# Use of Force in Public International Law – Was the Use of Force against Iraq in 1991 and 2003 Legitimate?

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## 1. Introduction

The main focus for this thesis will be on the two major wars against Iraq which occurred first in 1991 and then again in 2003. In both cases the issue is on what legal grounds were the use of force justified and whether these justifications were legitimate according to international law. For being able to answer this question relevant international law regarding the use of force between states must be applied, and in this case the relevant law is the provisions of the United Nations Charter. The applicability of the Charter is due to the fact that all parties involved in the wars are members of the UN and that the Charter in parts are a codification of customary law which is applicable to every state whether member or not.

The thorough assessment of whether the use of force in both Iraq wars are in accordance with the applicable Charter provisions will disclose the existence of further issues in addition to the main question of this thesis.

A first issue is the potential development regarding the situation of when states legally can resort to force which is not already expressly allowed for in the UN Charter. The question is whether the states' conduct at the outbreak of the wars has been accepted as law today.

A second issue regards the differences between the two wars. The legal evaluation of the wars will reveal that the wars were two very different wars in Iraq. These distinctions will be discussed in a separate section where the emphasis will be on comparing the results of the wars and the consequences of when a state is in breach of international law.

At last there will be a conclusion which will recapitulate the main points of this thesis and give an answer to the main question of the Iraq wars' legality and additionally give concluding remarks on how international disputes involving use of force are best dealt with.

## 2. Sources of International Law

The creation of rules in international law is different to the creation of rules in domestic law. Within a domestic legal system the making of new laws follows the constitutional machinery where the legislature is the main institution in the law-making process. In international law such law-making regime does not exist. In stead the sources of international law originate from the actions of the states, as the main actor, and they are thus the unofficial legislature in international law. These actions are primarily set out in treaties or, if there are no treaties, the actions may develop into customary norms.[1]

In a domestic legal system national tribunals play a central part in the law-making process. This is not the case in international law. Therefore, since there is no official legislature or judicial powers in international law that actively create rules, other sources that can "provide evidence of the existence of rules"[2] must be considered. As already mention treaties and customary law are example of sources, but also other sources exist. A list of the various sources can be found in art. 38 of the *Statute of the International Court of Justice* (ICJ Statute).[3] This article officially only binds the ICJ, but it is regarded as a general expression of the relevant sources applicable in international law and for this reason the sources mentioned here must be considered.[4] There is no order of preference between the sources referred to in this article, each dispute has to be adjudicated separately and the most relevant source for that particular case must be applied.

In the following only the sources that are of most importance for determining the legitimacy of the Iraq wars and the sources that are relevant for determining the possible development in the law on the use of force will be introduced.

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[1] Blay, Sam, Ryszard Piotrowicz and Martin Tsamenyi, *Public International Law: An Australian Perspective,* 2nd ed., Oxford University Press, 2006, p. 53.

[2] Ian Brownlie, *Principles of Public international Law,* 6th ed., Oxford University Press*,* 2003, p. 3.

[3] June 26, 1945.

[4] Ruud, Morten and Geir Ulfstein, *Innføring I Folkerett*, 2nd ed., Universitetesforlaget, 2002, p. 48.

## 2.1. Treaties

The first source mentioned in art. 38 of the ICJ Statute is international conventions that establish rules expressly recognised by the state parties.[5] In comparison treaties are a source similar to a contract because only the parties can derive rights and obligations from it. Thus, treaty as a source that is generally applicable is limited unless the treaty is a codification of customary law or is capable of affecting non-parties. Multilateral treaties are the only treaties that may have these qualifications as they have a wider scope of applicability compared to bilateral treaties. There is however not every multilateral treaty that can claim such qualifications, but one that can is the UN Charter[6] which is highly relevant in relation to the Iraq wars. Some of the provisions of the Charter are codification of customary law, such as the right of self-defence and the prohibition of use of force. According to art. 2(6) of the Charter the UN shall ensure that non-members comply with the principles of the Organisation as "far as may be necessary for the maintenance of international peace and security". This proves that the Charter is capable of affecting non-parties. Hence, the Charter is a source of international law that creates rules of general applicability.

### 2.1.1. Interpretation of Treaties

An important tool when interpreting the Charter and other treaties is the *Vienna Convention on the Law of Treaties* (Vienna Convention),[7] where art. 31 operates as a fundamental rule regarding treaty interpretation. According to its paragraph 1 "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The "ordinary meaning" can be found if looking at the context of a treaty which consists of the text, preamble, annexes, agreements relating to the treaty made between the parties and instruments made by one or more parties accepted by the other parties.[8] Together with the context, subsequent agreements between the parties and subsequent practice in the application of the treaty

[5] Art. 38(1)(a).
[6] June 26, 1945.
[7] May 23, 1969.
[8] Art 31(2).

regarding the interpretation shall be taken into account.[9] Aadditionally the 'ordinary meaning' has to be interpreted "in the light of its object and purpose".[10] The starting point for interpretation is thus the parties' intentions as expressed in the terms of the treaty in conjunction with the context and its purpose and object.

A further means of solving interpretation issues is the principle of effective interpretation. This principle is not given any further mentioning in the Convention as it is regarded to be "reflected sufficiently in the doctrines of interpretation in good faith in accordance with the ordinary meaning of the text".[11] According to the principle a treaty should be interpreted to have the appropriate effect where there are two possible interpretations and one is contrary the purpose of the treaty.

If the method of interpretation found in art. 31 leave the meaning ambiguous or obscure, or the result is absurd or unreasonable, preparatory work may be employed as a further means of interpretation.[12] Preparatory work as a means of interpretation is found in art. 32 of the Convention under the heading "supplementary means of interpretation". This indicates that such work is of less importance than the text of the treaty, and should only be applied when necessary. One of the reasons for this is that states can accede to a multilateral treaty after the drafting, and thus would not have had the opportunity to participate in the preparatory work of the treaty.[13]

### 2.1.2. Security Council Resolutions

The Security Council is an organ that derives its existence from the provisions of the Charter.[14] The Council's work is based on the articles contained in Chapters VI and VII and the result is primarily set out in resolutions. Therefore, the interpretation of its resolutions is indirectly an interpretation of the Charter, but with some modification due to the nature of these instruments. In this section only Chapter VII resolutions will be considered as they are relevant in relation to the Iraq wars.

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[9] Art 31(3).
[10] *Vienna Convention,* art. 31(1).
[11] Brownlie *(*2003), p. 606.
[12] *Vienna Convention*, *art*. 32.
[13] Ruud and Ulfstein (2002), p. 74.
[14] Art. 7(1).

The Charter gives little guidance on how to interpret Chapter VII resolutions, but some guidance can be found in the rules of interpreting treaties according to articles 31 and 32 of the Vienna Convention. However, the resolutions are not exclusively governed by them as they are of a different character than treaties. The provisions found in treaties reflect the common understanding of all the parties and thus bear a resemblance to that of contractual obligation. The Council only comprise of a limited number of states and therefore its resolutions are more similar to laws than contracts because it enacts duties upon all UN Member States, independently from their will.[15] Therefore, the method of interpretation found in Vienna Convention is not directly applicable on resolutions. However, some of the principles of that convention may still be applied. Consideration to the ordinary meaning of the terms of the resolution in its context is a good starting point for interpreting such instruments. The context of a resolution constitutes of the text, the preamble and the series of resolutions adopted on the same matter. The latter means is important as resolutions adopted by the Council under Chapter VII in relation to a specific matter are connected with each other. Therefore, to get a broad understanding of a particular resolution it must be viewed in the context of all relevant resolutions adopted on the same matter. In addition to this, the resolution and its context should be interpreted with regards to its object and purpose. Since the Council is an organ established by the Charter its resolutions has to be interpreted in the light of the Charter's objectives as well. Together with the context subsequent practice by the states shall also be taken into account. In looking at the practice of the states following the adoption of a resolution will indicate whether the measure decided upon is accepted by them. This succeeding behaviour may over time assist in developing international customary law which is an independent source in international law.

Furthermore, Chapter VII resolutions should be interpreted narrowly for two reasons. Firstly, if the Council decides on military actions this should be construed narrowly because the Council's power is not without limits. Secondly, the wording of a resolution tends to be ambiguous because they often reflect that no clear agreement was reached and

[15] Bruno Simma, *The Charter of the United Nations: A Commentary*, 2nd ed., vol. 1, Oxford University Press, 2002, p. 713.

rather constitute a compromise between the members of the Council.[16] As will be shown below, with the current voting procedure of the Council, agreeing upon a resolution is difficult.

In case of ambiguity, recourse to the debates by the members prior the adoption will highlight the imprecision and illustrate the members intended function with the resolution. These debates can be regarded as supplementary means of interpretation similar to the means found in art. 32 of the Vienna Convention. These means are only of secondary nature and should be treated accordingly.

### 2.2. Declarations of International Organisations

Declarations of international organisations are not on the list of sources found in art. 38 of the ICJ statute. However, organisations play an important role in developing international law as their meetings concerns many areas of inter-state activity.[17] The outcome of their meetings can be classified as state practice and contribute to the making of customary law.[18] Customary law is found on the list in art. 38 of the ICJ Statute, and thus declarations of international organisations can through this indirect route be a source in international law. For the outcome of their meetings to be classified as custom the function and the number of states participating in the organisation is important. Where an organisation is founded through a treaty that a great number of states have acceded to, their work is more likely to be treated as state practice. An example of such organ is the General Assembly established through the UN Charter. The Assembly's role is first and foremost to consider, discuss and to recommend on any matter within the scope of the Charter.[19] Thus, their work is not binding, but may develop over time into custom through constant and uniform usage that is generally followed by the vast majority of the states.

[16] Simma (2002), p. 713.
[17] Blay (2006), p. 71.
[18] Blay (2006), p. 71.
[19] *The Charter*, arts. 10 and 11.

## 2.3. International Customary Law

According to art. 38(1)(b) of the ICJ Statute international custom is a source that can provide evidence of rules that apply in international relations. International custom is created through the general practice of states that accept the practice as law. Every acts performed by the states which indicates their interpretation of law are relevant when determining what constitutes a custom.[20] These acts may be implied objection to other states' behaviour or their voting in international organisations to mention a few examples. Traditionally, there are three requirements that have to be satisfied before a new practice can be accepted as law. These requirements imply that the usage is constant and uniform generally followed by a vast majority of the states over a lengthy period of time and the states follow the practice in the belief that they are complying with an obligatory norm.[21] The last requirement is also known as *opinio juris* and refers to the subjective element of the development of international custom.

