

**THE USE OF FORCE BY THE UNITED STATES AGAINST IRAQ:**

# Legal Issues

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## **The Use of Force by the United States Against Iraq:**

# **Legal Issues**

## **Introduction**

This brief from Lawyers Against the War (LAW) examines the legality of the use of force by any member of the United Nations against Iraq. In particular, it considers whether:

the right of self-defence would justify the use of force against Iraq by another State; and the alleged failure of Iraq to comply with any of the existing UN Security Council resolutions would justify the use of force by another member of the United Nations against Iraq.

In summary, LAW's opinion is that:

- The use of force against Iraq would only be justified under international law if:
  - (a) Iraq mounted an armed and unlawful attack on another State; or
  - (b) the United Nations Security Council authorized the use of force in unambiguous terms through a resolution passed under Chapter VII of the United Nations Charter.

There is continuing dispute about whether the use of force against Iraq would be justified under international law if an attack by Iraq on another State was demonstrably imminent and could be averted in no way other than by the use of force.

- Iraq has not made an armed attack on any State since 1990-91, and no evidence is currently available to the public that any attack is imminent.
- Our view is that current Security Council resolutions do not authorize the use of force against Iraq. Such force would require further authorization from the Security Council.

At present therefore no State is entitled, under international law, to use force against Iraq.

## Factual Background

The factual background can be outlined briefly. The United States is openly threatening the use of force against Iraq. This use of force would appear to have the aims of (1) destroying such stores of non-conventional weapons as Iraq may have; and (2) bringing about a change of leadership. On the basis of the speech made by President Bush to the UN General Assembly on September 12, 2002, the United States appears to consider such action to be justified on the basis of the right to carry out a pre-emptive strike in self-defence, the right to respond in self-defence against an armed attack (in this case the attacks on 11 September 2001), and/or on the basis of current resolutions of the United Nations Security Council.

Evidence has not been placed before the public for the presence of stores of non-conventional weapons in Iraq, the means to deliver them, programmes to obtain or develop them and the intention to use them in an aggressive manner. Prime Minister Blair of the United Kingdom in a speech to Parliament of September 23, 2002 made public a “dossier” on Iraq prepared by British Intelligence and largely based on “secret intelligence” that Prime Minister Blair asked be accepted on “good faith”. From what Mr. Blair revealed in his speech, it appears that the most British Intelligence has determined is that Iraq has the potential to develop non-conventional weapons.

By letter dated September 16 2002, Dr. Naji Sabri, Minister of Foreign Affairs for the Republic of Iraq informed Secretary General Kofi Annan that Iraq will allow the return of UN weapons inspectors to Iraq without conditions. Dr. Sabri’s letter also expressed the intention of the government of Iraq to complete the implementation of prior Security Council resolutions and to act to remove any doubts that Iraq still possesses weapons of mass destruction.<sup>1</sup>

The factual background to the decision of the US to threaten military action against Iraq is unclear to the public. Evidence that the United States has about Iraq’s military

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<sup>1</sup> Letter from Foreign Minister Naji Sabri to the UN Secretary-General, 16 September 2002, at: <http://www.un.org/Docs/sc/letters/2002/s2002-1034.pdf>.

capabilities that would justify UN authorized military intervention has not been made available to the public. The UK and the US have not produced evidence that Saddam

Hussein intends to use weapons of mass destruction. Resolution 687 obliges Member states to provide such information to the UN.

Iraq is known to have had chemical weapons, which it first used against Iran during the Iran-Iraq war of 1980-1988. There have been allegations that Iraq may have the technology to build nuclear weapons, although such information as presented to the public has as yet been inconclusive. Iraq appears to have, in the past, persistently failed to co-operate with the UN weapons inspection programme as mandated by Security Council Resolution 687 (1991) and subsequent resolutions of the UN Security Council. The United States, on its part, is widely thought to have misused the weapons inspection system in order to pursue attempts to overthrow the present Iraqi government.<sup>2</sup> The United States requested the withdrawal of the weapons inspection teams (the United Nations Special Commission, UNSCOM) in December 1998, and the Executive Director of UNSCOM complied without consulting the Security Council.

## The Use of Force in International Law

The United Nations Charter provides the framework for the use of force in international law. Almost all States are parties to this Charter, including Iraq, the United Kingdom and the United States. The Charter emphasizes that peace is the fundamental aim of the Charter. The use of force is justified and will be authorized only when all other means to restore peace and security have failed. In that event legitimate force is limited to that necessary to restore a reasonable level of peace.

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<sup>2</sup> See in particular the comments of Rolf Ekéus, former executive director of Unscm from 1991 to 1997, in a radio interview on 28 July 2002: "some, especially the US, started to think about getting hold of [information about] other forms of capacity [than WMD]. For example: how was Iraq's security services organised; what was the conventional military... the location of president Saddam Hussein... [T]here developed hard pressure from primarily the US ... also to take into account strategic and tactical considerations, which corresponded to the interests of individual members of the Security Council." Ekeus confirmed that Unscm did become a cover at times for such activities. Full text at: <http://www.casi..org.uk/discuss/2002/msg01070.html>

The preamble to the Charter expresses a determination ‘to save succeeding generations from the scourge of war’, ‘to practise tolerance and live together in peace with one another as good neighbours’, ‘to unite our strength to maintain international peace and

security’, and to ensure ‘that armed force shall not be used, save in the common interest.’

