear consensus opposing it. Even several states that argued against the US position seemed not so much to reject a doctrine of preemption but to question

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<sup>85</sup> Ian Brownlie, *International Law and the Use of Force by States* (1963), p. 275.

<sup>86</sup> Bruno Simma et al (eds), *The Charter: A commentary* (1<sup>st</sup> ed, 1994), above p. 676.

<sup>87</sup> Thomas Frank, *When, if ever, May States Deploy Military Force without Prior Security Council Authorization?* (2001) 5 Washington University Journal of Law and Policy, 51, p. 59.

<sup>88</sup> Cited by Mirian Sapiro, above, p. 601.

<sup>89</sup> In discussing the Kennedy administration’s to cite article 51 as basis for the quarantine, Abram Chayes, in the *Cuban Missile Crisis and the Role of Law* 65 (1974) noted that “*it’s a very different matter to expand [Article 51] to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome...There is simply no standart against which [such a] decision could be judged. Whenever a nation believed that interests, which in the heat and pressure of a crisis it is prepared to characterize as vital, were threatened, its use of force in response would become permissible*”.



whether the criteria established under customary law were met in this case<sup>90</sup>.

In 1967, Israel launched an attack on the Egyptian army massing on its borders and quickly won what came to be called the Six-Day War. During the course of Security Council debates, Israel ultimately argued that it was acting in anticipation of what it believed would be an imminent attack by Arab states. Although this action is frequently cited as the classic modern case of legitimate anticipatory self-defense, Israel also sought to justify its strike on the basis that Arab preparations for war constituted an armed attack. Not surprising, support for Israel tended to fall along predictable political lines. But even the supporters of Israel, such as US and UK, tend to refrain from asserting a doctrine of preemption. The Soviet Union, Syria and Morocco all spoke against Israel. There were more speakers who were negatively disposed to anticipatory self-defense, but again, there was no clear consensus opposed to the doctrine.

Proponents of this view frequently cite the international reaction to an Israeli bombing attack on an Iraqi nuclear reactor. When Israel attacked the Iraqi nuclear reactor, the case was discussed in the Security Council. The USA was the only State which (implicitly) indicated that it shared the Israeli concept of self-defense. Although it voted for the Security Council resolution condemning Israel (resolution 487/1991<sup>91</sup>), it pointed out after the vote that its attitude was only motivated by other considerations, namely Israel's failure to exhaust peaceful means for the resolution of the dispute. All other members of the SC expressed their disagreement with the Israeli view, by unreservedly voting in favor of operative paragraph 1 of the resolution, whereby *'[the SC] strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct'*. Egypt and Mexico expressly refuted the doctrine of anticipatory self-defense. It is apparent from the statements of these states that they were deeply concerned that the interpretation they opposed might lead to abuse. In contrast, Britain, while condemning without equivocation the Israeli attack as a grave breach of international law, noted that the attack was not an act of self-defense and could not be justified as a forcible measure of self-protection<sup>92</sup>. However, many of the states that declared

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<sup>90</sup> UN Doc. No. S/PV.1024:51 (1962). For example, Mr. Quaison-Sackey, the delegate from Gana, asked, "Are the grounds for the argument that such action is justified in exercise of the inherent right of self-defense? Can it be contended that there was, in the words of a former American Secretary of State whose reputation as a jurist in this field is widely accepted, a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation?" Then, he responded to these questions. In the essence, he was accepting the notion of anticipatory self-defense would be permissible if the criteria of necessity were met, but in this case he concluded that the requirement was not met.

<sup>91</sup> Resolution 487, SC Res 487, UN SCOR, 36<sup>th</sup> sess, 2288<sup>th</sup> mtg, UN Doc S/RES/487 (1981).

<sup>92</sup> Antonio Cassese, in *International Law*, (Oxford, 2001) at 309-31.



that the Israeli attack was illegal took this view based on the fact that there was no “imminent” threat rather than based on the belief that anticipatory self-defense is illegal per se<sup>93</sup> Although the Security Council ended up censuring Israel for its action, the most notable aspect of this debate was the willingness to engage in a discussion of the concept of preemptive self-defense.