## 2.4. Other Sources of International law

The Charter and resolutions are the main sources applied in relation to the Iraq wars, but also other sources are applied in a limited extent. The other sources found in art. 38 of the ICJ Statute are general principles of law and, as subsidiary means, judicial decisions and writing of publicists. General principles of law are principles of a general nature that can be found in almost every domestic legal system and can be transferred to the international level. Judicial decisions from the ICJ are regarded as subsidiary means due to art. 59 of the statute which proclaims that a decision form the Court is not binding except between the parties and in the respect of their particular case. This establishes that decisions are not to be considered as precedents in the same way as judicial decisions operate in a common law system. Nevertheless, the decisions of the ICJ have proved to be influential in subsequent cases before the Court. The writings of publicists may be explored when applying the other sources of international law, but due to the rapidly increasing quantity of literature an international court will not depend solely on these sources. The authors of international law

[20] Ruud and Ulfstein (2002), p. 54.
[21] Brownlie (2003), p. 7.

literature may in some cases write from a domestic point of view. This helps in explaining why writing of publicists should be handled with care and only holds the position as a subsidiary means in the ICJ Statute.

## 3. The United Nations

The United Nations is a successor of the League of Nations which ceased to exist as a result of not achieving the purported aim of promoting "international co-operation and to achieve international peace and security".[22] The total failure of the League of Nations was evident with the outbreak of the Second World War in 1939. At the same time as the atrocities of the Second World War took place the allies commenced their work on a "new legal world order for the post-war era"[23] which came to be known as the United Nations. The establishment of the UN was a lengthy process over several years with multiple conferences and political power play. To be able to found a new world order a large number of disputed issues were to be discussed before reaching an agreement on the final text of the UN Charter in 1945. Although there were many disputed matters there was great consensus among the states that the unilateral use of force had to come to an end, and in stead the focus should be on collective co-operation to maintain international peace and security.

### 3.1. The Charter

The Charter is a binding multilateral treaty adopted by the UN members and is by some also considered as a Constitution for the international community.[24] However, the Charter is and remains a treaty which means that no state is bound by its provisions unless they provide their assent to become a member of the UN and to comply with the Charter.[25] For

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[22] *Covenant of the League of Nations,* April 28, 1919, preamble.
[23] Simma (2002), p.1.
[24] Benedetto Conforti, *The Law and Practice of the United Nations,* 2nd ed., vol. 36, Kluwer International Law, 2000, at p. 10.
[25] Conforti (2000), p. 10.

non-members only the provisions that are a codification of customary law are binding. It is true that according to art.2(6) the UN shall ensure that non-members comply with the principles of the Organisation. However, this is not an obligation imposed on non-members but on the members of the UN.

The provisions of the Charter give rise to the organs that operates within the UN and sets out rules regarding the relationship between the members. The Charter is an essential instrument for the UN to achieve its main purpose of maintaining international peace and security. This purpose is achieved through means such as requiring members to "settle their international disputes by peaceful means",[26] to "refrain in their international relations from the threat or use of force"[27] and the system of collective security stipulated in Chapter VII.

### 3.2. UN Organs

As established above, the Charter contains rules stipulating the institutional design of the UN where art. 7 mentions its principal organs. In this section only the Security Council will be introduced as their work is of most relevance for considering the issues relating to the Iraq wars.

Chapter V of the Charter is devoted to the Security Council and sets out its functions and powers. The Council is primarily responsible for the "maintenance of international peace and security"[28] and its duties are mainly related to this matter. For achieving this aim the Council have means available in Chapter VI and VII of the Charter. The provisions of Chapter VI provide the Council with the power to encourage the parties to resolve their dispute with peaceful means.[29] If these attempts fail or are unlikely to succeed, the Council can respond to the situation according to the articles under the Chapter VII. Under this Chapter the Council can act in response to threat or breach of international peace and security in a more powerful way. If the Council decides that the measures found in this chapter are necessary for maintaining and restoring international peace and security they

[26] Art. 2(3).
[27] Art. 2(4).
[28] *The Charter*, art. 24(1).
[29] *The Charter*, art. 33.

should be implemented jointly by the Member States.[30] This last concept is the system of collective security which is the main method, as a last resort, of preventing and removing threats to the peace and suppressing acts of aggression in the UN-era.[31]

Before the Council can make any decisions regarding a substantive matter it is required that the five permanent members do not vote against the decision.[32] This is called the veto power and is vested in the US, UK, Russia, France and China. If any of the veto nations vote against a substantive matter before the Council, the Council is barred from acting upon the issue and can thus not prevent the situation to escalate. Apart from the permanent members the Council consists of ten non-permanent members who are elected for a term of two years.[33] The limited number of members in the Council is in contrast to the composition of the General Assembly where every Member State is represented.[34] In keeping the members of the Council to a limited number enables it to act quickly and to enforce its decision, a task that would be impossible if every Member States were to consider the issues before any actions could be decided upon.

## 4. Relevant Law

All of the parties involved in the Iraq wars are members of the UN, consequently the use of force in both situations have to comply with the relevant articles of the Charter for them to be legitimate. The Charter contains both provisions that prohibit the use of force and provisions that permit the use of force. As will be shown in subsequent sections the relevant articles applicable regarding the Iraq wars are the provisions that allow use of force. It is, however, important to notice that these rules only operates as narrow exception to the principal rule found in art. 2(4) which stipulates a general prohibition on the use of

[30] *The Charter*, art. 25.
[31] *The Charter*, art 1(1).
[32] *The Charter*, art. 27(3).
[33] *The Charter*, art .23(1) and (2).
[34] *The Charter*, art. 9(1).

force. Therefore, this article will first be introduced because without this principal rule the articles stipulating the exceptions would be redundant.

### 4.1. Art. 2(4)

Article 2(4) is the principal rule regarding use of force in international relations. The article contains a general prohibition on the threat or use of force. Prior to the UN Charter there existed few limitations on the use of force. The Briand-Kellogg Pact[35] from 1928 contained a universal prohibition on war, but to only prohibit "war" led many countries to use force against other states without actually declaring war. Art. 2(4) have now remedied this to some extent by prohibiting threat or use of force in stead of mere "war". Furthermore, the article is labelled "the corner stone of peace in the Charter"[36] as it expresses the objective of putting an end to the unilateral use of force by states.

#### 4.1.1. Interpretation Problems

The language of art. 2(4) represents an improvement compared with previous attempts of stipulate a prohibition of war. Nevertheless, there are still some issues regarding the content and scope of the prohibition, but these issues will not be examined here in great detail. However, one issue of interpretation that are of importance for this thesis is the word "force". This is an ambiguous word without obvious defined limits and various types of force could come within its scope. Here it suffices to say that the meaning of the word "force" is limited to mean armed force whether direct or indirect. This is supported by paragraph 7 of the Charter's preamble, art. 44 and the *Friendly Relations Declaration*[37] adopted by the General Assembly.

### 4.2. Exception from the Use of Force

The general prohibition in art. 2(4) is not without exceptions and the Charter contains provisions stipulating when the use of force is lawful. The first exception is the right of self-defence found in art. 51 and the other exception follows a decision from the Security

[35] August 27, 1928.
[36] Simma (2002), p. 117.
[37] GA Res. 2625 (XXV) 1970.

Council according to Chapter VII. Both these exceptions operated as justifications in relation to the use of force against Iraq and it is in the light of these exceptions that the legitimacy of the use of force against Iraq has to be considered. In the following the content and interpretation issues of these two exceptions will be explained.

### 4.2.1. Self-defence

The development of the right to self-defence follows the development of the prohibition to use of force. Up till the twentieth-century the right to resort to war had no limitation, thus the right of self-defence was of diminutive importance.[38] When the right to wage war became more restricted in the twentieth-century, the importance of a right to self-defence increased.[39] Then in 1945 the UN and the Charter was established which aimed at putting an end to the unilateral use of force. However, a total ban of unilateral action would not be reasonable and therefore the Charter allows for such action on one occasion. This right of unilateral action is known as self-defence as contained in art. 51. Although the UN Charter recognises unilateral use of force in self-defence, this right is not without limits. These limits will be explored below.

#### 4.2.1.1. Interpretation Problems

There are several aspects concerning the right of self-defence found in art. 51 which require interpretation.

Firstly, art. 51 establish self-defence as an inherent right. The effect of this is by some taken as a reference to the customary right of self-defence that existed prior to the adoption of the UN Charter and that it therefore continues to apply in its unmodified form independently of the Charter.[40] There is no clear answer to whether this is the case or not, but considering that the UN members agreed to the text of the Charter is an indication of them accepting the right of self-defence only within the limits stipulated in art. 51. This is also supported by the *Nicaragua* case where the ICJ affirms that the inherent right of self-

[38] Simma (2002), p. 789.
[39] Simma (2002), p. 789.
[40] Avra Constantinou, *The Right of Self-defence under Customary International Law and Article 51 of the UN Charter*, Ant. N. Sakkoulas/Bruylant, 2000, p. 54.

defence cannot be of other than customary nature, but "its present content has been confirmed and influenced by the Charter".[41]

The second phrase that calls for construction is "armed attack". This phrase is not expressly defined in the Charter, and for this reason leaves the understanding of the expression vague. Nevertheless, it is not up to the states to determine subjectively that they have experienced an armed attack against their territory. The phrase has to be interpreted according to the rules of interpretation found in Vienna Convention. Starting with a textual approach, a literal understanding of "armed attack" is that force used on a large scale such as a full military invasion will activate the right of self-defence. Force used on a minor scale will also activate the right of self-defence for example incidents of cross-border shootings and bombardment. This means, according to the text, that mere frontier incidents are not within the scope of "armed attack". From this it can be inferred that an attack with substantial effect is required before the right of self-defence can be invoked. The wording of art. 2(4) supports this interpretation. This can be illustrated by comparing the scope of "armed attack" with the scope of the phrase "use of force" found in that article. Out of the two expressions, "armed force" is a narrower concept than "use of force". As stated above "use of force" constitutes of armed force which can be either direct or indirect. This is different to the term "armed force" which requires an actual attack with substantial effects. Consequently, indirect force, such as organising or assisting, does not trigger the right of self-defence. Thus, not every unlawful use of force will reach the threshold of "armed attack" which leaves the affected state without a right to invoke self-defence. In this situation it is up to the Security Council to determine whether the unlawful use of force constitutes a threat or breach of the peace and decide on measures found in Chapter VII of the Charter.