Article 1 of the Charter sets out the United Nations’ purposes, the first of which is:

‘To maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.’

All other provisions of the Charter must be interpreted in accordance with this aim: see the 1969 Vienna Convention on the Law of Treaties, Article 31, which provides that a treaty must be interpreted in accordance with its objects and purposes, including its preamble.

The Charter goes on to set out two fundamental principles:

‘2(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

2(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations.’ (emphasis added)

Article 2(4) has been described by the International Court of Justice (ICJ) as a peremptory norm of international law, from which States cannot derogate.<sup>3</sup> The effect of Articles 2(3) and 2(4) is that the use of force can *only* be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN’s purposes.

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<sup>3</sup> *Nicaragua v United States*, [1986] ICJ Reports 14, at para 190

The Charter authorizes the use of force in the situations set out in Chapter VII. Article 42 states that, if peaceful means have not succeeded in obtaining adherence to Security Council decisions, the Security Council ‘may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.’

States require a resolution of the Security Council in order to use force against another State (subject to Article 51: see below). Force is only justified where there are no peaceful means available for resolving the dispute. We stress that, in our view, where Members believe that another State has breached a resolution of the Security Council, that State does not have a unilateral right under Article 42 to use force to secure adherence to it or to punish the allegedly delinquent State. The legitimate action to be taken is a matter for the Security Council.

Article 51 of the Charter reserves States’ rights to self-defence. This right is additional to the provisions of Article 42. States do not require a Security Council resolution in order to act in self defence but even the right of self-defence is subject to action by the Security Council, as is clear from the terms of Article 51:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.’ (emphasis added)

Articles 42 and 51 are exceptions to the prohibition on the use of force and have been interpreted narrowly.

The Charter allows only two situations in which one State can lawfully use force against another:

- (a) In individual or collective self-defence (a right under customary international law, which is expressly preserved by Article 51 of the Charter).
- (b) Pursuant to a UN Security Council resolution.

## Self-Defence

In this Opinion, LAW reviews the arguments about the legality of the use of force by the United States and the United Kingdom. We do not review the arguments for the

legality of the use of force by States that have indicated support for the use of force, namely Israel, Italy and Australia.

LAW takes it to be uncontroversial that the United States and United Kingdom have not been the subject of any direct attack, which could even arguably be linked with Iraq. It is clear that the right of self-defence in response to an armed attack does not arise with respect to Iraq. The only possible justification is as an anticipatory form of self-defence against a future threat. We turn to consider whether such a right is known to international law.

### **Is there a right of anticipatory self-defence in international law?**

Article 51 of the Charter is silent about whether ‘self-defence’ includes the pre-emptive use of force, in addition to the use of force in response to an attack. In order to answer the question, other conventional sources of international law must be examined, including state practice and the works of experts on international law. This analysis follows the approach set out in Article 38(1) of the Statute of the International Court of Justice, which provides that:

‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’

State practice is ambiguous, but tends to suggest that the anticipatory use of force is not generally considered lawful, or only in very pressing circumstances. There are

numerous examples of States claiming to have used force in anticipatory self-defence, and being condemned by the international community. Examples of State practice are given by Professor Antonio Cassese, former President of the International Criminal Tribunal for the Former Yugoslavia.<sup>4</sup> One particularly relevant example is the international reaction to an Israeli bombing attack on an Iraqi nuclear reactor:

‘When the Israeli attack on the Iraqi nuclear reactor was discussed in the [Security Council], the USA was the only State which (implicitly) indicated that it shared the Israeli concept of self-defence. In addition, although it voted for the SC resolution condemning Israel (resolution 487/1991), it pointed out after the vote that its attitude was only motivated by other considerations, namely Israel’s failure to exhaust peaceful means for the resolution of the dispute. All other members of the SC expressed their disagreement with the Israeli view, by unreservedly voting in favour of operative paragraph 1 of the resolution, whereby ‘[the SC] strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct.’ Egypt and Mexico expressly refuted the doctrine of anticipatory self-defence. It is apparent from the statements of these States that they were deeply concerned that the interpretation they opposed might lead to abuse. In contrast, Britain, while condemning ‘without equivocation’ the Israeli attack as ‘a grave breach of international law’, noted that the attack was not an act of self-defence. Nor [could] it be justified as a forcible measure of self-protection.’<sup>5</sup>

Cassese concludes that, ‘[i]f one undertakes a perusal of State practice in the light of Article 31 of the Vienna Convention on the Law of Treaties, it becomes apparent that such practice does not evince agreement among States regarding the interpretation or the application of Article 51 with regard to anticipatory self-defence.’<sup>6</sup>

Oppenheim<sup>7</sup> states that:

‘while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and

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<sup>4</sup> Antonio Cassese, *International Law*, (Oxford, 2001) at 309-31.

<sup>5</sup> *Ibid* page 310.

<sup>6</sup> *Ibid* page 309

<sup>7</sup> R Jennings QC and A Watts QC (eds), *Oppenheim’s International Law: Ninth Edition* 1991

proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances.’<sup>8</sup>

Detter states<sup>9</sup> that, ‘it must be emphasized that anticipatory force falls under the prohibition of force in Article 2(4) of the Charter entailing a presumption that it is illegal. A mere threat of attack thus does not warrant military action...’

