

**THE LEGALITY AND VALIDITY OF THE PERSIAN GULF WAR AS
AUTHORISED BY THE UNITED NATION'S SECURITY COUNCIL
RESOLUTIONS**

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DECLARATION

I, **HARSIMRAN KAUR PANESAR**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University supervisor.

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ABSTRACT

In assessing the Persian Gulf War in terms of *ius ad bellum* and the *jus cogens norms*, the implied authorisation provided by the UN Security Council resolutions exhibits considerable ambiguity in its role as a peacekeeper in the international arena. Therefore, this study will provide an in-depth analysis of these resolutions, which were considered as the legitimate basis for the rationales made by the Bush and Blair administration in the justification of the Gulf war. Further facilitating the view that the UN System on the general prohibition on the use of force is used as a mechanism by powerful Western States to impose imperialism on Middle Eastern countries. This study will also establish the use of threat or force under the UN Charter regime and international laws governing the use or threat of force, thus outlining relevant legal rules under which force may lawfully be permitted.

LIST OF CASES

Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986.

Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America, International Court of Justice (ICJ), 6 November 2003.

The Case of the S.S. Lotus (France v Turkey), Judgement, PCIJ Reports 1927.

Certain Expenses of the United Nations, Advisory Opinion, ICJ Reports 1962.

Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa, Advisory Opinion, ICJ Reports 1971.

LIST OF LEGAL INSTRUMENTS

Charter of the United Nations, 24 October 1945.

Vienna convention on the law of treaties, 23 May 1969.

The Statute of the International Court of Justice.

Vienna Convention on Law of Treaties.

Protocol Relating to the Establishment of the Peace and Security Council of the African Union.

United Nations Charter.

LIST OF ABBREVIATIONS

| | |
|--------|---|
| ACtHPR | African Court of Human and Peoples' Rights |
| AU | African Union |
| PSC | Peace and Security Council |
| ICJ | International Court of Justice |
| ICCPR | International Covenant on Civil and Political Rights |
| ICL | International Law Commission |
| P-5 | Permanent Five States of the Security Council (United States, United Kingdom, China, Russia and France) |
| UN | United Nations |
| SC | Security Council |
| UNGA | United Nations General Assembly |
| UNSC | United Nations Security Council |
| VCLT | Vienna Convention on the Law of Treaties |
| NATO | North Atlantic Treaty Organization |
| OAU | Organization of African Unity |
| APSA | African Peace and Security Architecture |
| CEWS | Continental Early Warning System |
| ASF | African Standby Force |

CHAPTER ONE: INTRODUCTION

1. Background

The international community assigns prominence to *jus cogens* (also known as peremptory norms), bestowing them with upmost priority, it is superior to other rules of international law and no derogation is permitted. Conflict with a peremptory norm renders a treaty void.¹ The foreplay between the Security Council and peremptory norms is evident from its resolutions through which it manifests its decisions. The use or threat of force is prohibited² and has a *jus cogens* status, this subsists within customary international law as evident from an *opinion juris* as to the legal obligation from refraining to use force by States.³ The unilateral use or threat of force is prohibited⁴ under the UN Charter, however this prohibition is limited in two circumstances, the most eminent being the right to self- defence, provided under Article 51⁵ and the other being the principle of collective security, which entails the use of force pre-emptively.⁶

In relation to this principle, breaches of peace, threats to the peace and acts of aggression are considered to be justifications for the authorisation of the use of force by Member States. The Security Council is empowered with the determination and authorisation of the use of force under Article 39 of the United Nations Charter, which is a recourse for Member States in relation to handling matters of such sensitive gravity. The Security Council bears the primary responsibility for the maintenance of international peace under Article 24 (1) of the United Nations Charter.

Article 42 of the Charter is a measure available to the Security Council to authorise the use or threat of force, through action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations. This in connection with the invasion of Iraq by the U.S.-led coalition of States in 1990, which established an emerging trend within the international community.

¹ Article 53, *Vienna convention on the law of treaties*, 23 May 1969, 1155 UNTS 331.

² Article 2 (4), *United Nations Charter*.

³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 89.

⁴ Article 2 (4), *United Nations Charter*.

⁵ Article 51, *United Nations Charter*.

⁶ -<<https://www.mta.ca/clubs/atlis/atlis> >- on 22 Feb 2018.

The use of force has been a vital issue, regarding the UN collective security system since the first authorization to use force against the country which subsequently led to another invasion in 2003.

1.1 Statement of problem

The Persian Gulf War in 1991, Iraq, authored a series of cumulative interferences by the Security Council through their resolutions, demonstrating difficulties concerning the scope of authorisation by the Council and its validity.

The Council passed several resolutions namely: resolution 660/1990, 661/1990, 665/1990 and 678/1990 being the last straw, to ensure compliance from Iraq, failure of which led the Council to authorise Member States to use “all necessary means” to implement resolution 660 and other subsequent resolutions and to restore international peace and security in the area.⁷ Succeeding to the adoption of these resolutions, the early drafts of resolution 678 expressly authorised force, this was later objected to by the USSR, leading to the above neutral expression. The seemingly vague wording of resolution 678, brought about doubts in the authorisation of the use of force by the Council, resulting to a “legal” basis for the justification of armed attacks by the Bush administration.

1.2 Research question (s)

The main research question is to what extent were the Security Council resolutions in respect to the Persian Gulf War legal and valid under the UN Charter.

From this 3 secondary questions can be drawn;

- i) Whether Iraq’s failure to comply with the Councils resolutions posed the need for the use of force against it – was it justified under *jus ad Bellum*?
- ii) Was the military action against Iraq within the scope contemplated by the resolution?
- iii) Is the Security Council through its resolutions free to give Member States a *carte blanche*?

⁷ UNSC 678 (1990), 13.