A second issue regarding self-defence is when this act may commence. According to the wording of art. 51 the right of self-defence is activated if an "armed attack occurs against a Member of the United Nations". Consequently, the attacked state can not commence their defensive acts before an actual attack take place on their territory. It can be debated whether this understanding is tenable. Some would argue that it is unreasonable for a state

[41] 1986 ICJ Report 392, para. 176.

to wait for an attack to occur if it is evident that an attack is imminent.[42] However, if an attack is clearly imminent indicates that there is a threat to the peace and any use of force is thus under the Council's domain according their responsibility as stipulated in art. 24.

#### 4.2.1.2. Individual and Collective Self-defence

The right of self-defence can be exercised either individually or collectively. The exercise of individual self-defence is regarded as the key component of art. 51; every state has the right to defend its sovereignty if an armed attack occurs against it. The article also opens up for the possibility to exercise self-defence collectively. The requirements for utilise collective self-defence is the same as with individual self-defence, but with one exception. As well as proving that an armed attack has occurred the attacked state must ask for assistance from other states to fend off the armed attack.[43] It is also now established through Security Council Resolution 661[44] that third states do not have to be attacked themselves or have any treaty or other links with the attacked state. This is contrary to earlier legal commentary on the issue of collective self-defence.[45]

#### 4.2.1.3. Limitation on Self-defence

Article 51 instructs when a right of self-defence exist, but give no guidance at all regarding the limits of the defensive act.[46] For the purpose of determining these limits, art. 51 has to be read in conjunction with customary law.[47] As for the duration of the defensive action, the right of self-defence is only legitimate "until the Security Council has taken measures necessary to maintain international peace and security".[48] From this it can inferred that the right of self-defence is only of a temporary nature until the Council take necessary measures. The time limit on the right of self-defence is compatible with the purpose of the UN and art. 2(4) of the Charter, namely to restrict unilateral use of force, and when force is

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[42] Ruud and Ulfstein (2002), p. 179.
[43] Blay (2006) p. 234.
[44] SC Res. 661 (1990).
[45] Oscar Schachter, 'United Nations Law in the Gulf Conflict', 85 *Am. J. Int'L.* 452, (1991), p. 457.
[46] Ruud and Ulfstein (2002), p. 180.
[47] Ruud and Ulfstein (2002), p. 180.
[48] *The Charter,* art. 51.

necessary, it should be under the operation of the Security Council which is primarily responsible for international peace and security.

Further limitations can be found in customary law and are referred to as necessity, proportionality and immediacy. The requirement of necessity means that all peaceful remedies must have been exhausted.[49] In addition to the requirement of necessity there has to be symmetry between the defensive action and its purpose of repelling the armed attack, which is referred to as the requirement of proportionality.[50] The final requirement of self-defence is the principle of immediacy. An action taken in self-defence must be a direct response to an armed attack and not purport to be a new military action. If there is an undue time-lag between the defensive action and the armed attack, the former may appear as a retaliatory act and is contrary to the prohibition in art. 2(4).

### 4.2.2. Security Council Decision

As described above the Council is primarily responsible for the maintenance of international peace and security and have means available for achieving this aim. Use of force through collective enforcement measures decided by the Council is one of the means available and is thus a second exception to the prohibition in art. 2(4). The means of using force are contained in Chapter VII of the Charter, but before such measure can be decided upon the Council have to determine pursuant to art. 39 "the existence of any threat to the peace, breach of the peace or act of aggression". If the Council concludes affirmative it then has wide discretionary powers to recommend or decide what measures that should be taken for the maintenance of international peace and security. Therefore, a determination according to this article is pivotal as it is the gateway for any action under Chapter VII.[51] The article that opens up for the use of force in this Chapter is art. 42. Under this article the Council has the power to decide on use of military forces by air, sea or land as may be

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[49] William A. M. Henderson, *'The 'Bush-Doctrine' of Pre-Emptive Self-defence: A legal analysis of the 'Bush-Doctrine' when applied to the threat from States that fail to control their territory, terrorists and WMD',* Institutt for Offentligrett, 2007, at p. 7.

[50] Leo van den Hole, 'Anticipatory Self-defence Under International Law', 19 *Am. U. Int'l L. Rev.* 69 (2003-2004), p. 103.

[51] Danesh Sarooshi, *The United Nations and the Development of Collective Security*, Clarendon Press, 1999, p. 33.

necessary to maintain or restore international peace and security. However, before such measures can be decided upon the non-forceful measures provided for in art. 41 must be either inadequate or prove to be inadequate.

## 5. Iraq 1991

### 5.1. Historical Background

Both Iraq and Kuwait was part of the Ottoman province of Basra, an empire that ceased to exist in 1918. After the dissolution both states were recognised as sovereign states, but the issue concerning the international border between them remained disputed. The disagreement continued till the 1980s. During this decade their relationship improved as a result of Kuwait becoming a member of Gulf Co-operation Council and their support of Iraq's war against Iran. [52] After the war with Iran, Iraq was in a serious debt to Kuwait and was thus economical vulnerable. Its vulnerability became worse when the oil prices collapsed while at the same time Kuwait increased its oil production. Iraq claimed that the reason for this was Kuwaiti cross-border drilling into Iraq's oil field.[53] This led Saddam Hussein and his military forces to invaded Kuwait on the 2 August 1990 with the aim of securing Kuwait as Iraq's 19th Province.[54]

### 5.2. The War's Legal Justification

Iraq's invasion of Kuwait was a cross-border incursion undisputedly within the scope of the word "force" in art. 2(4) of the Charter and is thus a clear violation of that article. As both Iraq and Kuwait are UN members the provisions of the Charter was applicable and a series of Security Council resolutions were adopted. In February 1991 the Iraqi troops were driven out of Kuwait by a military coalition operation called *Operation Desert Storm*. The

[52] For more details on the historical background see Mary Ellen O'Connell, *International Law and the Use of Force: Cases and Materials*, Foundation Press, 2005, at p. 27.
[53] The New York Times, September 3, 1990.
[54] David Morris, 'From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations', 36 *Va. J.Int'l L.* 801, (1995-1996), at p. 888.

operation was under US command with a coalition co-operating with the Government of Kuwait. The legal basis for this operation was Resolution 678 which authorised Member States to "use all necessary means" [55] to evict Iraq from Kuwait.

The following will give an introduction to the resolutions adopted prior to Resolution 678 to better understand its background. Subsequent section will then examine the legal issues of that resolution.

### 5.2.1. Security Council Resolutions

Prior to the adoption of Resolution 678 eleven resolutions were passed by the Security Council which illustrate a step by step procedure in responding to Iraq's illegal occupation. The first resolution to be adopted was Resolution 660 which condemned the invasion.[56] The next to be adopted was Resolution 661, which imposed mandatory economic sanctions on both Iraq and Kuwait.[57] Resolutions 665[58] and 670[59] further tightened the sanctions imposed in Resolution 661 as Iraq did not comply. Resolution 662[60] and 677[61] declared the annexation of Kuwait null and void as it is contrary to international law and urged states not to recognise it. The Council also passed resolutions concerning the law that operates during hostilities, such as taking of hostages and third-state nationals and the need for humanitarian aid.[62] Resolution 667[63] condemned the interference with diplomatic missions and Resolution 669[64] dealt with Kuwait's request for assistance under art. 50 of the Charter. Before analysing the legal ground of authorising the use of force in Resolution 678 and its legitimacy, an understanding of Resolutions 660 and 661 are necessary. In Resolution 660 the Council determined that Iraq's invasion of Kuwait represented a breach of international peace and security. This determination is pursuant to art. 39 of the Charter which is necessary before any measures available in Chapter VII can be taken to implement

[55] SC Res. 678 (1990), para. 2.
[56] SC Res. 660 (1990).
[57] SC Res. 661 (1990).
[58] SC Res. 665 (1990).
[59] SC Res. 670 (1990).
[60] SC Res. 662 (1990).
[61] SC Res. 677 (1990).
[62] SC Res. 664, 666 and 674 (1990).
[63] SC Res. 667 (1990).
[64] SC Res. 669 (1990).

the Council's decision to maintain or restore international peace and security. The Council's intention of making the resolutions relating to Iraq's invasion binding becomes evident when it in the same resolution simultaneously adopted measures that can be found in art. 40. The measures that the Council can recommend according to that article are of a provisional nature. The measures are only an attempt to prevent an aggravation of a situation and are thus "emergency measures preliminary to any other resolution adopted on the basis of Chapter VII".[65] The provisional measures provided for in Resolution 660 are the demand of immediate and unconditional withdrawal of Iraqi forces and for Kuwait and Iraq to commence negotiations to resolve their differences. As Iraq did neither comply with the order to withdraw from Kuwait nor commence any negotiations to settle their differences with Kuwait, the Council adopted Resolution 661. Acting under Chapter VII of the Charter, the Council imposed mandatory economic sanctions on both Iraq and Kuwait to give effect to its decision of restoring international peace and security. The resolution does not make a direct reference to any specific article under Chapter VII, but only art. 41 of the Charter empowers the Council to impose such comprehensive economic sanctions. Thus, this article can be regarded as the legal basis for the resolution.

The far-reaching economic sanctions proved to be inadequate of achieving the Council's objective of restoring international peace and security. Consequently, Resolution 678 was adopted which authorised Member States to use all necessary means to implement the decision of the Security Council. Notwithstanding the authorisation stipulated in the resolution, questions arose as to whether the authorisation given was a valid authorisation to use force. A second issue was the uncertainty regarding the actual legal basis of the resolution. These two issues will in the following be examined respectively.

#### 5.2.1.1. Valid Authorisation to Use Force

The first issue regarding the validity is the interpretation of the phrase "all necessary means" in paragraph 2 of Resolution 678. It is not obvious that the ordinary meaning of this phrase denotes the use of force. Recourse to previous resolutions on the matter must then be considered for determining the intended meaning of that resolution. Then it becomes

[65] Conforti (2000), p. 182.

evident that the phrase authorises the use of force, remembering that comprehensive sanctions had been adopted prior to this resolution except the use of force.[66] The debates preceding the resolution are also a helpful tool in attaining an understanding of a resolution's text. In this case a majority of states participating pronounced without a doubt that the resolution was an authorisation to use force.[67] This establishes that the use of force authorised in the resolution was legitimate. Nevertheless, there were still further issues with the adoption of the resolution.