Cassese considers that, ‘[i]n the case of anticipatory self-defence, it is more judicious to consider such action as *legally prohibited* while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds...’<sup>10</sup>

Henkin states,<sup>11</sup> ‘Nothing in ... its drafting ... suggests that the framers of the Charter intended something broader than the language implied... . They recognized the exception of self-defence in emergency, but limited to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication ... [N]ations should not be encouraged to strike first under pretext of prevention or pre-emption.’

In conclusion, LAW concludes that a number of authors believe that States may have the right to defend themselves by using force to pre-empt an imminent and serious attack, but that this right is not yet established in law. However, if a right to use such force does exist, it would have to be exercised in accordance with the general rules and principles governing self-defence. These are well summarized by Oppenheim:

‘The development of the law, particularly in the light of more recent state practice, in the 150 years since the Caroline incident suggests that action, even if it involves the use of armed force and the violation of another state’s territory, can be justified as self defence under international law where:

- (a) an armed attack is launched, *or* is immediately threatened, against a state’s territory or forces (and probably its nationals);
- (b) there is an urgent necessity for defensive action against that attack;

<sup>8</sup> Ibid pp41-42. It should be noted that Sir Robert Jennings was the British Judge on the ICJ and was its President.

<sup>9</sup> *The Law of War*, Second Edition, (Cambridge, 2000), p86.

<sup>10</sup> Supra note 4 at page 311.

<sup>11</sup> *How Nations Behave*, Second edition, pp 141-142.

- (c) there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;
- (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, i.e. to the needs of defence...<sup>12</sup>

These principles apply to the anticipatory use of force just as to any other use of force in self-defence.

### **Is anticipatory self-defence justified in this case?**

Although it has not been established that international law recognizes the right to use anticipatory force in self-defence, we have concluded above that, if there is such a right, it only exists in situations of great emergency, as set out by Oppenheim.

United States evidence about the level and nature of threat presented by Iraq to other countries has not been made public. The United Kingdom's dossier does not suggest that Iraq poses anything more than a potential threat. The information available to the public at present contains no demonstration, or even any evidence, of Iraq's intentions to use any weapons that it may have on another State, including the United States and United Kingdom, other than in the exercise of its inherent right to self-defence. The burden of proof is on these Governments to demonstrate the existence of a pressing and direct threat. They must also demonstrate that there is no effective alternative to the use of force. The lack of any effective alternative to force cannot be established when Iraq has: a) agreed to allow the return of UN weapons inspectors to Iraq without conditions, b) expressed the intention to complete the implementation of prior Security Council resolutions and c) expressed the intention to act to remove any doubts that Iraq still possesses weapons of mass destruction.

## **Collective self-defence**

It is clear from the above discussion of the law of self-defence that the capacity to attack, combined with an unsubstantiated claim that there exists an intention to do so in the future otherwise than lawfully, is not sufficiently pressing to justify the pre-emptive use of force. The threat must at least be imminent. The degree of proximity required for a lawful exercise of the right of self-defence must also be proportionate

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<sup>12</sup> Supra note 7 page 412

to the severity of the threat. A threat to use very serious weapons – nuclear weapons being the obvious example – could justify an earlier use of defensive force than might be justified in the case of a less serious threat. However, the existence of a threat, regardless of how serious that threat may be, must be supported by credible evidence. Evidence that Iraq posed such a threat has not been produced.

Article 51 also preserves the right of collective self-defence. This only arises if certain very narrow conditions apply. In the *Nicaragua* case, the ICJ stated that:

‘it is the State which has been the subject of an armed attack which must form and declare the view that it has been attacked. There is no rule of customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.’<sup>13</sup>

In order to justify the use of force against Iraq on the basis of collective self-defence by the United States with any of its allies, for example the United Kingdom or any other NATO country, there must first be credible evidence that Iraq has carried out, or intends to carry out, an armed attack on the United States or another ally of the country claiming the right to attack. No government has supplied any evidence to show that Iraq carried out the terrorist attacks on 11 September 2001. It appears that those attacks were carried out by al-Qa'ida, an international terrorist organization with support and funds supplied from a number of countries and with particularly close links to the Taliban regime in Afghanistan. This link was used as the justification for the military action taken by the United States, the United Kingdom and others against Afghanistan.

Further, even if it could be shown that Iraq has funded or otherwise assisted al-Qa'ida, this does not necessarily justify the use of force in self-defence. According to the International Court of Justice in the *Nicaragua* case:

‘In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this ... [T]he Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale

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<sup>13</sup> Supra note 3 para 195.

but also assistance to rebels in the form of the provision of weapons or logistical or other support.’<sup>14</sup>

LAW is not aware of any evidence that Iraq has provided ‘weapons or logistical or other support’ to al-Qa’ida. Such support would not, in any event, amount to an armed attack. Unless Iraqi involvement in the September 11 terrorist attacks could meet the higher standard set out in the *Nicaragua* case, namely something more than the provision of weapons, logistical or other support, the attacks of September 11 could not in themselves justify the use of force against Iraq.