1.3 Hypothesis

This dissertation aims to test the following three hypotheses;

- That the Security Council in authorizing the use or threat of force is acting under *Jus ad Bellum* and international laws.
- That the Security Council in authorising the use of force has stern command over that use.
- That the Security Council resolutions were the legal basis of the action taken by the Bush administration against Iraq, not the just war principles of public international law.

1.4 Research objectives

The general objective of the study is to analyse the application of Chapter VII of the Charter in relation to the use or threat of force used against Iraq.

The objective entails in specific to:

- i) Critique or appraise the Security Council resolutions in order to establish sufficient authorisation of the use of force under the Charter.
- ii) Comment on the legality of the Gulf war under the Charter and its legal effects thereafter.

1.5 Theoretical framework

This study adopts two theoretical frameworks in order to investigate the extent of the obligatory powers the Security Council possess in relation to general principles of international law and the extent of the use of its power in relation to delegated action. These theories include the **modern institutionalism theory** and **political realism**.

The former theory assumes that the structure of an organisation is based on the manner in which they are designed thus affecting their dynamics, implementation and processes. This theory recognises that institutional frameworks employ regulative elements at their inception but overtime operate as normative systems.⁸

The Security Council is regarded as a hegemonic body which can be attributed to the overriding obligatory powers it possess over any other international agreement.⁹ The hegemonic nature of the Security Council is founded in its collective power as an organ empowered by obedience from Member States, by virtue of Article 103, which states that, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.¹⁰

Adam Watson- an international relations theorist, included the element of inducing and pressures leading to States to lose some of their internal and external independence within the definition of hegemony.¹¹ The legitimacy attached with the Council in relation to the new institutionalism model comes into effect through political strategies where various players transform the Council to suit their own preferences.¹²

The modern institutionalism theory comes into play with regards to the Council’s hegemonic nature. The predominant view are the effects, an institution has on members to conform to the expectations of the fields in which they are members. Clemens and Cook noted that homogenizing pressures exert influences throughout an organizational field and the influence of institutional pressures. The primary sources of legitimacy brings rise to a debate to the extent of powers granted to such institutions.

⁸ Scott Richard, *Institutions and Organizations: Ideas, Interests and Identities*, (Stanford University).

⁹ Article 103, *United Nations Charter*.

¹⁰ Mathieson J, *Thinking Different about the UN Security Council*, 2008.

¹¹ Watson, *Hegemony and History*, (2007), 90.

¹² Clark I, *Hegemony in international society*, (Oxford University Press, Oxford, 2008), 149.

The theory of political realism aids in evaluating the politics of authoritative bodies such as the Security Council, Morgenthau's enrichment on this theory is that it is a power theory. This means that the relations between states are characterised by competition for power rather than cooperation, principal actors or states act in pursuit of their own national interest and are concerned with their own security. The significance to this study is apparent as the very business of the Security Council aligns with realism's main concerns, the issues of peace and security, of which maintaining this comes down to power. The composition of the Security Council and its decisions manifested by its resolutions, are supposed to represent a coercive power in the world.¹³ The decisions of this Council are strictly binding on its members,¹⁴ the power granted to this body under the Charter attempts to bridge the realist view of pursuing own national interests. However, given the composition of the Council and its decision making processes, this theory is sufficient to provide a clear view of the rationales behind the war by the Bush and Blair administration.

¹³<<https://www.jstor.org/stable/pdf/25482037.pdf?refreqid=excelsior%3A9cec4467e44fe0cec045ef0603cd216b>>- on 23 Feb 2018.

¹⁴ Article 39, *United Nations Charter*.

1.6 Literature review

Cassese expounds on the exceptions to the use or threat of force, in particular to Article 51 of the United Nations Charter which provides for the right to defence. He addresses the question on the use of collective self-defence, this refers to the intervention by one or more States in favour of the Victim State.¹⁵ This was highly invoked by the Bush administration. The UN has further fallen on the doctrine of non- recognition whereby it doesn't admit the legality of a situation, this doctrine is resorted to when the UN is unable to recommend or direct effective sanctions,¹⁶ the Security Council's identification of the annexation of Kuwait by Iraq as null and void, in resolution 662/1990, made evident the use of this doctrine. However, Cassese gives a dispersed application of the above concepts in the UN system. This paper will unify these concepts and specifically apply them to the context of Council resolutions.

Brownlie discusses the distinction between acts of aggression and breach of peace, the former one is encompassed within Article 3 of the Charter, which encompass a list of acts which are considered as aggressive,¹⁷ the later refers to hostility between the armed units of two states, the side which is defeated quickly is irrelevant.¹⁸ This is relevant to the study because the Security Council specified in resolution 660/1990 that the invasion by Iraq was considered a breach of international peace and security.

It was further noted by Brownlie that the provision of invoking non-forcible measures¹⁹ by the Council in response to the use or threat of force inflicts serious harm on citizens without endangering the will to comply in the government. He further noted the effect of this measure on the Iraqi government as refractory and remarked it as a blunt instrument.²⁰

Brownlie did not take into account the scope of the Council's power to make determinations and authorisation under Article 39 and the severe implications of its resolutions on the conduct of the coalition of states.

¹⁵ Cassese A, *International law*, 2nd ed. (Oxford University Press, Oxford, 2008), 366.

¹⁶ Cassese A, *International law*, 2nd ed. (Oxford University Press, Oxford, 2008).

¹⁷ Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, Oxford, 2008), 760.

¹⁸ Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, Oxford, 2008), 761.

¹⁹ Article 41, *United Nations Charter*.

²⁰ Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, Oxford, 2008), 763.

Nicaragua case, the Court provided three conditions for the lawful exercise of the right to self- defence. The Council indicated in the preamble of resolution 661/1990 the Inherent right of individual or collective self-defence in response to the armed attack against Kuwait. This case was unable to articulate the possible misapplication of this indication directed in pursuance to a further express mandate, which will be analysed in this paper in line with the conditions specified by the Courts.