A second issue regards the validity of the entire resolution. When voting for the resolution China, which is a permanent member of the Security Council, abstained from voting. This is in conflict with the understanding of art. 27(3) of the Charter which requires that the Council's decisions on substantive matters must include "the concurring votes of the permanent members". According to a textual interpretation the article means that the permanent members must be present and voting at the time of adoption. If a permanent member fails to be present it must be deemed that the state is not voting and therefore no decision by the Council can be made. Thus, the failure of China not to vote on the matter must render the Resolution 678 invalid. However, since the drafting of the Charter the practice of adopting resolutions in the Security Council where a permanent member abstains from voting has seen a constitutional development within the Charter structure.[68] According the practice today a resolution will be adopted if it has the requisite votes and no negative votes despite the abstention of a permanent member. The reasoning for this practice is where a permanent member does not participate in the voting process it has chosen not to veto the resolution.[69]

Not only China opposed the resolution, but Cuba and Yemen, two members of the Council at the time, was also in opposition to the authorisation of force. In their view it has to be determined that action taken pursuant to art. 41 proved to be inadequate before the measures provided for in art. 42 can be invoked. Article 42 begins: "should the Security

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[66] Christopher Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', 55 *Mod. L. Rev* 153 (1992), p. 166.
[67] S/PV. 2963 (1990).
[68] Vaughan Lowe, 'The Iraq Crisis: What Now?', 52 *Int'l & Comp. L.Q.* 859 (2003), p. 868.
[69] Blay (2006), p. 241.

Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces". Cuba and Yemen inferred from the article that there is a need of considering the adequacy of sanctions under art. 41 before authorising use of force. Since no such consideration was done prior to the adoption of Resolution 678, Cuba and Yemen regarded it as invalid.[70] According to a literal understanding of art. 42 their inference seems plausible. The article clearly says that the Council may take such action by air, sea or land forces if it should consider the measures found in art. 41 not sufficient. The word "consider" implies that the adequacy of the measures taken under art. 41 first needs to be properly assessed and formally declared to be inadequate before measures provided for in art. 42 can be decided upon. However, art. 42 has to be understood in the light of the Charter and the Security Council's purpose. The main purpose of the Charter is to maintain international peace and security and to this end a prohibition on unilateral use of force is an important tool. For achieving this purpose the Council is primary responsible and has to follow the systematic structure of Chapter VII where use of force operates as a measure that can be decided upon as a last resort for achieving its purpose. When it became evident that the economic sanctions did not fulfil the goal of a full withdrawal of Iraqi troops to restore international peace and security further measures were necessary. The Council then decided to authorise use of force which indicates that the Council impliedly considered the economic sanctions to be inadequate. In a situation of war the Council has to act rapidly in order to achieve its purpose of maintaining and restoring international peace and security. This purpose speaks in favour of interpreting the articles in Chapter VII in the light of putting an end to the illegal use of force and not to prevent the Council from taking appropriate measures. Hence, a properly assessment of the measures taken according to art. 41 and a formal declaration of their inadequacy is not required as the literal understanding of art. 42 might imply.

[70] S/PV. 2938 (1990).

#### 5.2.1.2. Legal Basis for the Authorisation

In Resolution 678 the Council is acting under Chapter VII of the Charter, but does not specify which article it is acting under. As already established the resolution is an authorisation to use force and the most compatible article of the Charter is 42, but other regarded it as justified under Chapter VII generally, while others again regarded it as an authorisation of collective self-defence.[71] This confusion has been illuminated by the International Court of Justice. In the *Expenses*[72] case the Court rejected the argument that authorisation by the Security Council of armed forces in the Middle East and Congo had to be based on art. 42 for it to be legitimate. In the Court's opinion the power of the Council would be excessively limited if this understanding was applied. In stating this, the Court did not suggest any other article applicable, but pronounced a liberal construction of the Council's authority to allow use of force which can be drawn from its primary responsibility of maintaining international peace and security. According to this statement the reference to Chapter VII in Resolution 678 is thus sufficient. It is important to remember that judicial decisions in international law do not create precedence and are only binding between the parties in that particular case.[73] However, in this case the Court is not making a statement regarding an issue that is only applicable in this particular case, but on the issue of the Council's legal basis for authorising armed force. This is an issue that is likely to occur in subsequent cases and thus a consistent rule on the matter is advantageous. Although the need of a consistent rule speaks in favour of a liberal construction, there are objections to the interpretation made in the *Expenses* case. The interpretation may cause confusion and uncertainty, and on such a sensitive issue as the use of armed force, it would be desirable to have unequivocal and constant rules regarding the legal basis. In particular considering that the Charter itself contains a general prohibition on the use of force in art. 2(4), the authorisation from the Security Council should not leave any doubt about the legal basis for a resolution.

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[71] Christine Gray, *International Law and the Use of Force*, 2nd ed., Oxford University Press, 2004, p. 205.
[72] 1962 ICJ Reports 151, 167.
[73] *ICJ Statute*, art. 59.

Establishing that a liberal construction is legitimate, various articles of Chapter VII have been considered as the most appropriate legal basis for Resolution 678. Considering that the legal basis can be art. 42, arguments arose that the authorisation is not in accordance with art. 43 of the Charter.

According to art. 42 the Council itself is primary responsible for carrying out the measures decided upon through its own forces. These forces are the Member States meant to make available to the Council based on agreements concluded in accordance with the procedure stipulated in art 43. When the Charter was drafted such agreements were thought of being a necessary condition for the Council to implement collective military operations.[74] Article 106 of the Charter also supports this view. For the Council to commence "the exercise of its responsibilities under Article 42" are depending on the conclusion of the special agreements referred to in art. 43. However, such agreements have never been concluded and thus the Council authorised the operation under American command. The critics then argued that the operation was *ultra vires* Security Council power.[75] Firstly, the principle of effective interpretation speaks in favour of accepting such an authorisation. In case there are two possible interpretations where one allows the treaty to have appropriate effect and the other does not, the principle states that "the former interpretation should be adopted".[76] Therefore, despite the lack of own UN forces the Council should not be deprived of making such authorisation as that would be contrary the asserted purpose of the UN; namely to maintain international peace and security through effective collective measures.

Secondly, the concept of authorising Member States to use force was a new feature at the time and could therefore not be justified according to previous practice from the Council. Nevertheless, there still existed evidence of states submitting their national forces to UN led operations. This practice is based on the *Uniting for Peace* resolution adopted by the General Assembly in 1950.[77] This resolution was adopted when it became clear that the Council was unable to fulfil its role due to the Cold War and also the lack of art. 43

[74] Schachter (1991), p. 463.
[75] Blay (2006), p. 241.
[76] Ruud and Ulfstein (2002), p. 72.
[77] GA Res. 377 (V), (1950).

agreements led to the adoption of the resolution.[78] The Assembly recommends in its paragraph 8 each member to have within its national forces military facilities that can be made available for service as a United Nations unit "upon recommendation by the Security Council or the General Assembly". The fact that this resolution was adopted with the requisite two-thirds majority indicates the states' position on the need to maintain international peace and security through other means than those envisaged by the Charter. The subsequent practice of the states also provide evidence that the procedure of submitting national sources to UN led operations have become accepted as law, and thus can be seen as customary law.[79]

A second option regarding the legal basis of the authorisation to use of force is art. 48 which also can be found in Chapter VII. There are supporters of this option who argue that the use of force by a coalition authorised in Resolution 678 is compatible with art. 48.[80] To determine whether this understanding is plausible art. 48 must be read together with Resolution 678. According to art. 48 the members of the UN are obliged to take "the action required to carry out the decisions of the Security Council for the maintenance of international peace and security". In other words, for the Council to be able to implement its decision it has the right to impose duties upon states to participate in the action required to reach this objective. According to this textual interpretation art. 48 makes it clear that the language of the article is of mandatory nature. Applying this understanding on Resolution 678 makes it evident that art. 48 can not operate as legal basis for the coalition's use of force in Iraq. Resolution 678 merely authorised the use of force. The military measures were not required action, but rather permissive action to which art. 48 does not apply.[81]

[78] Blay (2006), p. 243.
[79] Blay (2006), p. 244.
[80] Greenwood (1992), p. 168.
[81] Schachter (1991), p. 463.

### 5.2.2. Collective Self-defence

As established above the legal basis for Resolution 678 is subject to a liberal construction. Some has construed the resolution's reference to Chapter VII as an authorisation to act in collective self-defence pursuant to art. 51.

Arguments put forward as to why the resolution falls within the scope of art. 51 is based on the fact that the authorisation were given to Member States co-operating with Kuwait to use all necessary means to repel the Iraqi forces. The armed forces of the cooperating states were not to be placed under the control of the Security Council due to the fact that the choice of means, timing, command and control were left to the coalition. Furthermore, there was no reference to a United Nations forces, neither did the forces operate under the flag of the UN.[82] In this respect the resolution is often compared with the resolution relating to the UN recommendation of military force in Korea where the use of UN flag and UN command were apparent. These arguments must be evaluated according to the requirement of self-defence contained in art. 51 and customary law to determine their tenability.

Firstly, comparing paragraph 2 of Resolution 678 with the scope of self-defence indicates that the resolution was not an authorisation of collective self-defence. That paragraph authorises use of force to implement Resolution 660, which demands Iraq's withdrawal, and to restore international peace and security in the area. The last aim, to restore international peace and security in the area, goes beyond the scope of self-defence. A right to act in self-defence requires the occurrence of an armed attack, which is undisputed in this case, but also customary requirements regarding the limits of self-defence exist. As mentioned earlier these requirements are the notion of necessity, proportionality and immediacy. While the notions of necessity and immediacy are satisfied, this is not the case with the requirement of proportionality. According the notion of proportionality the defensive action is restricted to repel an armed attack on its own territory. Therefore, the aim of restoring international peace and security in the area as stipulated in Resolution 678 is outside the scope of self-defence and is thus not an authorisation of collective self-

[82] Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law,* Kluwer Law International, 1996, p.271.

defence. Furthermore, the right of self-defence in art.51 is an inherent right which refers to the right as a customary law existing prior to the Charter era. Although it is suggested that the customary right of self-defence have now been modified by the Charter it expressly states that this intrinsic right shall not be impaired by the Charter as it is regarded as a right that belongs to every state. Under the Charter era this is the one and only time the initial use of force is outside the control of the Council. Therefore, an authorisation from the Council that allow states to act in self-defence is not necessary provided the additional requirements for such a right are satisfied.