The issue of collective self-defence was highlighted by the statement of the North Atlantic Council of NATO, on 12 September 2001, that ‘if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty ... the United States’ NATO allies stand ready to provide the assistance that may be required as a consequence of these acts of barbarism.’

On 2 October 2001, NATO declared that it did, in fact, consider that the attacks came from abroad, and that they would therefore be regarded as falling within the scope of Article 5. Article 5 of the Treaty states that:

‘The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.’

No force has in fact been used by NATO pursuant to this statement of 12 September. Although it has been determined that the acts of terrorism were ‘directed from abroad at the United States’, no evidence of a link with Iraq has emerged.

Article 5 of the Washington Treaty is expressly subject to Article 51 of the Charter of the United Nations. All the restrictions on the use of collective self-defence in

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<sup>14</sup> Ibid

international law therefore apply. All that Article 5 does is to state in advance that, if the legal conditions for collective self-defence are met in a particular case, the members of NATO will act. Since one of the requirements for collective self-defence is a request from the attacked State, Article 5 provides a standing request from all NATO states for assistance in the event of an attack. The criteria applying to the use of force under Article 51 must still be met. Whether the right exists will depend on the evidence.

## The Role of the Security Council

### *Article 42*

The Security Council can authorize the use of force. To do so, the Security Council must comply with the constitutional principles of the United Nations, and with the objects and purposes of the Charter. To properly authorize the use of force against Iraq, the Security Council must be convinced that Iraq poses a ‘threat to the peace’, and that the proven threat cannot be averted in any way other than by the use of force (Article 39 of the Charter).

Iraq has invited the UN weapons inspectorate, to recommence inspections in Iraq. If Iraq, in the future acts to substantially impair the ability of UNMOVIC to reasonably carry out its legitimate work, and all other avenues for satisfying reasonable fear that Iraq’s weapon production constitutes a threat to international peace and security, Iraq’s continuing violations may lead the Security Council to conclude that peaceful means have failed to ensure compliance with the necessary portions of existing resolutions and that the use of force is necessary. Having reached that conclusion, the Security Council could then pass a resolution under Article 42, explicitly authorizing the specific actions, including the use of force against Iraq necessary to restore peace.

An argument put forward by the United Kingdom, prior to the release of the September 23 2002 dossier, in favour of taking action without consulting the Security Council is that the Security Council may decide not to authorize the use of force. Prime Minister Blair, speaking on 3 September 2002, stated that the United Nations had to provide ‘a way of dealing with it, not a way of avoiding dealing with it. It has to be done and we have to make sure there are not people who are simply going to turn a blind eye to this.’

This argument implies that the decision to use force can legitimately be made by individual States, and that the Security Council need only endorse that decision. As we discussed in greater detail below, this ignores the constitutional position of the United Nations as a forum for collective decision-making. Two commentators writing in 1999<sup>15</sup> argue convincingly that:

‘If the Security Council is dysfunctional or paralyzed by the exercise of the veto, as arguably occurred during the Cold War, the case for implied authorization might be stronger. However, Council practices since the Cold War simply does not support any greater need for a flexible reinterpretation of the Charter to support the actual behaviour of States. Five times in the past eight years the Security Council has authorized the use of force to address threats to world peace.’<sup>16</sup>

LAW considers that the fact that the Security Council may decide that the use of force is not currently justified is not a legal justification for bypassing the Security Council. The only possible legal argument in favour of action without a further Security Council resolution is that current resolutions themselves authorize the use of force.

### **Do current Security Council resolutions authorise the use of force?**

The Security Council has not passed a resolution expressly authorizing the use of force against Iraq since Resolution 678, passed at the start of the Gulf War. The United States and the United Kingdom appear prepared to argue that:

- (c) The current Security Council resolutions *implicitly* authorize the use of force by Member States in the event of Iraq’s persistent non-compliance;
- (d) Further or alternatively, Iraq’s failure to comply with the cease-fire requirements set out in Resolution 687, which brought to an end military action against Iraq during the Gulf War, and amplified subsequently, justify the renewed use of force under Resolution 678, without further authorization from the Security Council.

<sup>15</sup> Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to use Force, Cease-fires and the Iraqi Inspection Regime* [1999] AJIL 124, at 127.

<sup>16</sup> Those occasions were: SC Res 678, authorising the use of ‘all necessary means’ to liberate Kuwait; SC Res 794, authorising ‘all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’, SC Res 940, authorising ‘all necessary means to facilitate the departure from Haiti of the military leadership’, SC Res 929, authorising France to use ‘all necessary means’ to protect civilians in Rwanda, SC Res 770, authorising states to take ‘all measures necessary’ to facilitate humanitarian assistance and enforce the no-fly zone in Bosnia.

Resolution 678, at paragraph 2, authorized Member States 'to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'. This can only mean resolutions subsequent to Resolution 660 but prior to Resolution 678.

Resolution 660 had the sole aim of restoring the sovereignty of Kuwait. After that had been achieved, Resolution 687 (1991) imposed a formal cease-fire. That cease-fire was conditional on Iraq's acceptance of certain terms and Iraq did accept those terms.

The Security

Council's current requirements of Iraq are contained in Resolution 687 and subsequent resolutions.