ICJ Reports noted the invoking of Article 51 of the Charter in justifying the use or threat of force in self- defence only within strict confines laid down in the Charter, thus preventing the pursuance of arbitrary interests.²¹ This aids in the analysis of the State led coalition action against Iraq, which acted as one of the justifications for the action, under the pretext of the right to self-defence. It further commented on the language and context within Security Council resolutions. However, they did not inquire into the lawfulness of a response to an imminent threat of an armed attack and was unable to further probe into examining the Council's tendencies of drafting ambiguous content which brings with itself serious consequences.

²¹ ICJ reports 2005, 168.

1.7 Methodology

There are three main categories that shall be consulted in this study, namely, archival (primary) sources, secondary sources and case studies.

- a) The **archival sources** includes the resolutions by the Security Council and agreed minutes between States, verbatim records, conference resolutions, advisory opinions and other documents concerned with the activities of the Bush administration.
- b) The **secondary sources** to be employed consist of literature produced by scholars in response to the Security Council authorities on the use or threat of force. These shall include treatises, books, journal articles and credible newspaper publications.
- c) **Specific case laws** shall also be offered in this study. These shall focus on providing a pragmatic context on the application and interpretation of the relevant law.

1.8 Chapter breakdown

This paper shall be organized into 5 chapters.

Chapter One introduces the topic of study, gives a basic background of the research question and discusses the problem statement, hypotheses, literature review and methodology of the research study. Justification for the selection of the PSC as the comparative organ will be provided within this chapter.

Chapter two expounds on the nature of the peremptory norm of the use or threat of force, its limitations and the role of the Security Council in relation to the use or threat of force. Furthermore, this chapter will provide a historical background of the relevant facts of the Persian Gulf War, which is necessary in the conceptualisation of the contents within the resolutions passed in respect to this war.

Chapter three will examine the resolutions passed by the Security Council in light with the provisions under Chapter VII of the Charter. The authorisation of force and its legality will be emphasised by case law in particular the *Nicaragua case* and the *Oil Platforms case*, which has further developed the rules on ensuring effective authorisation of the use of force. Chapter four provides a comparative framework with the Peace and Security Council, the standing organ of the AU. The PSC works in support of peace-building and post-conflict reconstruction as well as humanitarian action and disaster management.

Chapter 5 takes a holistic view of the topic by summarising the findings and conclusions drawn within the context of the problem statement and research questions that informed the topic.

CHAPTER 2

CONCEPTUAL FRAMEWORK

THE JUS COGEN NORM OF THE USE OR THREAT OF FORCE IN PUBLIC INTERNATIONAL LAW

2. Introduction

The first chapter set out the foundation of the paper by highlighting underlying problems of legality and validity, traceable within Security Council resolutions. Briefly presenting the overlapping roles between the United Nations (UN), the Security Council (UNSC) and the use or threat of force in relation to the Persian Gulf War.

It is vital for one to comprehend the basis upon which the Council authoritatively employs within its resolutions obligatory commands. Therefore, it is important to backpedal into the framework which orchestrated the entire framework on the use of force. In this chapter, the concept of *jus cogens norm* shall be explored. This chapter will further probe into the use or threat of force as a *jus cogens norm* and provide an explanatory account of its significance in public international law. The general prohibition of the use or threat of force and its subsequent exceptions provided within the UN Charter will be discussed.

2.1 Jus cogens norms- the use or threat of force

Rules which govern relations between States, international organizations and interactions between themselves form the body of public international law.²² The Statute of the International Court of Justice contains a provision for the genesis of international law of which international custom, as evidence of general practice accepted as law is listed.²³

Customary international law is composed of two elements which constitutes its substance; State practice which developed over a period of time as evidence of general practice accepted as law and *opinio juris* which refers to a legal obligation to ensure compliance with these rules.²⁴ However not all customary international laws accord the status of pre-emptory norms (also known as *jus cogens*). A pre-emptory norm/ *jus cogens* is a technical term given to

²² Dorr O & Schmalenbach K, Vienna Convention on the Law of Treaties: A Commentary, 23, -< <https://link.springer.com/book/10.1007%2F978-3-642-19291-3>>- accessed on 28th November.

²³ Article 38 (1), The Statute of the International Court of Justice

²⁴ Malcom Shaw, *International Law*, 6th ed. (Cambridge University Press, Cambridge, 2008), 74.

norms which are accepted and recognized by the international community as norms from which no derogation is permitted. From this, one can infer the hierarchical superiority of *jus cogens* norms against other norms of general international law.²⁵ The doctrine of *jus cogens* norms emerged from natural law concepts, which entails that states cannot freely establish their contractual relations without respecting certain fundamental principles within the international community.²⁶ Four criteria's are set out for a norm to be determined as *jus cogens*, which includes: 1) status as a norm of general international law 2) acceptance by the international community of states as a whole 3) immunity from derogation 4) modifiable only by a new norm having the same status.²⁷

A treaty deviating from pre-emptory norms of general international laws is void.²⁸ International customs attaining the status of *jus cogens* would mean that a State regardless of its treaty practice cannot deviate from these laws.

It is evident from the above that the status of *jus cogens* norms is relatively high, as it prevails over other customary rules. Such that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.²⁹

The VCLT (Vienna Convention on the Law of Treaties) succinctly defines *jus cogens* as norms, "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."³⁰

The nature of warfare and armed conflicts requires intense regulations due to its heavy impact on a humanitarian aspect,³¹ thus some of the laws governing armed conflicts are *jus cogens* norms to ensure compulsory obligation. The general prohibition on the use of force is a *jus cogens* norm which aims to restrict international warfare and armed conflicts.³²

²⁵ Larry May, 'Habeas Corpus as *Jus Cogens* in International Law', 28.