Resolution 661 also supports the view that Resolution 678 is not an authorisation to act in collective self-defence, although that resolution appears to be contradictory. This resolution affirmed "the inherent right of individual and collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter". The very same resolution also imposed mandatory economic sanctions on Iraq and Kuwait which all the members had to comply with according to art. 25 of the Charter. This gave rise to a debate of whether the right of self-defence can be replaced by mandatory economic sanctions imposed by the Security Council. The answer to this can be found when interpreting art. 51 of the Charter. This article establishes for how long the right of self-defence exists, which is "until the Security Council has taken measures necessary to maintain international peace and security". This indicates that the right of self-defence can be replaced by mandatory economic sanctions that the Council imposes. State practice also supports this.[83] Some commentators argued that the measures taken had to prove to be necessary in actually drive Iraq out of Kuwait and only then is the right of self-defence barred.[84] As long as the measures do not "definitely restores and maintain international peace and security"[85] an attacked state can always claim the right of self-defence. This construction overlooks some of the purposes of the United Nations and the Security Council. Article 1(1) state that the main purpose of the UN is to maintain international peace and security and this objective is to be reached through effective collective measures to defeat breaches of the peace. Additionally, the primary responsibility for the

[83] Constantinou (2000), p. 202.
[84] Alexandrov (1996), p. 266.
[85] Alexandrov (1996), p. 266.

maintenance of international peace and security is conferred on the Security Council which indicates that any disputes regarding threat to the peace, breaches of the peace and acts of aggression are under the Council's domain. Therefore, self-defence is only permissible until the Council has acted upon the matter which it clearly has in this case. As stated above Resolution 661 was contradictory when it affirmed the right of self-defence and at the same time imposed mandatory sanctions. A possible explanation to why the Council affirmed the right of self-defence when it is clear that it cease to exist after mandatory economic sanctions are imposed may be of political reasons. If the economic sanctions proved not to be the necessary measures in compelling Iraq, Kuwait would regain the right of self-defence if the Council was barred from adopting subsequent resolutions imposing more severe measures. As the Council is well aware of, achieving the necessary votes for authorising use of force is difficult due to the veto power. Hence, if the economic sanctions turned out to be inadequate and the Council could not agree on further resolutions, Kuwait would not be left without any means of defending themselves.

### 5.2.3. Conclusion

Despite the disputed issues regarding the validity of the authorisation to use force and the legal basis of the resolution the criticism proved to be unfounded. There is beyond doubt that the resolution authorises use of force. The abstention of China during the voting procedure did not render the authorisation invalid due to a constitutional development of art. 27(3). Furthermore, a formal declaration of the inadequacy of the measures taken pursuant to art. 41 is not necessary before measures according art. 42 can be decided upon. This follows from the systematic structure of Chapter VII which stipulates a step by step procedure when dealing with breaches of the peace. The legal basis of the resolution is subject to a liberal construction according to ICJ. This means that for the Council to merely state it is acting under Chapter VII of the Charter is sufficient when authorising armed force. While a liberal construction is permissible, not every article in Chapter VII is applicable according the text of Resolution 678. As shown above art. 48 is not applicable and the resolution is not an authorisation of collective self-defence. The most appropriate article is art. 42 although the action taken is in conflict with articles 43 and 106 which require the UN to have own forces available before the Council can exercise its powers

under art. 42. Resolution 678 marked a new method of authorising force by conferring it on Member States to act upon the authorisation which is a new development of the collective security system originally intended by the Charter. This will be discussed in section 8. In conclusion, the authorisation to use force for achieving the Council's aim of expelling Iraq out of Kuwait and restoring international peace and security in the area is legitimate despite the above mentioned issues.

## 6. Iraq 2003

### 6.1. Background

After the military action against Iraq in 1991 ended the Council adopted a permanent cease-fire resolution containing disarmament obligations for Iraq and it also established an inspection regime whose main task was to ensure Iraq's compliance with the obligations.[86] In 1998 the UN inspectors were pulled out of Iraq, upon request from the US, as it became difficult to cooperate with the Iraqi Government on the terms of the disarmament obligations under Resolution 687. After the military action of *Operation Desert Fox*[87] the weapons inspectors were refused to return by Iraq. The refusal of letting the weapon inspectors back in caused the US and the UK to be suspicious of Iraq producing weapons contrary to Resolution 687 and then supplying those weapons to terrorists.[88] Then in 2001 the US experienced a horrible terrorist attack on US soil which killed thousand of civilians. The September 11th incident marked the beginning of US's war against terrorism. Immediately after the attack in 2001 the US commenced their military action against Afghanistan labelled under the right of self-defence. At the same time a war against Iraq

[86] SC Res. 687 (1991).
[87] This operation was a four-day bombing campaign on Iraqi targets in an attempt to enforce cooperation with the terms of Resolution 687. The campaign took place in 1998 and was executed by the US and UK.
[88] Gray (2004), p. 271.

was already considered as a necessity in the war against terrorism.[89] Again the US expressed concern about the possibility of Iraq developing weapons of mass destruction in violation of Resolution 687 and soon declared Iraq, Iran and North-Korea to constitute an 'axis of evil' who threatens the international peace and security. This led the US, after numerous debates in the Security Council, to declare war on Iraq in March 2003 and attained great support from both the UK and Australia, who also joined in the war constituting what came to be known as the 'coalition of the willing'.

## 6.2. The War's Legal Justification

Prior the use of force against Iraq, the coalition presented several arguments in order to justify the war in accordance with international law. The main argument by the coalition was that their recourse to force was justified according to Security Council resolutions. The justifications were based on both resolutions adopted for the present situation and resolutions adopted in relation to Iraq's invasion of Kuwait in 1990. A second justification was based on the right of self-defence. These two justifications will be assessed respectively in order to determine their legitimacy according to international law.

### 6.2.1. Security Council Resolutions

In relation to the war against Iraq in 2003 there did not exist an expressed authorisation to use force by the Security Council. Resolution 1441, the last resolution to be adopted before the war in Iraq commenced, does not contain the phrase "all necessary means" which is now the phrase commonly understood as an authorisation to use force. The issue that subsequently arose was whether there existed an implied authorisation to use force in either existing resolutions or resolutions adopted immediately before the military operation against Iraq begun. The following will first give an illustration of the arguments regarding the legality of the war presented by the coalition. Subsequently, an assessment of whether the arguments are legally tenable will be given.

[89] Ronli Sifris, 'Operation Iraqi Freedom: United States v Iraq- the Legality of the War', 4 *Melb. J. Int'l L.* 521 (2003), p. 523.

#### 6.2.1.1. The Coalition's Justification

The coalition justified their actions based on a combination of resolutions 678, 687 and 1441. The latter resolution was adopted in November 2002 and its paragraph 2 states that the resolution is giving Iraq a "final opportunity to comply with its disarmament obligations under relevant resolutions". One major resolution in this respect is Resolution 687 which sets out the terms of a permanent cease-fire. Resolution 678 is, as established above, the resolution where the Security Council authorised use of force against Iraq in 1991. What the coalition claim is that Resolution 1441 revives the authorisation given in Resolution 678 because the former resolution determines that Iraq is in material breach of its disarmament obligations under Resolution 687.[90] According to the Attorney-General in the United Kingdom the authorisation in Resolution 678 was only suspended but not terminated by Resolution 687.[91] The Attorney-General in Australia gave similar reasons, stating that the authorisation in Resolution 678 had not expired.[92] Australia argues that the authorisation given in Resolution 678 contains no time limit and the authority to use force was not "confined to restoration of the sovereignty and independence of Kuwait".[93] In their view the authority was also given to "restore international peace and security in the area",[94] a purpose which is still relevant today as it was in 1990. Overall, both UK's and Australia's arguments as to the revival of Resolution 678 are corresponding. Both claim that authorisation given under this resolution was still in force because Resolution 1441 in its preamble explicitly refers to Resolution 678. The UK stresses that the Security Council in Resolution 1441 expressly decides in paragraph 1 that Iraq "has been and remains in material breach" of its obligation under Resolution 687. In their view the fact that Iraq is already in material breach is enough to revive the authorisation of force in Resolution 678, but the Council has decided in paragraph 2 to give Iraq "a final opportunity to comply with

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[90] S/RES/1441 (2002), para. 1.
[91] Warbrick, Colin and Dominic McGoldrick, 'Current Developments, Public International Law', 52 *Int'l & Comp. L.Q.* 811, (2003), p. 812.
[92] Memorandum of Advice, Australia, March 18, 2003 http://pandora.nla.gov.au/pan/10052/200305210000/www.pm.gov.au/iraq/displayNewsContent4acc.html?refx=96 (Last visited 19/02/08).
[93] Memorandum of Advice, Australia.
[94] SC Res. 678 (1990), para. 2.

its disarmament obligations".[95] The argument of Resolution 678's revival due to Iraq's material breach is also the primary justification to use force by both the US and Australia as well.

Both the UK and Australia then sums up the operative paragraphs of Resolution 1441 beginning with paragraph 4 which declares that failure by Iraq to comply with the resolution is considered to be a further material breach of their obligations. If there happen to be any further breaches or interference with the weapon inspectors the matter has to be reported immediately to the Council.[96] Upon receipt of such report the Council decides to convene immediately "in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security".[97] In paragraph 13 the Council warned that Iraq "will face serious consequences as a result of its continued violations of its obligations".

From the UK point of view there was no 'automaticity' in Resolution 1441, in other words that resolution did not revive the authorisation in Resolution 678 immediately on its adoption.[98] After all, it did offer Iraq one final opportunity to comply with its obligations and any failure thereof would have to be considered by the Security Council. However, the requirement of the Council to "consider" the matter did not mean that no further actions could be taken without a new resolution from the Council where it expressly authorises the operation. In the UK's view no second resolution was necessary because Resolution 1441 did not expressly mention the need of a new resolution to authorise use of force.[99] If the Council had intended to adopt another resolution, paragraph 12 of Resolution 1441 would have provided the Council with the power to decide what needed to be done to secure international peace and security, rather than merely considering the matter.[100]

The US's approach was much the same as that of the UK and Australia. In their view the Council had decided in Resolution 1441 that Iraq remained in material breach and due to this would face serious consequences. Iraq had given up on their final opportunity offered

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[95] Warbrick and McGlodrick (2003), p. 814.
[96] S/RES/1441 (2002) para. 11.
[97] S/RES/1441 (2002),para. 12.
[98] Warbrick and McGlodrick (2003), p. 814.
[99] Warbrick and McGlodrick (2003), p. 814.
[100] Warbrick and McGoldrick (2003), p. 814.

to them by the Council to comply with their disarmament obligations and continued to commit additional breaches. The additional breaches were reported by the weapon inspectors who gave notification of delays in cooperation. The inspectors did not find any weapons of mass destruction, but confirmed that many prohibited weapons were unaccounted for. These weapons could only be located if Iraq immediately and unconditionally cooperated with the inspectors.[101] On this basis the US argued that the cease-fire established in Resolution 687 was removed due to Iraq's non-compliance which led to the revival of the authorisation given under Resolution 678.[102] Australia supported this view in their Memorandum of Advice. In their view Iraq's conduct after the adoption of Resolution 687 reveals that it still does not accept the terms of that resolution. As a consequence the cease-fire is not effective and the authorisation in Resolution 678 is revived.