Those requirements include the destruction of all chemical and biological weapons and all ballistic missiles with a range greater than one hundred and fifty kilometres, the unconditional agreement not to acquire or develop nuclear weapons (Resolution 687, paragraphs 8(a), 8(b), and 12), and full co-operation with the UN-appointed weapons inspectorate. Such inspections were initially the responsibility of the Special Commission and the International Atomic Energy Agency, and are now to be carried out by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), established by Resolution 1284 (1999), and the International Atomic Energy Agency.

Shortly after the cease-fire, Resolution 688 dealt with the humanitarian issues arising from the situation in Iraq. It called upon Iraq to allow access to international humanitarian organizations. It is important to note that this resolution was *not* passed under Chapter VII of the Charter, and did not authorize the use of force to achieve its objectives. However, the United States, the United Kingdom and France used Resolution 688 as authority to establish 'safe havens' for Kurds and Shiites, and then to establish no-fly zones over Iraq. These developments are set out in detail by Christine Gray in *International Law and the Use of Force*, (Oxford, 2000) at pp 191-192.

The United States and the United Kingdom have argued that Resolution 688 implicitly authorizes Member States to respond to Iraq's actions, including by establishing no-fly zones, and thereafter to defend those zones by force. The US and UK argue that these zones are essential for humanitarian purposes and to monitor Iraq's compliance with the Security Council's requirements. These arguments are

convincingly rejected by one legal commentator Christine Gray in the following terms:

‘In fact there did not seem to be any adequate legal basis for the establishment of the safe havens by the coalition forces. Resolution 688, although referred to at the time by the States involved, clearly does not authorize forcible humanitarian intervention. It was not passed under Chapter VII and did not expressly or implicitly authorize the use of force. The USA, UK and France did not expressly rely on a separate customary law right of humanitarian intervention in any Security Council debates or in their communications to the Security Council at the time of the establishment of the safe havens. Such a right is notoriously controversial; since the Second World War it has always been more popular with writers than with States.’<sup>17</sup>

Iraq’s obligations were further amplified in a series of Resolutions passed after Resolution 687. Among these, in Resolution 707, the Security Council noted Iraq’s ‘flagrant violation’ and ‘material breaches’ of resolution 687. It considered that these constitute a ‘material breach of the relevant provisions of that resolution which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region’ (paragraph 1).

In Resolution 949, it was stressed again that ‘Iraq’s acceptance of resolution 687 (1991) adopted pursuant to Chapter VII of the Charter of the United Nations forms the basis of the cease-fire’ and that ‘any hostile or provocative action directed against its neighbours by the Government of Iraq constitutes a threat to peace and security in the region’, while ‘underlining that it will consider Iraq fully responsible for the serious consequences of any failure to fulfill the demands in the present resolution.’ Those demands include, at paragraph 5, full co-operation with the Special Commission.

This demand was repeated in resolutions 1051, 1060, 1115, 1134, 1137 and 1154. The latter resolution states that the Security Council is ‘determined to ensure immediate and full compliance by Iraq without conditions or restrictions with its obligations under resolution 687 (1991) and the other relevant resolutions’. Significantly, the Security Council also

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<sup>17</sup> Christine Gray, *After the Ceasefire: Iraq, the Security Council and the Use of Force* [1994] BYIL 135 at 162.

‘[s]tresses that compliance by the Government of Iraq with its obligations, repeated again in the memorandum of understanding, to accord immediate, unconditional and unrestricted access to the Special Commission and the IAEA in conformity with the relevant resolutions is necessary for the implementation of resolution 687 (1991), but that any violation would have severest consequences for Iraq.’

The Security Council also decides ‘to remain actively seized of the matter, in order to ensure implementation of this resolution, and to secure peace and security in the area.’

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

The key question is whether Resolution 678 still allows Member States to use ‘all necessary means’ to ensure compliance with subsequent resolutions, or alternatively whether the ‘severest consequences’ envisaged by the Security Council in Resolution 1154 (now backed up by the demands in Resolution 1205) include the use of force by Member States.

The International Court of Justice, in the *Namibia Advisory Opinion* (1971) ICJ Reports 15, 53 stated that ‘The language of a resolution of the Security Council should be carefully analyzed ... having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences...’ This has been described as ‘one of the very few authoritative guides to the interpretation of Security Council resolutions’<sup>18</sup>

LAW does not consider that the current resolutions implicitly allow the use of force. The wording of the Gulf War resolutions shows that, when the Security Council intends to authorize the use of force, it does so in clear terms. Resolution 678 referred

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<sup>18</sup> Michael Byers, *Terrorism, The Use of Force and International Law after 11 September* (2002) 51 ICLQ 401, at 402.

to the use of ‘all necessary means’, phrasing which does not appear in any subsequent Resolution relating to Iraq. The phrase ‘all necessary means’ has also been used when the Security Council authorized intervention in Rwanda, Bosnia, Somalia and Haiti.

Resolution 686, paragraph 4, which marked the provisional cessation of hostilities, expressly preserved the right to use force under Resolution 678. However, Resolution 687, which marked the permanent ceasefire, uses no such terms. This demonstrates a clear recognition that the right to use force requires express terms if it is to be continued. The absence of any clear terms in any resolution after 686 leads us to the conclusion that no such use of force was authorized.

Further, Resolution 687 states that the Security Council

‘[d]ecides to remain actively seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.’