²⁶ Gennady M. Danilenko, International Jus Cogens: Issues of Law-Making, 2 EUR. J. INT'L L. 42, 44 (1991),

²⁷ -< <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1011&context=scujil>> on 15th July.

²⁸ Article 53, *Vienna Convention on Law of Treaties*.

²⁹ Article 64, *Vienna Convention on Law of Treaties*.

³⁰ Article 53, *Vienna Convention on Law of Treaties*.

³¹ UC JHA, *International Humanitarian Law: The Laws of War*, 5.

³² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 89.

The use of force encompasses the analysis of hostilities between those participating in armed conflicts. This analysis is broadly divided into two branches: *Jus ad bellum* and *Jus in bello*. The former governs the right to pursue wars or using force, examining whether resorting to force is lawful or unlawful. The latter is also known as international humanitarian law, which guides the conduct of States once the war has begun.

2.2 The UN Charter and the Use of Force

The *jus cogens* norm of the use or threat of force is preserved within the U.N Charter. Article 2(4) of the U.N Charter imposes a general prohibition on the threat or use of force by its members against the territorial integrity or political independence of any State, or in any manner inconsistent with the purpose of the United Nations.³³

The International Law Commission maintained that this prohibition is a rule of customary international law having the character of a *jus cogens* norm.³⁴ The effect of this provision was to prevent unnecessary use of force or armed conflicts by States to resolve hostilities arising between them. The general prohibition on the use of force withholds States from enjoying discretion in deciding when to resort to war.³⁵

The Declaration on Principles of International Law adopted by UN General Assembly in 1970 comprehensively examined Article 2 (4) and proclaimed the following. First, States have the duty to refrain from the threat or use of force in its international relations. Such use constituting a violation of international laws and the UN Charter.³⁶ Secondly, States must not threaten or use force to solve international disputes. Third, wars of aggression constitutes a crime against peace for which there's responsibility under international law. Fourthly, States must refrain from acts of reprisal involving the use of force and lastly States must not deprive right of self- determination and independence.³⁷

³³ Article 2 (4), *United Nations Charter*.

³⁴ International Law Commission, *Draft Articles on the Law of Treaties*, ILC Yearbook, 1966, 247.

³⁵ Sean D. Murphy, *Principles of International Law*, 2nd ed. (West Thomson Reuters, West), 495.

³⁶ UNGA, *Declaration on principles of international law friendly relations and cooperation among States in accordance with the charter of the United Nations*, UN A/Res/2625 24 October 1970.

³⁷ UNGA, *Declaration on Principles of International Law*.

2.3 Pacific settlement of disputes

Before resorting to the use of force in the settlement of disputes, it is in the interest of peace and security to ensure that a variety of diplomatic methods are adopted in peaceful settlement. Pacific settlement of disputes are methods or procedures which implement peaceful dispute settlement.

The UN solely dedicates Chapter VI of the Charter to pacific settlement of disputes whereby Article 33 requires parties to any dispute to seek a solution by the following broad methods: diplomatic methods, such as negotiation, enquiry, mediation and conciliation; institutional methods, such as regional agencies or arrangements; and adjudicative methods, such as arbitration or judicial settlement or other peaceful means of their own choice.³⁸

Parties to a dispute are initially encouraged to develop pacific settlement through regional arrangements or by regional agencies, this is done either on the initiative of the states concerned or by reference from the Security Council.³⁹

2.4 Exceptions to Article 2 (4)

The phrase under Article 2(4), “against the territorial integrity or political independence of any State” limits the prohibition set forth. The prohibition is curtailed beyond territorial integrity or political independence of a state, which means that States may resort to the use or threat of force to enforce human rights or for humanitarian purposes.⁴⁰

There exists two exceptions to the prohibition set out within Article 2(4). The first being the inherent right of individual or collective self-defense, the Charter in itself cannot impair the right of self-defense if an armed attack occurs against a Member State, until the Security Council has taken measures to restore international peace and security. Reporting the measures adopted by members in the exercise of this inherent right to the Security Council is required to be effected immediately.⁴¹

Embodied within Article 51 this exception doesn't create a new right but rather preserves a pre-existing right under customary international law, because the Charter itself preserves customary international law.⁴² The International Court of Justice in the *Nicaragua* case

³⁸ Article 33, *United Nations Charter*.

³⁹ Article 52 (3), *United Nations Charter*.

⁴⁰ Sean D. Murphy, *Principles of International Law*, 2nd ed. (West Thomson Reuters, West), 493.

⁴¹ Article 51, *United Nations Charter*.

⁴² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 176.

established that the inherent right of self-defense is of a customary nature and that the presence of this provision within the Charter neither subsumes or supervenes customary international law.⁴³

Individual or collective self-defense are both recognized within this provision, the U.S led coalition was collectively composed of several countries which justified the military action in the Persian Gulf on this basis. The preamble of the Security Council Resolution 661 affirmed this right, in response to the armed attack by Iraq against Kuwait.⁴⁴

Article 51 necessitates an armed attack prior to the enforcement of the right to self-defense, because the responding force has to be prompted first.⁴⁵ The degree of an attack which may compel a member state to resort to self- defense is unsettled, for this reason Article 51 requires the Security Council's intervention prior to the enforcement of this right.