#### 6.2.1.2. Legal Assessment

The argument that Resolution 678 was revived by Resolution 1441 due to violation of disarmament obligations, in particular Resolution 687, requires a thorough legal assessment. Before commencing the assessment some fundamental principles of the UN and doctrines will be brought to attention. Initially there is "no known doctrine of the revival of authorisations in Security Council resolution",[103] but this alone is not enough to decline the argument of revival. The principles of interpretation that applies for interpreting Security Council resolutions and general principles established by the UN must be considered for determining the legality of the use of force. Firstly, a basic principle of the UN Charter is peaceful resolution of disputes which means that use of force may only be used as a last resort. Secondly, as one of the main purposes of the UN was to end unilateral actions, the use of force is now under the control of the Security Council. Inferring from the coalitions' justifications the principles of interpreting Security Council resolutions and the general principles of the UN seems to have been ignored all together.

[101] Gray (2004), p. 272.
[102] S/2003/351.
[103] Lowe (2003), p. 865.

**Suspending the authorisation**

The coalition referred to Resolution 687 as not terminating the authorisation in Resolution 678, but merely suspending it. To argue that a cease-fire suspends a military action was a valid argument before the drafting of the Charter,[104] but is no longer applicable in the age of the UN and with the Security Council controlling the use of force. Supporting this does also the principle of interpreting Security Council resolutions in the context of all relevant resolutions. The very important resolution the coalition fail to mention is Resolution 686, which is a provisional cease-fire agreement.[105] In its paragraph 4 the resolution states that during the period Iraq need to comply with the cease-fire obligations in paragraphs 2 and 3, the authorisation in Resolution 678 remains valid. This means that the time it will take for Iraq to end the hostilities, Member States are still authorised to use force. After full compliance by Iraq with the terms of this resolution the authorisation to use force expires. Although the Council has not expressly withdrawn the authorisation, the wording of Resolution 686 speaks in favour of an implied withdrawal of the authorisation. A further indication that the authorisation given in Resolution 678 expired upon compliance with Resolution 686 can be found in paragraph 34 of Resolution 687. In that paragraph the Council decides to remain seized on the matter of Iraq's disarmament and to take such further steps as may be required for the implementation of the present resolution. The task of deciding what these further steps will consist of are, if such steps are necessary, clearly up to the Council to decide, and not individual states.

**Material Breach**

The argument of Resolution 678's revival due to material breaches of disarmament obligations by Iraq is subject to objection. In this case the coalition relied on the traditional material breach doctrine which applied to cease-fires prior to the UN existence. Before the Charter era, any violations of a cease-fire agreement by one party gave the other party the right of annulling it and, if necessary, to recommence the fighting.[106] Now, in the Charter

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[104] *Hague Convention (IV) respecting the Laws and Custom of War on Land and its annex: Regulations concerning the Laws and Custom of War on Land,* 18 October, 1907, art. 36.
[105] SC Res. 686 (1991).
[106] *Hague Convention (IV)*, art. 40.

era, the rules regarding cease-fire agreements have changed. The rule that applies today is art. 2(4) of the Charter which imposes the basic obligation on UN members to refrain from using force.[107] It can be inferred from the word 'cease-fire' that there once was military action, but these have now ceased and the prohibition in art. 2(4) once again applies. It is true that after a cease-fire is in place there will still be tension and minor disturbances in the affected area. Nonetheless, for the use of force to be legal again a new resolution must be obtained from the Council before any actions can be taken, unless the requirement of self-defence is satisfied. Thus, a material breach of the permanent cease-fire agreement found in Resolution 687 is not a tenable ground for justifying a revival of Resolution 678 and consequently use of force.

**Objectives**

The objectives of Resolution 678 were to implement Resolution 660 which demanded a withdrawal of Iraqi troops out of Kuwait and to restore international peace and security in the area. According to the coalition the latter objective is still relevant today as it was in 1990. The first objective of securing withdrawal of Iraqi troops contains no ambiguity, but the second objective of restoring international peace and security in the area is rather indistinct. Phrases such as 'area' and 'restoring international peace and security' do not specify any precise objective. 'Area' could mean just Iraq or the entire Middle-East.[108] Textually, the last phrase holds great uncertainty as the Council does not stipulate what it takes for international peace and security to be restored. The phrase could mean that a regime change is necessary, occupation of Iraq or physical destruction of important national necessities.[109] For this reason the claim made by the coalition that this purpose is still relevant today as it was in 1990 is credible. However, this understanding is incorrect. Once again the principles that apply when interpreting Security Council resolutions must be considered. This means that a resolution has to be interpreted in its context and its objective, and, additionally, according to the main goal of the Charter. Furthermore,

[107] Lobel, Jules and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime', 93 *Am. J. Int'l L.* 124, (1999), p. 144.
[108] Lobel and Ratner (1999), p. 139.
[109] Lobel and Ratner (1999), p. 140.

according the principles of interpretation a resolution should be interpreted narrowly. Resolution 678 should therefore be interpreted in conformity with the objectives clearly intended by the Council, which was to evict Iraq out of Kuwait. This objective was the main purpose of adopting that resolution. Thus, ambiguous language that can be construed to authorise force for purposes not intended by the Council must be interpreted narrowly. Also the aim of the Charter to restrict the use of force to a minimum in international relations speaks in favour of interpret Resolution 678 narrowly. Although the Council has the power to authorise military actions, it is not to be presumed that the authorisation is without limits. Therefore, the authorisation in Resolution 678 does not expand beyond the specific issue of Iraq's withdrawal of its troops on Kuwait's territory. The fact that Resolution 678 does not expand beyond this issue is in addition underscored by paragraph 4 of Resolution 687. In that paragraph the Council decides to guarantee the inviolability of the international boundary between Iraq and Kuwait and to that end take all necessary measures. This indicates that the Council only accepts use of force in relation to the Iraq-Kuwait conflict, and that the authorisation in Resolution 678 does not go further than this conflict.

**Non-compliance**

There is also another significant aspect of Resolution 687 that the coalition is missing. Pursuant to paragraph 33 of that resolution a formal cease-fire is effective upon official notification of Iraq's acceptance of the terms of Resolution 687. This intention is reaffirmed in resolution 1441 where the Council recalls that a formal cease-fire is based on acceptance. The word 'acceptance' is crucial in this context as it has to be distinguished from the word 'compliance'. It is not required that Iraq complies with the terms of Resolution 687 for it to be effective, simply their acceptance is enough. This acceptance was presented by Iraq on 6 April 1991.[110] Consequently, the formal cease-fire was effective and any further measures were up to the Council to take as it in both Resolution 687 and 1441 decides to remain seized of the matter. The fact that Iraq does not comply with its

[110] S/22456 (1991).

disarmament obligations is thus not a valid argument to claim that the authorisation in Resolution 678 is revived.

**'Automacity' and new resolution**

Resolution 1441 in itself supports the argument that the use of force was not up to individual states to decide in order to make Iraq comply with disarmament obligations under Resolution 687. Firstly, in its preamble the resolution recalls Resolution 678 which merely authorised the use of force to uphold and implement Resolution 660. This is done to remind the member states of the scope of that authorisation; an authorisation that was given in response to an exceptional situation. Although Iraq is already in material breach of its disarmament obligation, Resolution 1441 gives Iraq a final opportunity to comply. If Iraq nevertheless does not comply with its obligations it shall constitute a further material breach which will be reported to the Council for assessment. Upon receiving such a report the Council shall convene to consider the situation and the need for full compliance with all relevant resolutions. In the context of considering the situation the Council has repeatedly warned that Iraq will face serious consequences as a result of the continuing violations. This means that Iraq has already been warned that further violation will have a severe outcome, but only after the Council has considered the situation and decided upon appropriate measures. Once again the measures that needs to be taken in order to secure international peace and security is clearly up to the Council to decide. Thus, the further violations do not automatically authorise use of force. The debates in the Council leading up to the adoption of Resolution 1441 also illustrate that the resolution does not and was never meant to authorise a military action. Such a resolution would not have attained the necessary votes for it to be adopted. Most states who participated in the adoption of the resolution welcomed the lack of 'automaticity' in the use of force and that it was now set up for a two-stage approach in case of further material breach by Iraq. Furthermore, the wording of the resolution enhances the important role of the Security Council and respect of international law. It is also stressed that use of force is a last resort and that with a prior

authorisation of the Council.[111] The same approach can be found in Resolution 1154 adopted in 1998 which establish a new inspection regime regarding Iraqi weapons.[112] When this resolution was passed the Council rejected that the resolution automatically authorised the use of force in case of further violations by Iraq. The Council emphasised that their explicit authorisation was necessary to justify any military action against Iraq.[113] A similar view can be found in the war against North-Korea that took place in 1950. In this case the Security Council recommended the use of force to repel the armed forces in the Republic of Korea.[114] When this objective was achieved a question that arose was whether the same resolution could operate as a legal basis to pursue the North-Koreans in their territory and see their total destruction. The US position was that a new authorisation was unnecessary, but nevertheless the US sought and obtained a new authorisation which was given by the General Assembly. [115] Although this was an authorisation given by the General Assembly, the conduct of seeking further authorisation when the objectives of the former action changes is evidence of state practice. This situation can be compared with the coalition denying the need for a new resolution authorising use of force. It is difficult to reconcile the coalition's objective of securing compliance with disarmament obligation with the objective of Resolution 678. The inspection regime was first imposed after the end of hostilities in 1991 and after Kuwait had regained their sovereignty. The coalition invokes use of force to secure compliance with disarmament obligations on the basis of Resolution 678 which is an authorisation to oust Iraq out of Kuwait. Clearly, the aims of that resolution and Resolution 687 are different and thus the invocation by the coalition is not logical. Since the coalition is invoking new objectives it means that the original objectives are accomplished, and thus a new resolution would be necessary to use force.

[111] SC/7564 (2002).
[112] SC Res. 1154 (1998).
[113] S/PV. 3858 (1998).
[114] SC Res. 83 (1950).
[115] Lobel and Ratner (1999), p. 139.