This clearly contemplates that the Security Council remains seized of the matter and will itself decide what further steps may be required for the implementation of that resolution.

The Secretary General of the United Nations has made it clear that Resolution 678 was directed at a unique and specific situation:

‘The Iraqi invasion and occupation of Kuwait was the first instance since the founding of the Organization in which one Member State sought to completely overpower and annex another. The unique demands presented by this situation have summoned forth innovative measures which have given practical expression to the Charter’s concepts of how international peace and security might be maintained.’<sup>19</sup>

Those ‘unique demands’ relating to the invasion and occupation are no longer in existence. The Secretary General’s remarks underline how exceptional the United Nations considers the use of force, and how dependent the decision to use force was on the fact that Iraq had actually invaded another Member State. No such action has been taken by Iraq since then.

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<sup>19</sup> The United Nations Blue Book Series Vol IX, *The United Nations and the Iraq-Kuwait Conflict 1990-1996* (1996), at 3

Further, shortly after the end of the Gulf War, US officials gave evidence to the House Committee on Foreign Affairs that the military incursions into Iraq were authorized only because they were ‘pursuant to the liberation of Kuwait, which was called for in the UN resolution’, and the United Kingdom declared that the sole purpose of the operation was to liberate Kuwait.<sup>20</sup>

Much reliance is placed, particularly by the United States but also by the United Kingdom, on Resolution 1154. The warning of ‘severest consequences’ in Resolution 1154 is a clear reference to the use of force. However, it is addressed to Iraq, not the Member States, and is not worded as an authorization. At the meeting which led to the adoption of Resolution 1154, the ‘automaticity’ issue was debated: whether UN members would, without more, have the right to use force if Iraq failed to comply with the Resolution. Niels Blokker, in *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’* (2000) 11 EJIL 541, summarizes the debate as follows:

‘No agreement was reached on this issue. The US and the UK did not receive support for the view that UN members would have such an automatic right. The other members of the Council, including the other permanent members, emphasized the powers and authority of the Security Council and in some cases explicitly rejected any automatic right for members to use force. Sweden emphasised that “the Security Council’s responsibility for international peace and security, as laid down in the Charter of the United Nations, must not be circumvented.” Brazil stated that it was “satisfied that nothing in its [the Resolution’s] provisions delegates away the authority that belongs to the Security Council under the Charter and in accordance with its own resolutions.” And Russia concluded that, “there has been full observance of the legal prerogatives of the Security Council, in accordance with the United Nations Charter. The resolution clearly states that it is precisely the Security Council, which will directly ensure its implementation, including the adoption of appropriate decisions. Therefore, any hint of automaticity with regard to the application of force has been excluded; that would not be acceptable for the majority of the Council’s members.” (Emphasis added)

The intentions of the majority of States that passed Resolution 1154 could hardly be clearer: the resolution gives Member States no authority whatsoever to use force in

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<sup>20</sup> Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to use Force, Cease-fires and the Iraqi Inspection Regime* [1999] AJIL 124, at 140.

the event of non-compliance. The United States attempted to persuade the Security Council to include an express authorization of force. It failed, as the above analysis shows. It cannot now be asserted by any State that, on its correct interpretation, Resolution 1154 does after all authorize the use of force.

The potentially serious consequences of ignoring the clear intent expressed by Permanent Members of the Security Council have been highlighted by Dame Rosalyn Higgins, the British Judge on the ICJ. Writing in a different but related context – whether UN resolutions gave NATO the implied authorisation to intervene in Kosovo<sup>21</sup> – she states that:

‘One must necessarily ask whether [the implied authorisation argument] is not to stretch too far legal flexibility in the cause of good. In the Cold War legal inventiveness allowed peacekeeping instead of collective security enforcement. Then, at the end of the Cold War, we saw enforcement by coalition volunteers instead of UN military action under Article 42 of the Charter. In our unipolar world, does now the *very adoption* of a resolution under chapter VII of the Charter trigger a legal authorisation to act by NATO when *it* determines it necessary? If that is so, then we may expect that in the future Russia will again start exercising its veto in the Security Council, to make sure resolutions are not adopted, thus undercutting the possibility of useful political consensus being expressed in those instruments.’<sup>22</sup>

The issue of implied authorization was further debated in the Security Council, following *Operation Desert Fox*, a British and American series of air strikes on Iraq in December 1998. The United Kingdom and the United States argued that Resolution 1205 implicitly revived the authorization of the use of force contained in Resolution 678. The matter was debated at the 3930<sup>th</sup> meeting of the Security Council on 23 September 1998, when the majority of states speaking in the debate argued that the use of force by the United Kingdom and the United States under the purported authorization of Resolutions 678, 1154 and 1205 was unlawful.

At that debate, Boris Yeltsin, President of the Russian Federation, stated that:

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<sup>21</sup> It should be noted that, in the case of Kosovo, it was argued that the use of force was justified in international law on another ground – the doctrine of humanitarian intervention – but, for present purposes, it is only the suggestion that the use of force against Serbia was justified by the doctrine of implied authorisation by Security Council Resolutions which we need consider.

<sup>22</sup> *International Law in a Changing Legal System* [1999] CLJ 78 at 94, based on the text of the Rede Lecture, delivered in the University of Cambridge on 22 October 1998.