The opposing view is that anticipatory self-defense is lawful. Many proponents of this position contend that Article 51 was not intended to invalidate prior customary international law, which permitted anticipatory self-defense. Although the arguments of specific defendants of this view are variable, a typical claim is that the reference in Article 51 to an inherent right indicates that the Charter’s framers intended for a continuation of the broad pre-UN Charter customary right of anticipatory self-defense. The occurrence of an armed attack was just one circumstance that would empower the aggrieved state to act in self-defense. As the US judge on ICJ, Stephen Schwebel, noted in his dissenting opinion on *Nicaragua v. US*, Article 51 does not say “*if, and only if, an armed attack occurs*”<sup>94</sup>. It does not explicitly limit the exercise of self-defense to only the circumstance in which an armed attack has occurred. Unfortunately, despite Schwebel’s willingness to express his views on anticipatory self-defense, neither the ICJ or the UN Security Council has authoritatively determined the precise meaning of Article 51. Indeed, in the *Nicaragua* case, the ICJ made a point of noting that, because “*the issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised (...) the Court expresses no view in the issue*”<sup>95</sup>. As a consequence, the language of the Charter admits two interpretations about the permissibility of anticipatory self-defense.

For instance Dereck Bowett has stated that it was never the intention of the Charter to prohibit anticipatory self-defense since 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 jeopardize its very existence<sup>96</sup>.

The 1967 Six Day War, during which Israel responded with force to threats posed by Egypt, Jordan, Syria and Iraq, is an example of a situation where the

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It should be noted that since the passing of the resolution 487, has been propounded some arguments that hindsight the Israeli strike was justified, see, eg, Michael Reisman, *Israel’s Air Strike upon the Iraqi Nuclear Reactor* (1983) 77, *American Journal of International Law* 584.

<sup>93</sup> See, eg, statements made by representatives of Nigeria, Sierra Leone, Uganda and UK expressing the view that there was no imminent threat, cited by Anthony Arend, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993), pp. 78-79.

<sup>94</sup> *Nicaragua v. US*, ICJ Rep. 1986, above, dissent of Judge Schwebel, p. 347.

<sup>95</sup> *Ibid.*, (opinion of the Court) [194].

<sup>96</sup> Derek Bowett, *Reprisals Involving Recourse to Armed Force*, (1972) 66 *American Journal of International Law* 1, p. 4.



majority of the international community seemed to accept Israel's right to anticipatory self-defense or at the very least failed to condemn it. In this case, a combination of factors rendered it reasonable for Israel to conclude that an armed attack was imminent and to respond by using force.

Others defend that anticipatory action in self-defense is normally unlawful, but not necessarily unlawful in all circumstances and that it will depend on the facts of the situation, specially the seriousness of the threat and the degree to which preemptive action is really necessary and the use of force is the only way of avoiding that serious threat. Of course, the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defense than they are in other circumstances<sup>97</sup>.

Based on the practice of the states and perhaps founded on general principles of law, as well as simple logic, international scholars, generally agree that a state doesn't need to wait to suffer an armed attack in order to defend itself, as long as it is certain that the attack is imminent. This is also the standard in most of domestic legal systems<sup>98</sup>. The international legal scholars also agree that it is necessary to limit the situations and conditions that allow a state to anticipate self-defense. For instance, Humphrey Waldock says “ *where there is convincing evidence not merely of threat and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, through it has not passed the frontier*”<sup>99</sup>. But in this kind of cases some scholars prefers to label defense that in these circumstances as “*incipient self-defense*” rather than anticipatory<sup>100</sup>.

Another case is when the victim of an attack may use force based on clear convincing evidence that the enemy is preparing to attack again. In other words, the victim no needs to wait for new attacks to be mounted. The defense must be carried out within a reasonable time from the initial attack in order to fit the characterization of defense during ongoing armed attacks<sup>101</sup>. For instance, if terrorists are planning a series of attacks in a terror campaign, the state may respond to prevent future attacks about which it has evidence. However, in absence of convincing evidence of future attacks responsive force could amount to unlawful reprisals or punishment<sup>102</sup>. An example of the international community condemning the use of

97 R Jennings QC and A Watts QC (eds), *Oppenheim's International Law: Ninth Edition* 1991 pp. 41-42.

98 Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, ASIL, August 2002, p. 8.

99 Humphrey Waldock, *The regulation of the uses of Force by Individual States in Intertional Law*, 81 Hague Recueil 451, p. 498, cited by Yoram Dinstein, *War, Aggresssion, and Self-Defense* (3 ed. 2001), p. 172.