The second exception is authorization by the U.N. Security Council.⁴⁶ Bestowed with the responsibility of maintaining international peace and security, the Security Council has the power to permit the use or threat of force to enforce its duties under the U.N. Charter.⁴⁷ The Security Council must abide by the purposes and principles of the United Nations in the discharge of its duties.⁴⁸

The doctrine of the responsibility to protect was adopted at the 2005 World Summit and was approved by all Member States of the United Nations. It primarily obliges individual states to bear the responsibility to protect its populations against mass atrocity crimes.⁴⁹ The Security Council further adopted resolution 1674 requiring the Council to protect civilians during armed conflicts, further resurfacing the responsibility to protect civilians from genocide, war crimes, ethnic cleansing and crimes against humanity.⁵⁰ The international community then enables individual nations to carry out this responsibility by assisting States to exercise their responsibility and support the United Nations in establishing an early warning system. Failure of which permits the international community to take action in a timely and decisive manner in accordance with the U.N Charter. The Security Council is a

⁴³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 94.

⁴⁴ UNSC 661(1990).

⁴⁵ Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, Oxford, 2008), 763.

⁴⁶ Article 39, *United Nations Charter*.

⁴⁷ Article 42, *United Nations Charter*.

⁴⁸ Article 24, *United Nations Charter*.

⁴⁹ UNGA, *World Summit Outline*, 2005,

un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf
-, para.138-139.

⁵⁰ UNSC 1674 (2006).

notable organ through which the responsibility to protect is implemented in the United Nations organization. This is because individual States may justify unilateral action on the responsibility to protect within the framework of Articles 2(4) and 51 of the Charter.⁵¹

2.5 Action in respect to use or threat of force

Situations which compel the need for contravening the general prohibition set out above, call for the invocation of an exception to that general rule. The United Nations as an international organization follows a standard set of processes in initiating the use of force, this is supplemented by their governing constitution- the Charter. In the event of a failure of use of pacific settlement of disputes, the maintenance of international peace and security may require settlement by means of force.

A determination of the existence of any threat to peace, breach of peace, or act of aggression is to be made by the Security Council, subsequently deciding upon forcible or non-forcible measures to restore international peace and security in instances of determined existence.⁵² The existence of any of the above three notions must be determined prior to taking action.⁵³ The Security Council enjoys a wide discretion in the determination of the existence of breach of peace, there are no express limits to this discretionary power set out within Article 39 of the Charter.⁵⁴ The authoritative determination validates actions in respect to responses to the threats to or breaches of the peace. The Council must simultaneously apply pacific settlement of disputes in Chapter VI with the provisions under Chapter VII of the Charter.

Subsequent to a determination made under Article 39, the Security Council puts into place measures to ensure conformity and compliance. Such measures are divided into three categories, which are implemented in a consecutive order.

The first measure of response captured within Article 40 of the U.N Charter is however a provisional measure which is imposed before making recommendations or deciding on measures after determination under Article 39.⁵⁵

⁵¹ James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford University Press, Oxford, 2008), 756.

⁵² Article 39, *United Nations Charter*.

⁵³ Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, Oxford, 2008), 759.

⁵⁴ Certain expenses of the United Nations, ICJ reports 1962, 151-168.

⁵⁵ Article 40, *United Nations Charter*.

Secondly, Article 41 of the Charter is also known as non-forcible measures because it does not involve the use of armed forces, it is a non- military enforcement technique which entails complete or partial interruption of economic relations and severance of diplomatic relations.⁵⁶ The enforcement of non-forcible measures are not directly implemented by the peace keeping forces, in its place Member States are obliged under authoritative orders from the Security Council to implement these measures. This obligation on Member States derives from the agreement of the said in the acceptance and enforcement of Security Council decisions,⁵⁷ prevailing over any other international agreements which may conflict with the provisions of the Charter in which Member States are parties to.

Sanctions under Article 40 are comprehensively designed and implemented by regimes by the Council in coalition with Members States. There are fourteen types of sanction regimes which aim to politically settle disputes to foster the restoration of peace. A sanction committee chaired by a non-permanent member of the Security Council administers each regime, there exists different personnel such as the monitoring groups, teams and panels. However, this personnel does not extend their services to all 14 regimes, they support 11 of the 14 sanction committee.⁵⁸

Forcible measures as the final measure of response are harsh in nature, falling within Article 42 of the Charter this measure is authorization of the use of forces by the Security Council to take action such as demonstrations, blockade and operations by air, sea or land. Pursuant to findings made under Article 39 of the Charter. It is argued that Article 42 is broad exposing both the process of recruiting the forces, the nature of command and operational control.⁵⁹

The Security Council after utilizing its determination powers under Article 39 of the Charter, condemned and demanded withdrawal of Iraq from Kuwait,⁶⁰ but didn't authorize use of force. They systematically adopted another resolution invoking Article 41 of the Charter, imposing economic sanctions on Iraq. Furtherance to their non-compliance to previous resolutions, the following resolution invoked Article 42 of the Charter, giving way to the use of force.

⁵⁶ Article 41, *United Nations Charter*.

⁵⁷ Article 25, *United Nations Charter*.

⁵⁸ -< <https://www.un.org/securitycouncil/sanctions/information> >- on June 2019.

⁵⁹ Seyersted F, 'United Nation Forces Some Legal Problems', 473.

⁶⁰ UNSC 660 (1990), 13.

2.6 Conclusion

As seen above, the general prohibition on the use of force and its strict implementation by virtue of its acknowledgement as a *jus cogens norm*, is the basis upon which an analysis of the research problem is cemented. With the aid of general principles of international laws, the conditions which permit the exceptions of the use of force provides examining tools on how the Council manifests its peacekeeping roles through its resolutions. The Charter as the legislative framework in the field of use of force contains provisions guiding theoretical principles supplementing the Council's responsibility to protect.

CHAPTER 3

ANALYSIS OF LEGALITY AND VALIDITY OF SECURITY COUNCIL GULF WAR RESOLUTIONS

3. Introduction

The previous chapter discussed the conceptual framework of the research. It examined the Gulf war through the overlying principles of the use of force and *Jus Cogens* norms, it was important in enhancing our apprehension in the interpretation of international law principles in conducting and governing military actions for peace operations.