### 6.2.2. Self-defence

Out of the three countries constituting the coalition only the US justified their use of force against Iraq as an act of self-defence. In their letter addressed to the Security Council they claimed that their actions taken were "necessary steps to defend the United States and the international community from the threat posed by Iraq".[116] Whether this is a legitimate justification must be assessed according to the right of self-defence contained in art. 51 of the Charter. As discussed under section 4 self-defence is subject to requirements found in both art. 51 and customary law. According to art. 51 a right of self-defence exists if an armed attack occurs against a member of the UN. The phrase "if an armed attack occurs" requires that an actual attack on a state's territory with substantial effects take place before the right of self-defence can be invoked. In this case it is undisputed that an armed attack from Iraq did not occur against the US or any other state. If the US could establish links between al-Qaeda, the terrorist organisation responsible for the September 11 attack, and the Iraqi government a right of self-defence could be plausible. However, such links were never established and if it was, the amount of time passed after the attack in 2001 till the use of force in 2003 could be considered to be too long. [117] Thus, it is difficult to justify the use of force against Iraq as a response to the terrorist attacks. What is further worth noticing is that the US in its letter to the Council acknowledges that Iraq merely poses a threat to the US and the international community. It is undisputed that a mere threat does not trigger the right of self-defence, and the only legal option to use force is if the Security Council has determined, according to art. 39, that Iraq in fact poses a threat to the international peace and security and decides upon measures found in Chapter VII.
The only possible right of self-defence the US can invoke is the disputed issue of pre-emptive self-defence. This issue will be discussed more thoroughly below. Here it suffices to say that this notion of self-defence can not be extracted from the Charter's text or interpreted in accordance with one the purpose of the UN, namely to restrict the unilateral use of force. This establishes that the requirement found in art. 51 is not satisfied so there is

[116] S/2003/351.
[117] Sifris (2003), pp. 536-537.

no need to consider the requirements according customary law. Therefore, the use of force can not be justified under the right of self-defence contained in art. 51 of the Charter.

### 6.2.3. Conclusion

After the legal assessment of the justifications submitted by the coalition it becomes evident that the justifications were flawed for many reasons. None of their attempts of justifying the use of force is in accordance with international law. Two of their arguments were based on the legal situation prior to the UN era. Firstly, the traditional material breach doctrine that applied to cease-fires is no longer applicable due to art. 2(4) of the Charter. Secondly, the argument that a cease-fire merely suspends the authorisation in Resolution 678 is also no longer applicable. Had the coalition kept due regard to the principles of interpreting Security Council resolutions this second argument could have been avoided. The coalition did not read Resolution 678 in context of all relevant resolutions. This led them to overlook Resolution 686 which clearly states when the authorisation to use force expires. The argument that the aim of Resolution 660 to "restore international peace and security in the area" read alone could operate as a legitimate justification to use force. Yet again this argument is not legally tenable due to ignoring to read Resolution 678 in the light of its objective and in accordance with the main goal of the Charter. In doing this the coalition would have realised that resolutions authorising force and containing ambiguous language should be construed narrowly. The fact that Iraq does not comply with disarmament obligations under Resolution 687 does not justify use of force. The disarmament obligations are expressly based on acceptance and not compliance. Additionally, there was no 'automacity' in Resolution 1441. In case of further violation of disarmament obligations it was up to the Council, and not individual states, to take further steps and decide what these might involve. If further steps were taken these might have serious consequences for Iraq as they have been repeatedly warn of this possibility. Thus, for the use of force to be legitimate a new resolution was necessary. This is supported by the debates in the Council prior to the adoption of Resolution 1441 and state practice. When different objectives to those found in Resolution 678 are invoked indicates that the objectives of that resolution are achieved and new resolution to authorise military action is necessary. Neither is the argument that use of force was justified under the right of self-

defence in conformity with art. 51 as there is no prior "armed attack" by Iraq. In conclusion, the justifications submitted by the coalition are contrary to international law and thus the use of force against Iraq is not legitimate.

## 7. Comparative Analysis

Above the legitimacy of the operations in 1991 and 2003 were assessed. This assessment was based on the justifications for going to war and revealed that out of the two operations only the one in 1991 was legitimate. Although the use of force in 1991 was legitimate it is not the same as saying that the operation achieved its stated purpose. The use of force in 2003 might as well have achieved the coalition's stated purpose despite the operation's unlawfulness. In this section there will therefore be a comparative analysis to see whether the legitimacy of the use of force may have worked as a decisive factor in the actual outcome of the war compared to the desired outcome.

This section will also compare the consequences of when a state is in breach of international law. Does a state's position internationally affect the way in which international law is implemented against it in case of violation?

### 7.1. The Result

The objective with the operation against Iraq in 1991 was to expel the Iraqi troops from Kuwait after their illegal invasion of that country.[118] This objective was achieved shortly after the action begun and consequently the military operation ceased. Therefore, the actual outcome of the war coincides with the desired outcome.

The objective of the US led operation against Iraq in 2003 was to disarm Iraq of weapons of mass destruction they were holding contrary to Resolution 687. Soon after the operation begun the coalition defeated the Iraqi government and Saddam Hussein was found and put for trial. However, the main objective of disarmament was not achieved. There was no

[118] SC Res. 660 (1990).

evidence of Iraq holding weapons of mass destruction in violation of Resolution 687.[119] On top of this the operation is still ongoing today, five years after the outbreak of the war. Therefore, the actual outcome of the war does not coincide with the desired outcome. The issue then is whether these results may be connected with the legitimacy of the operations.

The operation in 1991 gained its legitimacy through Security Council authorisation. From the moment Iraq invaded Kuwait the Council was actively involved in the process and followed the structure of Chapter VII of the Charter before eventually authorising the use of force. Furthermore, after the end of hostilities the Council continued to adopt resolutions, where the main resolutions are those setting out the terms of a cease-fire. This operation is an example of multilateral cooperation among states that allowed the Council to carry out the role entrusted to it by the states,[120] and is by some regarded as the most successful military operation in modern history.[121]

The operation in 2003 did not attain an expressed authorisation from the Council prior the military actions. The reason for this is that some of the members of Council did not see the mere possibility of Iraq possessing weapons of mass destruction as enough for authorising force. This view was also expressly stated in its Resolution 1441 from 2002 where the Council in stead established an inspection regime and decided to remain seized on the matter. Notwithstanding the lack of authorisation the coalition began their military actions. This behaviour made it complicated for the Council to respond appropriately to the situation that arose in Iraq as a consequence of the war, and their approach is somewhat pragmatic as it seems to accept the status quo.[122] Numerous resolutions were adopted stipulating what was to happen in the future Iraq,[123] but due to disagreement between the members of the Council prior to the outbreak of the war agreeing on a resolution that pleased every state was difficult. Several states made it clear that the involvement of the Council in the crisis that followed the military action was not to be taken as an acceptance

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[119] Gray (2004), p. 278.
[120] Thomas J. Schoenbaum, *International Relations – The Path Not Taken*, Cambridge University Press, 2006, p. 9 and *the Charter* art. 24(1).
[121] Morris (1995-1996), p. 890.
[122] Gray (2004), p. 279.
[123] SC Res. 1472, 1483, 1500, 1511 (2003).

of the use of force. They simply would not legitimise the use of force retrospectively.[124] Therefore, the action taken by the coalition is an example of "unilateral statecraft"[125] which was one of the main purposes for the UN to restrict and is expressly stated in art. 2(4). There is no empirical data affirming a connection between the legitimacy of the operations and the actual outcome of the operations. However, it is interesting to see that the 1991-operation which was legitimate and could therefore be taken through effective collective measures is the one that achieve its stated purpose. In the Charter era breaches of the peace is to be defeated through collective measures for the purpose of maintaining and restoring international peace and security, which the 1991-operation is a case example of. The 2003-opration thus purports to be total opposite. It was not legitimate and did not achieve its stated purpose. Due to the operation not being in accordance with the Charter it could therefore not be taken through the key element of the Charter, namely effective collective measures. While the first Iraq war adhered to international law, the second Iraq war is a case example of states resorting to force unilaterally by bypassing international law and institutions.[126] Therefore, there is a possibility that the legality, or rather the illegality, of the 2003-operation may have worked as a decisive factor for this operation to not achieve its stated purpose.

### 7.2. Consequences of Breach

When Iraq invaded Kuwait in 1990 it was a clear violation of art. 2(4) of the Charter and the international community was quick to condemn the unlawful use of force. The Security Council also convened promptly and decided on proper consequences for the Iraqi government which continued after the end of the illegal occupation of Kuwait.
As thoroughly assessed above the operation in 2003 was not authorised by the Council or could not be justified as self-defence. Thus, the operation must be considered as being in violation of art. 2(4) of the Charter. Nevertheless, the coalition has not seen any official consequences from the international community or the Security Council compared to what Iraq did when they invaded Kuwait. One of the reasons for this is the US and the UK's

[124] SC/7713 (2003).
[125] Schoenbaum (2006), p. 9.
[126] Schoenbaum (2006), p. 8.

position as permanent members of the Security Council. If the Council were to adopt Chapter VII measures in this situation the US and the UK have safeguarded themselves by being a permanent member and can consequently veto any proposed resolution. A second option could be to submit the case to the ICJ, but the US has not ratified the ICJ statute. The Court is primarily open to the states that are parties of the Statute,[127] but the Security Council can lay down conditions "under which the Court shall be open to other states".[128] However, before such conditions are determined in the Council it must be decided whether this is a question of procedural or substantive matter.[129] The problem is that this decision is regarded as a non-procedural vote and therefore the US and the UK can veto the question which makes the issue regarding the conditions for opening up the Court to non-parties a substantive matter.[130] Consequently, when the issue regarding the conditions are up for consideration as a substantive matter the US and the UK can veto again. Thus, they have the power to save themselves from being brought to the Court and face their breach of international obligations. A third possibility is for Iraq to invoke responsibility for the coalition according to the *Articles on the Responsibility of States for Internationally Wrongful Acts*.[131] These articles are drafted by the International Law Commission which has based their work on codifying existing law and to ensure a progressive development of international law. Therefore, some of the articles represent customary law and applies to every state as such. However, the unstable situation in today's Iraq and the US's leverage on present Iraqi leadership render this possibility mere theoretical than practical. Therefore, as the situation is today the coalition has not been faced with any official sanctions from either states or organisations. However, the coalition's international relations with other states have been damaged to some extent. This has been evident for the coalition, in particular the US, by an evolving anti-American attitude and by loss of close allies such as France and Germany.[132]

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[127] *ICJ Statute*, art. 35(1).
[128] *ICJ Statute*, art. 35(2).
[129] Blay (2006), p. 26.
[130] Blay (2006), p. 26.
[131] GA Res. 56/83 (2002).
[132] Schoenbaum (2006), p. 4.