‘[t]he UN Security Council resolutions on Iraq do not provide any grounds for such actions. By use of force, the US and Great Britain have flagrantly violated the UN Charter and universally accepted principles of international law, as well as norms and rules of responsible conduct of states in the international arena ... In fact, the entire system of international security with the UN and the Security Council as its centre-piece has been undermined.’

China also expressed the view that the actions violated international law, and France ended its role in policing the no-fly zones. The French Minister for Foreign Affairs stated that France had ended its participation since the operation changed from surveillance to the use of force: he considered that there was no basis in international law for this type of action.<sup>23</sup>

This analysis of the Security Council debates shows that most Member States, including three Permanent Members, do not consider that the Resolutions can bear the meaning argued for by the United States and the United Kingdom, and consider that the proposed interpretation is incompatible with the framework laid down for collective decision-making. The arguments of the United States and the United Kingdom have been said by one legal commentator to distort the language of the Security Council’s resolutions:

‘It is no longer simply a case of interpreting euphemisms such as “all necessary means” to allow the use of force when it is clear from the preceding debate that force is envisaged; the USA, the UK and others have gone far beyond this to distort the words of resolutions and to ignore the preceding debates in order to claim to be acting on behalf of the international community.’<sup>24</sup>

The issue of implied authorization was further debated after the United States and the United Kingdom attacked Iraqi radar installations and command and control centres in and outside the no-fly zones in February 2001. The UN Secretary-General stressed that

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<sup>23</sup>See Christine Gray, *From Unity to Polarisation: International Law and the Use of Force against Iraq* (2002) 13 EJIL 1, at 22, and Constantine Antonopoulos, *The Unilateral Use of Force by States After the End of the Cold War*, [1999] JACL 117, at 155.

<sup>24</sup>Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq* (2002) 13 EJIL 1, at 10.

only the Security Council could determine the legality of actions in the no-fly zones: only the Security Council was competent to determine whether its resolutions were of such a nature and effect as to provide a lawful basis for the no-fly zones and the action taken to enforce them.<sup>25</sup> Russia, China and France all rejected the legality of the air strikes, and Gray concludes that: ‘The enforcement of the unilaterally proclaimed no-fly zones has thus come to be seen as illegitimate, despite UK protestations of humanitarian necessity.’<sup>26</sup>

Given the objects of the Charter, one of which is to preserve peace, LAW considers that clear terms must be required to authorize the use of force. Bearing in mind the fact that ambiguities in interpretation should be resolved in compliance with the Charter’s objectives, the use of force is not justified until the Security Council says so in clear terms, and does so in terms directed at the current situation. LAW considers that the Charter’s overriding commitment to the use of force only as a last resort to restore international peace and security entails that explicit authorization be required, rather than seeking to make resolutions bear meanings clearly at odds with the intentions of large numbers of the States which drafted them, including Permanent Members of the Security Council.

The constitutional importance of the United Nations, and the constraints this places on interpretations of the relevant resolutions, is well expressed by Lobel and Ratner:

‘To resolve these issues [whether the current Resolutions implicitly authorise the use of force], two interrelated principles underlying the Charter should be considered. The first is that force be used in the interest of the international community, not individual states. That community interest is furthered by the centrality accorded to the Security Council’s control over the offensive use of force. This centrality is compromised by sundering the authorisation process from the enforcement mechanism, by which enforcement is delegated to individual states or a coalition of states. Such separation results in a strong potential for powerful states to use UN authorisations to serve their own national interests rather than the interests of the international community as defined by the United Nations.’<sup>27</sup>

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<sup>25</sup> Reported in Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, (2002) 13 EJIL 1, at 12, and recorded at [www.un.org/News/dh/latest/page2.html](http://www.un.org/News/dh/latest/page2.html).

<sup>26</sup> *Ibid*

<sup>27</sup> Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to use Force, Cease-fires and the Iraqi Inspection Regime* [1999] AJIL 124, at 127.

Further, the Gulf War ended with a Security Council commitment to remain ‘actively seized’ of the situation. This strongly implies that they will apply their judgment *afresh* to any new proposals for the use of force. As Loeb and Ratner express it,

‘It should not be presumed that the Security Council has authorized the greatest amount of violence that might be inferred from a broad authorization. For example, Resolution 678 clearly authorized force to oust Iraq from Kuwait, but the broad provision on restoring international peace and security ought to be read in the context of that purpose. It should not be interpreted to authorize an escalation of the fighting that would remove the Government or enforce weapons inspections.’<sup>28</sup>

So far we have considered the argument that the wording of the Security Council resolutions implicitly authorizes the use of force. We have considered the terms of the relevant resolutions, their natural meaning and the intentions behind them, and consider that that argument is unpersuasive.

There is a further, more specific argument relied upon by the United Kingdom. This argument involves the interpretation to be placed on cease-fire agreements specifically, rather than Security Council Resolutions more generally. The United Kingdom appears to consider that breach of the terms accepted by Iraq in the ceasefire resolution (Resolution 687) entitles Member States without more to use force to end those violations.

Assuming that Iraq has in fact significantly breached the Security Council’s requirements, this raises two questions of law: (1) whether material breach of requirements contained in a ceasefire agreement allows the use of force in response; (2) whether Member States are entitled unilaterally to determine the existence of such a breach and to use force without Security Council authorization.