100 Yoram Dinstein, *ibid*, p. 172.

101 Mary Ellen O'Connell, *above*, p. 8.

102 Mary Ellen O'Connell, *above*, pp. 9-10.



force in response to a threat of terrorism may be found in its condemnation of the 1986 US bombing raid in Libya<sup>103</sup>. However, whilst a Security Council resolution condemning the attack was defeated, the General Assembly did pass a resolution condemning the strikes<sup>104</sup>.

The enemy's intention to continue the attacks means that an armed force in self-defense is lawful. The world response to September 11 confirms that. The Security Council referred it in two resolutions to the right to resort self-defense in the face of the September 11 attacks<sup>105</sup>. The US and UK took action against Afghanistan based on the strength of evidence that more attacks would be forthcoming. In fact, on the Operation Enduring Freedom mounted against Afghanistan, the allies have argued that the September 11 attacks were part of a series of attacks on the US, which began in 1993 and that more attacks were planned<sup>106</sup>. Almost immediately following September 11, the US and several European countries apprehended individuals who indicated that more attacks were planned. The evidence was presented to NATO members and was deemed "compelling". Based on publicity available material, the US and the UK appear to have had clear and convincing evidence that America faced ongoing attacks. Subsequent to the launch of Enduring Freedom, US troops have found documents in Afghanistan that more attacks were indeed being planned.

The Security Council action after September 11 can be cited to support anticipatory self-defense in cases where an armed attack has occurred and convincing evidence exists that more attacks are planned but not yet underway<sup>107</sup>.

By contrast, international law continues to prohibit preemptive self-defense or even anticipatory self-defense when an attack is only a hypothetical possibility and not yet in progress.

The fact that Iraq has been prohibited by the Security Council from any development of nuclear weapons, following its defeat in Persian Gulf War and the suspicion that it had weapons of mass destruction (WMD) does not itself justified

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<sup>103</sup> After numerous terrorist attacks were perpetrated against US service personnel, in which Libya was clearly implicated, the US launched air-strikes against terrorists related targets in Libya. The US claimed that the strikes were necessary to prevent future attacks. It should be noted that whilst US claimed anticipatory self-defense in this case, this is often cited as a case of retorsion.

<sup>104</sup> Resolution 41/38, GA Res 41/38, UN GAOR, 41<sup>st</sup> sess, 78<sup>th</sup> plen mtg, UN Doc A/RES/41/38 (1986).

<sup>105</sup> UN S.C. Res. 1368 (2001) and UN. S.C. Res. 1373 (2001).

<sup>106</sup> The US has produce evidence tying Bin Laden to the 1993 attack to the World Trade Center, the 1998 embassy bombings in Nairobi and Kenya, the attack on the USS Cole in Yemen in 2000 and the attacks on the Pentagon and the World Trade Center on September 11, 2001. For a full discussion on the legality of the post-September 11 responses, see Mary Ellen O'Connell, *Terrorism and Self-Defense*, Jurist, Sept. 18, 2001 (available at <http://www.jurist.law.pitt.edu/forum>), Thomas Frank, *Terrorism and the Right of Self-Defense*, 95 AJIL839 (2001).

<sup>107</sup> Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, above, pp. 10-11.



an armed attack. Merely, the violation of the disarmament requirements and the mere possession of such weapons do not constitute an armed attack.

As a more general matter, the ICJ held in advisory opinion that the mere possession of nuclear weapons is not illegal in customary law<sup>108</sup>. The simple possession without even a threat of use does not amount to an unlawful armed attack.

As we can see from what we said above the State practice is ambiguous, but tends to suggest that the anticipatory use of force is not generally considered lawful, or is only lawful in very pressing circumstances.

It is more judicious to consider anticipatory self defense as *legally prohibited* while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds.

Which means that States *may* have the right to defend themselves by using force to pre-empt an imminent and serious attack. However, such use of force would have to be in accordance with the general rules and principles governing self-defense. In another words the use of armed force and the violation of another state's territory can be justified as self-defense under international law where: a) an armed attack is launched, *or is immediately threatened*, against a state's territory or forces (and probably its nationals); b) there is an *urgent necessity* for defensive action against that attack; c) there is *no practicable alternative* to action in self-defense, specially when another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use those legal powers to that effect; d) the action taken by way of self-defense is limited to what is necessary to stop or prevent the infringement, i.e. to the needs of defense<sup>109</sup>. These principles would apply to the anticipatory use of force just as well as to any other use of force in self-defense.