It is not possible to give a decisive answer to the question asked initially, but inferring from the discussion above a state's position internationally seems to affect whether a state is met with consequences or not due to violation of an international obligation. As the US and the UK, in contrast to Iraq, holds a strong position in the world owing to their permanent memberships of the Security Council, agreeing on sanctions against them is thus hard to obtain.

## 8. Towards a new development?

The two wars against Iraq were different in many ways such as the result and their legitimacy according to international law. Nevertheless, they had one similarity; they both brought about conduct that may further expand the already exciting exceptions to the prohibition on the use of force that can be found in the Charter. According to art. 31(3)(b) of the Vienna Convention any subsequent practice in the application of a treaty regarding its interpretation shall be taken into account when interpreting the treaty. This means that any subsequent practice of the states may establish a different interpretation of the Charter than what was originally envisaged by the drafters. The following will introduce these potentially new developments and assess whether they have been accepted as law evidenced by constant and uniform usage over a lengthy period of time followed by a vast majority of states.

### 8.1. Pre-emptive Self-defence

Under section 6 the US's claim of a right to act in self-defence against Iraq was evaluated and disclosed that the use of force could not be justified according to the right of self-defence as understood in art. 51. The reason being is that the US invoked a form of self-defence that can not be extracted from the text of that article. The kind of self-defence they invoked is known as pre-emptive self-defence and the US defines it in its *National Security*

*Strategy*[133]from 2002 as a right that can be invoked even if the time and place of the enemy attack is uncertain. This means that an attack of an enemy is not manifested or even probable, but mere possible. Although this was not accepted at time in 2003 the question is whether pre-emptive self-defence have been accepted as law later through the general practice of states.

Before answering that question it is worth noticing that the notion of commencing a defensive act prior to an armed attack coincides with the doctrine of anticipatory self-defence which was a part of the customary right of self-defence existing prior to the UN era. The doctrine emanated from the well known *Caroline* case,[134] and characteristic for this doctrine is that the defensive act can take place if the attack is imminent. This indicates that there prior to the Charter era was accepted for a state to commence the defensive acts before experiencing an actual attack on its territory. Therefore, the US is right when they in their *National Security Strategy* argue that it has for centuries been recognised as lawful for a state to defend themselves before being attacked.[135] As stated in section 4 it is not clear whether the pre-existing right of self-defence continued to exist in its unmodified form independently from the Charter. However, it is suggested that the states' acceptance of the right to self-defence stipulated in art. 51 is an indication on them surrendering their already existing right of self-defence to the clearly defined scope of the right as set out in the Charter. Hence, a right to commence the defensive act before being attacked is no longer applicable law and must for that reason be assessed in the light of state practice after 2003 to determine whether pre-emptive self-defence is accepted as law.

However, there is no example of states invoking this right after the US justified their war against Iraq in 2003 on this notion. In fact many of the states' behaviours have been on the contrary. Both the UK and Australia, who joined in a coalition with the US, did not justify their use of force as an act in pre-emptive self-defence, in stead they both justified the military operation based on Security Council authorisation.[136] Australia expressly stated in their Memorandum of Advice that there was no need to consider self-defence at all due to,

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[133] http://www.whitehouse.gov/nsc/nss/2002/index.html (Last visited 14/04/08).
[134] The *Caroline*, (24 April 1841) (1841-42) 29 *British and Foreign State Papers* 1129.
[135] http://www.whitehouse.gov/nsc/nss/2002/index.html (Last visited 14/04/08).
[136] S/2003/350, S/2003/352.

in their opinion, the authority found in existing resolutions.[137] This behaviour indicates that they found the doctrine of pre-emptive self-defence conflicting with the current regime on the right of self-defence according to the UN Charter. About forty-five other states were also offering political support for the war against Iraq, but the support was not offered on the basis of pre-emptive self-defence.[138] Denmark was one of these countries and in their statement from March 2003, it is in their view that the use of force was authorised through Security Council Resolution 1441 and existing resolutions.[139] Inferring from this there is no general practice among the states that proves the doctrine of pre-emptive self-defence is accepted. There is no need for the states to explicitly reject the doctrine. Their behaviour is the decisive factor when customary law is created and therefore their reluctance to support the US on this ground and the fact that it has not been invoked later is sufficient evidence of non acceptance. Therefore, as the legal situation is today pre-emptive self-defence is not accepted as law through the general practice of states.

## 8.2. Collective Security

Under section 5 the legal basis for the military operation against Iraq based on authorisation given in Resolution 678 from the Security Council was discussed. This revealed that the resolution was conflicting with the intended function on how collective security was meant to be implemented according to articles 42 and 43 of the Charter. The reason why there is a conflict with those articles is owed to the fact that Resolution 678 authorised Member States to use force which represents a delegation of the Council's powers to the states participating in the operation. The question then is whether this delegation has been accepted as law as it is not within the exact framework of the UN Charter. As mention above subsequent practice shall be taken into account when interpreting a treaty which means that the practice of delegating the Council's powers to use force may establish a different understanding of the Charter if followed by the states.

[137] Memorandum of Advice, Australia.
[138] Gray (2004), p. 183.
[139] http://www.stm.dk/Index/dokumenter.asp?o=3&n=0&h=3&t=13&d=1434&s=1 (Last visited 02/04/08).

The practice of delegating the powers to use force was immediately accepted by states participating in the military operation against Iraq in 1991.[140] However, this is not enough to establish a new custom. Further evidence that proves the practice to be constant and uniform followed generally by a vast majority of states over a lengthy period of time is necessary. Following Resolution 678 the Security Council has adopted multiple resolutions similar to the 1990 resolution authorising Member States, either as groups or individuals, to use force for the purpose of maintaining international peace and security. Such authorisation can be found in cases like Somalia,[141] Haiti,[142] Rwanda,[143] Eastern Zaire,[144] the Central African Republic,[145] Kosovo,[146] and Eastern Timor.[147] The states that carried out these military actions accepted the legality of the operation, and therefore they implicitly accepted the legality of the delegation practice by the Council.[148] The fact that this delegation practice has become the standard procedure in the Council itself further manifests that this practice is recognised as law by the states. This is due to the composition of the Security Council. Externally, the Council purports to act as one entity, but in reality the actions taken by the Council are evidence of state practice as the Council constitutes primarily of states. Therefore the delegation of the power to use force to the states, which was primarily vested in the Council, has been accepted as law through the general practice of the states. Consequently, this has established a different interpretation of the Charter as first intended by the drafters.

Although it is now accepted as law that the Council can delegate the power to use force, this competence is not without limits. What these limits comprise of can be determined according to the maxim called *delegateus non potest delegare* or better known as the non-delegation doctrine. As this doctrine is applied in a large number of states, in both common and civil law systems, the doctrine is regarded as a "general principle of law" which is a

[140] S/22090, S/22097, S/22100 (1991).
[141] SC Res. 794 (1992).
[142] SC Res. 940 (1994).
[143] SC Res. 929 (1994).
[144] SC Res. 1080 (1996).
[145] SC Res. 1136 (1997).
[146] SC Res. 1244 (1999).
[147] SC Res. 1272 (1999).
[148] Simma (2002), p. 758.

source in international law according to the ICJ Statute art. 38(1)(c). Therefore, as a source of international law, the doctrine is applicable to the UN and consequently the Security Council. The limitations that follow the non-delegation doctrine will not be explored in details here;[149] only one aspect of the limitation will be mentioned as it turned out to be of relevance for answering the question of the legality of the use of force against Iraq in 2003. One of the limitations on the competence is called "conditions for a lawful delegation" and imposes obligations on the Council regarding how it should delegate its powers. A feature of these conditions is the requirement that the resolution which delegates the power to use force clearly specify the objective of that resolution.[150] In Resolution 678 there were two objectives where one was not clearly specified, namely the objective of "restoring international peace and security in the area". In relation to the Iraq war in 2003 the broad objective of that resolution became an issue as the coalition justified their actions based on this objective. In resolutions adopted after Resolution 678 that also delegate the power to use force, the Council remedied this by establishing time limits for the operations and by giving an exact description of the situations use of force were authorised.

### 8.3. Summation

The US's conduct in relation to the Iraq war in 2003 has not resulted in a new acceptable exception to the prohibition on the use of force. Pre-emptive self-defence was not accepted at the time US first invoked this legal basis and is further evidenced by non-acceptance as this notion has not been invoked by other states in later situations. The Security Council's conduct in relation to the Iraq war in 1991, on the other hand, has resulted in an acceptable exception to the prohibition on the use of force which was not originally intended by the Charter. The states behaviour contributed to the acceptance by acting upon the delegated powers and subsequent resolutions from the Council further manifests the acceptance of the right to delegate its powers to states. Therefore, the form in which the collective security turn out to be has been accepted, but with limitations according to the non-delegation principle.

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[149] For in-depth details on the doctrine see Sarooshi, (1999).
[150] Sarooshi (1999), p. 155.

## 9. Conclusion

The main question for this thesis was whether the use of force against Iraq in 1991 and 2003 were legitimate. A thorough assessment of both situations revealed that the use of force in 1991 was legitimate according to international law while the use of force in 2003 was not. The wars' legitimacy may have had a decisive effect on the result of the wars as the one in 1991 was legitimate and successful, while the one in 2003 was illegitimate and has not seen a successful ending yet. The 1991 war was based on collectivism and consensus which allowed the Council to respond to the situation in a constructive manner. The 2003 war, on the other hand, was a unilateral act taken in contradiction to the existing Security Council resolution. This behaviour also made it difficult for the Council to agree on appropriate actions after the outbreak of the war as this could be taken as an implied or retrospectively accept of the use of force. Nevertheless, the unlawfulness of the military actions in 2003 has not yet caused any official consequences for the coalition, although their international relations with other states may have been damaged to some extent. This is in contrast to the quick response to Iraq's breach of international law in 1990. It is reasonable to believe that these differences are owed to the position these states holds internationally.

Although the wars were different in many ways, they had one thing in common; a potential development of the exceptions to use force. However, only one of these potential developments are accepted as law today; namely the revised meaning of collective security. As opposed to the development which is not accepted, pre-emptive self-defence, the development of collective security is not exactly according to the literal understanding of the Charter, but remains within its framework. The notion of pre-emptive self-defence, on the other hand, goes far beyond the ordinary meaning of self-defence as understood in the Charter. It is even conflicting with one of the main purposes of the UN to keep the unilateral use of force to a minimum.

To draw a conclusion from the above assessment it appears that international disputes involving the use of force are best dealt with through the Security Council which will take appropriate actions based on collectivism and consensus among the states rather than unilateral acts from states as they self see fit.

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