Resolution 687 is an agreement between Iraq and the United Nations. It does two things. Firstly, it brings the Gulf War to a permanent end. Secondly, it sets out a series of requirements for Iraq. The cease-fire was conditional on Iraq’s *acceptance of* those terms. It did accept those terms. LAW considers that, from the moment of ceasing hostilities, there exists a situation of peace, in which the obligation under Article 2(4) not to use force applies again in full. Loeb and Ratner give an example: ‘no one would

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<sup>28</sup> Ibid at 129.

seriously claim that member states of the UN command would have the authority to bomb North Korea pursuant to the 1950 authorization to use force if in 1999 North Korea flagrantly violated the 1953 armistice.<sup>29</sup>

It would be contrary to the Charter's objectives if, once the Security Council authorizes the use of force, that authorization constitutes a permanent mandate to Member States to use force as and how they determine it to be necessary. Statements made at the time of other cease-fires directly contradict the arguments of the United States and the United Kingdom. When the Security Council imposed a cease-fire on the parties to the conflict between Israel and various Arab governments in 1948, Count Bernadotte, the UN mediator, instructed that the UN cease-fire resolution was to mean that: '(1) No party may unilaterally put an end to the truce. (2) No party may take the law into its own hands and decree that it is relieved of its obligations under the resolution of the Security Council because in its opinion the other party has violated the truce.' The Security Council then reiterated that 'no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party.'<sup>30</sup>

The objections to these arguments were powerfully stated by Professor Thomas Franck at proceedings of the American Society of International Law in 1998:

[B]y any normal construction drawn from the administrative law of any legal system, what the Security Council has done is occupy the field, in the absence of a direct attack on a member state by Iraq. The Security Council has authorised a combined military operation; has terminated a combined military operation; has established the terms under which various UN agency actions will occur to supervise the cease-fire, to establish the standards with which Iraq must comply; has established the means by which it may be determined whether those standards have been met (and this has been done by a flock of reports by the inspection system); and has engaged in negotiations to secure compliance. After all these actions, to now state that the United Nations has not in fact occupied the field, that there remains under Article 51 or under Resolution 678, which authorised the use of force, which authorisation was terminated in Resolution 687, a collateral total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a

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<sup>29</sup> Ibid at 145.

<sup>30</sup> Ibid at 146.

violation of the conditions set forth in Resolution 678, is to make a complete mockery of the entire system.<sup>31</sup>

LAW considers that it is far from clear that material breaches of a cease-fire agreement authorize the use of force in response. However, *if* such use of force can ever be justified, this is clearly a decision to be taken by the Security Council. The constitutional arguments considered above apply with equal force in this context. Given the purpose of the system of collective decision-making, the emphasis on peaceful resolution wherever possible, and the Security Council's active management of the Iraqi situation to date, the better view is that neither breaches of the cease-fire agreement nor breaches of any other resolution authorize the unilateral use of force. Such use of force by the United States and United Kingdom would therefore violate international law.

## Necessity and Proportionality

The laws of war also set limits to the means and methods of any force that may ultimately be used. If used in self-defence, force is limited to that which is strictly necessary and proportionate to repelling any attack. If used pursuant to a UN Security Council Resolution, the force could only be used in a manner, and for purposes, consistent with the United Nations Charter.

LAW does not consider that force can be considered *necessary* to achieve compliance with the Security Council's requirements, and to secure peace, until (1) Iraq's current offer to readmit weapons inspectors has been taken up and shown to be made in bad faith or otherwise ineffective; and (2) Iraq has been demonstrated to pose a pressing and immediate threat to another Member State or States.

There is serious doubt about whether a full invasion of Iraq with the aim of changing the government would be proportionate to the aims of self-defence, or to the Charter's aim of maintaining peace and security. Iraq is a sovereign State: while the Security Council can demand that Iraq achieve certain results, it cannot dictate its choice of government. The Security Council Resolutions require Iraq to meet a long list of requirements. These could be met by Saddam Hussein's government. While the Security Council, or certain members of it, may not like that government, a change of

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<sup>31</sup> ASIL Proceedings, 1998, *Legal Authority for the Possible Use of Force Against Iraq*, at 139.

regime cannot be considered necessary to achieving the Security Council's legitimate aims.

## Conclusion

War against Iraq by the United States, or even the threat of it, would constitute a grave breach of the Charter of the United Nations and international law, unless it were properly authorized by the Security Council or it fell within the inherent right of

individual or collective self-defence. On the facts as they stand, and on the stated premises of American military action, it is neither. Even an explicit authorization by the Security Council of military force, in order for it to be considered a legitimate exercise of the authority of the Council, would have to be preceded by a determination of necessity that is simply not available on the facts.

A war against Iraq undertaken neither within the confines of the inherent right to self-defence nor pursuant to a fresh, explicit and proper authorization by the Security Council would constitute a war of aggression, "the supreme international crime" according to the judgment of the Nuremberg Tribunal. The innocent men, women and children victims of this crime would no doubt number in the many thousands. The accomplices to this crime would include all those who had the duty or authority to oppose it and did not.

LAW remains willing to assist further if so requested.

September 30 2002