## **2. Did the 2003 war against Iraq fall within the legal limits of anticipatory self-defense?**

Assuming that the US had a reasonable apprehension that Iraq possessed WMD and supported terrorism, and assuming that a potential terrorism attack would constitute an armed attack by Iraq it is necessary to consider whether anticipatory self-defense could be employed as a legal justification for the use of force against Iraq.

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<sup>108</sup> As the Court held "*in view of current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be stake*", Advisory Opinion on the Legality of the Threat of Nuclear Weapons, 1996 ICJ 226, 266 (July 8).

<sup>109</sup> R Jennings QC and A Watts QC (eds), *Oppenheim's International Law: (9th Edition) 1992*, vol. 1, p. 422.

Although it is not clear that international law recognizes the right to use anticipatory force in self-defense. We have concluded above that, *if* there is such a right, it only exists in situations of great emergency, as set out by Oppenheim. The evidence about the level and nature of the threat presented by Iraq to other countries was not clear. The US and its allies did not make clear to the international community the extent of the risk posed by Iraq and they also did not show that there was no effective alternative to the use of force. The lack of any effective alternative to force was in fact difficult to demonstrate while Iraq had offered to negotiate with weapons inspectors. In fact, all peaceful means for eliminating the threat posed by WMD were not exhausted.

It is clear from the above discussion of the law of self-defense that the capacity to attack, combined with an unspecified intention to do so in the future, is not sufficiently pressing to justify the anticipatory use of force. The threat must at least be imminent. Unless the notion of imminence changes to such an extent as to be made out based on reasonable subjective apprehension of a state that a threat exists, the use of force against Iraq cannot be regarded as a response to an imminent attack. However, the degree of proximity required must also, we consider, be proportionate to the severity of the threat. A threat to use very serious weapons – nuclear weapons being the obvious example – *could* justify an earlier use of defensive force than might be justified in the case of a less serious threat. However, the existence of the threat, regardless of how serious that threat may be, must still be supported by credible evidence. Such evidence has not so far been made available. Until today, as we know from the news, the Americans didn't find any real evidence of WMD.

The logical conclusion is that the war against Iraq did not fall within the ambit of the requirements of anticipatory self-defense as currently understood. Nevertheless, it is also true to say that given the continuing evolution of the law of anticipatory self-defense, particularly since 11 September, the war against Iraq was not as clearly illegal in 2003 as it would have been in an earlier era.

### **3. The emergence of a new doctrine?**

Few would disagree with the notion that the law must keep pace with social and political changes. Nevertheless, how to develop the law of self-defense in a way to address the current threats from WMD and terrorism remains a point of contention. As we already saw above, the Bush Administration, to justify its policy toward Iraq, has developed a new, multifaceted strategic doctrine, known as the “Bush Doctrine”, that advocates preemptive or preventive strikes against terrorists, states that support terrorists and hostile states possessing WMD. The Bush Doctrine has emerged to explain how September 11<sup>th</sup> has shattered basic assumptions about peace and security. By dropping the requirement of an armed attack and even rejecting



the need for an imminent threat in case of preemptive action, the Bush Doctrine<sup>110</sup> makes some dramatic departures from the existing international law that governs the use of force. The US claims the right to attack preemptively to counter a sufficient threat to its security<sup>111</sup>. The problem is that the legal justification for this policy choice is extremely difficult to reconcile with the UN Charter system for the use of force, which may explain why the Bush Administration didn't mention the UN Charter when discussing the preemptive self-defense in its National Security Strategy<sup>112</sup>. Note that the US does not explicitly affirm the legality of its longstanding policy of preemptive actions against sufficient threats; referring to preemptive action as an option and not a principle. The problem with the US argument is that it ultimately invests all states with a unilateral right both to determinate a threat to international peace and to take action against the threat. Such a development would effectively return the international legal order to its nineteenth century condition, permitting states to attack each other based on anxiety about their neighbor's military strength and intentions. It is also possible to infer that the US is hesitant to articulate a right that could be used by other states because under this line of reasoning it would be hard to differentiate the US war against Iraq and a eventual future Indian strike against Pakistan or a North Korean strike against South Korea, or a Russian attack on Georgia, or Azerbaijan attacks Armenia and so on. Any state that believes that another poses a possible future threat, regardless of the evidence, could cite US invasion of Iraq.