This chapter will dwell on an elaborate discussion of the main questions posed in this research, requiring an analysis of the resolutions adopted in respect to the Persian Gulf War. Furthermore, an analysis of actions taken by the Security Council and the Bush administration at each phase of the Gulf War. This chapter will further address the scope of military action and the command/control of peace operations by the Council through its resolutions.

3.1 Passage of Security Council Resolutions

A United Nations Security Council Resolution is a United Nations resolution adopted by the 15 members of the Security Council. Although the term resolution is not explicitly provided for within the UN Charter, there are similar alternatives such as “decision” which imply the adoption of a resolution.

The voting procedure of Security Council resolutions is set out in Article 27 of the UN Charter.⁶¹ The adoption of which is divided into procedural and non- procedural matters, draft resolutions on procedural matters requires an affirmative vote of 9 Council members.⁶² On the other hand, draft resolutions on non-procedural matters requires 9 affirmative votes in total and no veto from any of the 5 permanent members of the Security Council.⁶³

⁶¹ Article 27, *United Nations Charter*.

⁶² Article 27, *United Nations Charter*.

⁶³ Article 27, *United Nations Charter*.

3.2 Background of the Persian Gulf War: How the War started

On August 2nd 1990, Iraq invaded its oil rich neighbour, Kuwait. Iraq conducted a 2 day operation against the bordering state of Kuwait, resulting to an invasion and annexation of Kuwait.⁶⁴ The invasion followed Iraq's attempt to recover from their impoverished condition subsequent to the Iran-Iraq war, by increasing the prices of its oil. Concurrently, Kuwait had raised their oil production, increasing the supply of oil in the market,⁶⁵ destroying Iraq's attempt to improve their economic conditions. Subsequent to Kuwait's refusal to limit oil production and supply, Iraq was prompted with a motive to wage war against them, as their transgression was considered by Iraq as an act of aggression.

Iraq blamed Kuwait of misappropriating oil from their reserves in the Rumaila field by slant-drilling.⁶⁶ The stolen oil was reportedly worth billions of dollars, of which Iraq demanded repayment. An agreement between Kuwait, Organization of the Petroleum Exporting Countries (OPEC) and the United Arab Emirates concluded a decrease in oil production to 1.5 million barrels daily.⁶⁷ Despite this agreement, Iraqi forces were positioned along the border, preparing for an invasion.

Following the invasion, the legality of the collective action administered by the Bush administration was ambiguous. The measures taken by the Bush administration was premised on various resolutions adopted by the Council. This chapter will explore the various Security Council resolutions adopted throughout the Gulf War. Analysis of the aforementioned will aid in ascertaining the legality and validity of the war.

3.2.1 Resolution 660/1990

The Council, in the adoption of this Resolution, established that there exists a breach of international peace and security with regards to the invasion of Kuwait by Iraq. The Council acting under Article 39 and 40 of the Charter demanded the withdrawal of Iraq from Kuwait and called upon immediate intensive negotiations between them.

⁶⁴ UN SR E 1990 Report, para.11.

⁶⁵ Quigley J, 'The United States and the United Nations in the Persian Gulf War: New Order or Disorder', 1992, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1270&context=cilj> on 20 July 2019.

⁶⁶ Alahmad N, 'The Politics of Oil and State Survival in Iraq: Beyond the Rentier Thesis', 2007,3, -<<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-8675.2007.00467.x> > on 20 July.

⁶⁷ -<https://www.business-standard.com/article/economy-policy/gulf-arab-states-to-urge-opec-not-to-cut-oil-output-108090801005_1.html > on 14 September.

3.2.2 Resolution 661/1990

On 6th August the Security Council determined Iraq's failure to comply with ⁶⁸the previous resolution and affirmed the inherent right of individual and collective self-defence of Kuwait citing Article 51 of the Charter.⁶⁹ The Council imposed economic sanctions against Iraq, ordering both member and non-Member States of the U.N to strictly comply with the economic sanctions to ensure enforcement of the sanctions. The resolution imposed an embargo on all commodities or products originating in Iraq and on the sale or supply to Iraq of any commodities or products, including weapons or other military equipment.⁷⁰ The embargo did not extend to medical supplies and humanitarian foodstuffs.

3.2.3 The enforcement of Resolution 661/1990

The U.S. decided to apply an interdiction at sea of Iraqi commerce as a means of enforcing the economic sanctions against Iraq.⁷¹ The scope of implementing the economic sanction contemplated under resolution 661/1991 as contrasted with the naval interdiction imposed by the Bush administration display disparity in what the Council envisioned within the resolution. As stated by JF Williams, "A naval pacific blockade though economic in its effect is not purely economic in its methods".

Naval interdictions are a common action taken with the authorization of the United Nations in response to a breach of peace and security internationally,⁷² as a means of enforcing measures employed under Article 41 or 42 Charter. In earlier times, the restraint of commerce by means of interdiction at sea was employed by belligerent states during war.⁷³ Overtime such interdictions became a unilateral or multilateral action taken to achieve a middle ground between peace and war without the intention or decision to engage in armed hostilities.⁷⁴ The logic behind such interdictions was to deprive belligerents' resources

⁶⁸ -https://www.un.org/Depts/dpa/repertoire/89-92/CHAPTER%208/MIDDLE%20EAST/item%2022_Iraq-Kuwait_.pdf- accessed on 28 October.

⁶⁹ UNSC 661 (1990).

⁷⁰ UNSC 661 (1990).

⁷¹ Foster M, *The United States and the Rule Of Law in International Affairs*, Cambridge University Press.

⁷² McLaughlin R, 'United Nations Mandated Naval Interdiction operations in the territorial sea', *The International and Comparative Law Quarterly*, 249

⁷³ McLaughlin R, 'United Nations Mandated Naval Interdiction operations in the territorial sea', 249.