Another problem is that the imminence requirement is extremely problematic in the WMD context, because such weapons have a great potential to be used without ever revealing any evidence that an attack is imminent. While the threat of WMD may render the imminence requirement obsolete, the US has failed to provide a new rule that retains any objective restrictions on a state's discretion to use the force. It seems

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<sup>110</sup> The National Security Strategy of the United States of America (Sept. 24, 2002), “ *For centuries, international law recognize that nations need not to suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat... We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries (...).*

*The US has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The 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 uncertainly remains as to the time and place of enemy's attack. To forestall or prevent such hostile acts by our adversaries, the US will, if necessary, act preemptively”* at <http://www.whitehouse.gov/nsc/nss.html> (last visited April, 14, 2004).

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*



difficult to reconcile such an expansive right of preemptive action with the general prohibition on the uses of force. The Bush Theory is not supported by existing international law and with its lack of limiting principles is so expansive that it would seriously undermine the general prohibition of the use of force. Yet it was this controversial theory that formed part of the justification for the war against Iraq.

## FINAL CONCLUSIONS

From this work we can conclude that the war against Iraq was illegal and that the justifications used by the US and its allies for the unilateral intervention in Iraq, i.e. the use of force known as *jus ad bellum*, had no support in the existing international law.

The first argument – that the use of force was authorized by the UN Security Council resolutions- is legally flawed and runs contrary to the ICJ’s suggestion that the wording, context and intent of the Security Council must be carefully examined when interpreting resolutions. If we follow the ICJ’s approach, it is clear that the Security Council never intended to mandate the use of force to ensure compliance with resolution 687. Moreover, it is increasingly evident that Iraq was not committing gross material breaches of Resolution 1441 prior to the invasion.

The second argument – that the US resorted to the use of force in self-defense – is also flawed based on prevailing understandings of the law of self-defense. Even if weapons had been discovered in large quantities, this still would not have given the Coalition a legal basis for the war<sup>113</sup>.

US attempts to fashion new rules in response to changing international security environment, while understandable, have not yield a preferable alternative to the current legal regime governing the use of force. The US arguments are unattractive because they are not characterized by any coherent limiting principle to protect general prohibition on the use of force. There is however the possibility that no better alternative approach exists to alleviate the strain between international law and the altered imperatives of self-preservation.

Some will say that with this attitude it means that the strong do what they can and the weak suffer what they must<sup>114</sup>. We don’t think so. The US had not simply invaded Iraq without justification. As we saw, it invested considerable time and effort in trying to persuade the others of the legality of its cause in ways that made sense to other members of international community. The key problem, however,

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<sup>113</sup> It may, however, have given the Coalition a stronger moral basis for the war.

<sup>114</sup> This is a famous passage from *Melian Dialogue: Thucydide, The Peloponnesian War*, Richard Crawley translation, 1982 ed, p. 124, cited by Alex Bellamy, *op. cit.*, p. 520.



was that the US proceeded to invade Iraq despite failing to persuade others of its legal case. Nevertheless this does not mean that the international law of use of force has no effect on the behavior of the powerful states. Breaches of the law do not negate the law's existence. Indeed, in the case of Iraq, the fact that international debates about the legitimacy of the war were framed in legal terms demonstrates the continuing power of legal rules in international community.

If the September 11 terrorist attacks may have reinforced the proposition that UN Charter system is ill-equipped to deal with contemporary security threats, we must ask ourselves whether an alternative proposal to the existing legal framework are superior solutions or just gateways to a more chaotic system.

Just as plants and animals must adapt to the changing nature of their environment in order to survive, the law must adapt to changing social, political and technological factors in order to remains relevant<sup>115</sup>.

In fact, the international community finds itself at a critical juncture. The determination to avoid the scourge of war and the guarantees of international peace and security put in place following World War II have been undermined and even imperiled by the use of military force under the doctrine of preventive war and the invasion of Iraq. It is critical that member States following the attack on Iraq re-acknowledge their commitment to avoiding war and to the principles and purposes of the UN Charter, so the rule of law in avoiding future wars may prevail.

States that have aligned themselves with the policy of preventive war and with the legal position of the US in the Iraq war, a war described by the UN Secretary-General as not in conformity with the Charter, and a war which still continues. This position also aligns States with a strategy, which espouses a unilateralist approach to international problems and thus threatens a rift with other institutions, which underpin the international system. States have a stark choice: they can choose multilateralism, the rule of law, and respect for international law, treaties and institutions; or they can choose a unilateralist approach in which States pursue their own interests, irrespective of the will of the world community, and accept the rule of economic and military power. What will be the choice? Only the future can say it.

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<sup>115</sup> Ronli Sifris, *op. cit.*, p. 559.



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