⁷⁴ McNulty F, "School of Naval Command and Staff: Blockade: Evolution and Expectation," *Naval War College Review*, Vol. 19, (1966) <https://digital-commons.usnwc.edu/nwc-review/vol19/iss6/6> on 16 August 2019.

denying them the opportunity to engage in hostilities as the hardships would ensure compliance. However, naval interdictions are a dicey means of ensuring compliance with sanctions imposed as they may aggravate hostilities by provoking coercion.

United States employed this interdiction without consulting UN Member States or its allies, the basis of the naval interdiction was justified on the individual or collective self- defence affirmed in resolution 661/1990 above. The Secretary- General and other Council Member States argued that naval interdiction or blockages of commerce in peace time could only be authorized by the Council under Article 42 of the Charter after determining that the economic sanctions were not being enforced.⁷⁵

Interdictions or blockages at sea as a means of imposing sanctions gain their legitimacy from authorization by the United Nations, specifically Security Council resolutions. Unilateral actions by countries on their own discretion does not legitimize such interdictions as they lack support from the international community. The economic sanction as a weapon imposed in resolution 661/1990 did not properly or so clearly mandate a sea interdiction.

3.2.4 Resolution 665/1990

Two weeks later the Security Council adopted another resolution on 25th August, calling on Member States cooperating with the Government of Kuwait to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and to ensure strict implementation of the provisions of resolution 661 (1990). This came about after the Council noted Iraq's refusal to comply with the previous resolutions and the action of the Government of Iraq in using their vessels to export oil. The Council further instructed the Member States deploying maritime forces, to use such measures commensurate to the specific circumstances as may be necessary under its authority. The loss of countless lives as a result of the Iraqi invasion of Kuwait and the occupation of Iraq in Kuwait which jeopardized the latter's authority, sovereignty, independence and territorial integrity, was the reason for the above orders.⁷⁶

Even though there is no mention of the implementation of Article 42 of the Charter, this resolution was an enhancement to the previous charter on the imposition of economic sanctions. A supplement which further explained the implementation of the economic sanctions imposed under the earlier resolution.

⁷⁵ Murphy J, *Force and Arms in United Nations Legal Order*, 284-85.

⁷⁶UNSC 665 (1990).

3.2.5 Resolution 670/1990

The Security Council within this resolution clarified resolution 661/1990 by confirming that aircrafts were inclusive within the meaning of all means of transport in the economic sanction imposed on the aforementioned resolution.

This resolution further detailed the enforcement of the sanctions through aircraft means, the regulation was extended to taking off and landing of aircrafts from State Member territories to and from Iraq or Kuwait. However, the content within this resolution was not to be misinterpreted as authorization by the Council of the use of military force through air strikes. Simultaneously, the United States had more 250,000 military troops built up at Iraq and occupied Kuwait. Up to 400,000 military troops accumulated by the end of the year with other States including Saudi Arabia, Egypt, UK, France, Argentina and Canada participating in the deployment.⁷⁷

3.2.6 Resolution 678/1990

On November, the final resolution relating to this war was adopted after which the Security Council decided to remain seized of the matter providing a deadline of 15th January 1991 to Iraq to fully implement preceding resolutions. This resolution was adopted by a 12-2 (exception of Yemen and Cuba) with one abstention (China).⁷⁸

The military build-up was unable to compel Iraq's withdrawal from Kuwait, resulting to the adoption of this resolution. Therefore, the Security Council authorized Member States cooperating with the government of Kuwait to "use all means necessary" to uphold and implement resolution 660/1990.

3.3 Field Report of Action taken pursuant to these Resolutions

Iraq did not give in to the deadline, as a result, the military coalition of forces stationed in the region began a series of airstrikes which sustained for several weeks. Ground war offensive combat operations led by the Bush administration induced Iraq to call for a ceasefire first. Iraq further affirmed that they would withdraw after holding ceasefire within twenty one days. The rationale behind Iraq's condition was to ensure that the withdrawal

⁷⁷Damrosch L.F, *International law*, 4th ed, 2001, 1014.

⁷⁸UNSC 678 (1990).

would be smooth and secure. However, the Bush administration refused ceasefire and demanded the withdrawal to take place within seven days.⁷⁹

The Bush administration continued to execute a ground combat and initiated an air assault on Iraq as they did not comply with their demands. The combats and the degree of warfare prompted Iraq to retreat, the Bush administration continued to impose air attacks on retreating Iraqi forces.⁸⁰

3.4 Analysis of legality and validity of military action

A set of just war criteria's require consultation before determining that a war is just or legal; Firstly, a war is just if it stems from a legitimate authority. Secondly, the aim of waging a war should be legitimate and thirdly, waging a war should have a reasonable chance of success.⁸¹

As highlighted in the previous chapter, the general prohibition of the threat or use of force give way to exceptions of humanitarian, authoritative and self-defence conditions. The presence of the above criteria's were not apparent during the Gulf war, as challenges arose in the compliance with the requirements just war pose. The authoritative and self-defence exceptions plunge in murky waters from which it is difficult to assertively see its justness. Several issues arise from the disparity arising from the adoption of the resolutions and the interpretation and implementation of these resolutions. The United States of America has an obligation as a member of the United Nations to ensure the implementation of Security Council resolutions,⁸² and remain confined within the principles regulating the use of force and the principles encapsulated within Chapter 1 of the Charter.

The International Court of Justice in its advisory opinion in *Namibia* emphasized on the nature of the powers granted by the United Nations to the Council "Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security".⁸³ The only limitations are the fundamental principles and purposes found in Chapter 1 of the Charter.

⁷⁹ Murphy J, *The United States and the Rule Of Law in International Affairs*, Cambridge University Press, 152.

⁸⁰ Murphy J, *The United States and the Rule Of Law in International Affairs*, Cambridge University Press, 152.

⁸¹ -<https://www.beyondintractability.org/essay/jus_ad_bellum>- accessed on 18th November 2019.

⁸² Article 103, *United Nations Charter*.

⁸³ Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa), (1970), Advisory Opinion, ICJ Reports 1971, 31.

The attacks maintained by the Bush administration are divided into 3 main areas: the objective to overthrow the Iraqi regime as a means of compliance, the right to organize a coalition of forces hence acting as it deems necessary and the use of extreme preventive forces against Iraq by the U.S.⁸⁴

From the above facts, it is apparent that the U.S. aggression commenced with the implementation of economic sanctions, gradually, the severity and gravity increased as the Security Council adopted more resolutions on this matter. The final straw was resolution 678/1990 which was quoted as the justification for the war. The validity of this war remains unclear as the entirety of the military operations conducted by the Bush administration has accumulated conflicting views on the application of international principles on the use of force.

It is vital to note the purpose for which the resolutions were adopted. The United Nations demanded the withdrawal of Iraq from Kuwait leading to a string of resolutions to ensure rigidly the achievement of the withdrawal. The vague imposition by the Council to “use any means necessary” required those means to simply be directed towards ensuring the compliance of the primary resolution- demanding the removal of Iraq from Kuwait. The military operation conducted by the coalition of forces resulting to the destruction of the Iraqi capability and the removal of its leadership raised concerns as to the proportionality of the action taken.⁸⁵

Once the coalition of forces ensured the liberation of Kuwait then the means authorized by the Council ceased to be in effect and thus the actions taken by the coalition of forces in furtherance remains outside the scope of the authorization.

The right to organize a coalition of forces to carry out resolutions adopted by the Council finds its origins in the United Nations peace keeping jurisprudence. Peace keeping operations of the United Nations are distinguished from other general military operations as a tool for maintaining international peace and security. Three basic principles set peace keeping operations apart as a tool for maintaining international peace and security, they are not independent and are mutually exclusive. Consent of the parties as the first principle entails gaining the consent of the main parties to the conflict before deploying peace keeping

⁸⁴Gerard F. Powers, ‘United States institute of peace, special report, an ethical analysis of War against Iraq’, 158.

⁸⁵ Murphy J, *The United States and the Rule Of Law in International Affairs*, Cambridge University Press, 146.

operations. Lack of consent between the main parties to a conflict converts the Council's action from a peace keeping operation to a peace enforcement operation.

The key difference between a peace keeping and a peace enforcement operations is that the latter ensures the maintenance of peace in a conflict by prompting a cease-fire. Peace enforcement heavily demands the use of force and military capabilities to warrant a cease-fire or reinstate a failed cease-fire.⁸⁶ After the air strikes were carried out against Iraq by the Bush administration, Iraq had called for a cease fire by announcing formal suspension of its offensive combats⁸⁷. The air strikes were organised as a campaign by the Coalition which was driven by the agenda of liberating Kuwait. Majority of the attacks took place in Iraq with Kuwait hosting the Coalition troops within its territory⁸⁸.

The shortcomings of enforcement operations lies within the purpose for which peace enforcement operations are deployed, it is not fulfilled in its entirety because it does not directly resolve the problem which caused the conflict in the first place, therefore long lasting peace is not maintained.

The conduct of enforcement operations are usually undertaken by a coalition of States or regional organizations such as NATO. As a result of this peace enforcement operations are not within the direct control of the United Nations, there is no strict operational command by the UN. The role of the United Nations is to mandate international authorization of such operations.⁸⁹

It is evident from the Persian Gulf War that the Coalition was under the control of the Bush administration, military operations and subsequent operations lacked immanent control of the Security Council. The military capabilities in the deployment of peace enforcement operations need to be profound enough to stabilize the belligerent's forces. The military capabilities need to be equivalent or at least be able to overpower belligerent forces. Despite the lack of control and command of the U.N in enforcement operations and the authority which stems from the U.N to initiate these operations, the point of conducting these operations is bring belligerents to the negotiating table. The end of the operations is not to attain victory but to reach a settlement.⁹⁰

⁸⁶ -< <https://peacekeeping.un.org/en/principles-of-peacekeeping> >- on 20th September.

⁸⁷ Murphy J, *The United States and the Rule Of Law in International Affairs*, Cambridge University Press, 149.

⁸⁸ Morse Stan, 'Gulf War Debrief', *World Air Power Journal*(1991).

⁸⁹ Article 53, *United Nations Charter*.

⁹⁰ https://www.globalsecurity.org/military/library/report/call/call_93-8_chap3.htm accessed on 5th September.

The Bush administration found its authority within the Council's resolutions and the Charter provided enforcement tools, however the decision making and action taking aspects were reserved by the coalition of forces. The entire orchestration was supposed to ensure compliance with the resolutions. The Iraqi forces were unable to overcome the air strikes carried out by the Bush administration and was thus willing to abide by all UN resolutions. The Iraqi forces came down to a position where they were finally willing to reach a settlement with the U.N.

Article 41 permits the Council to call on Members to contribute forces for the implementation of its resolutions. Article 43 further imposes on the Member States, in accordance with special agreement(s), the requirement to contribute to maintenances of peace and security operations. Thus the formation of a coalition of forces is inevitable given the ability of the United Nations to adopt Member States forces as their own.

The International Court of Justice in the case of *Certain Expenses* highlighted the plasticity of the capacity to conduct military operations by the Security Council, irrespective of the fact that Article 43 controls the use of force in accordance with agreements between Member States. The Court observed, "... [The Court] cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded".⁹¹

The naval interdiction operations authorised by the Council continued to be in operation even after the withdrawal of Iraq in 1991. Even though Article 51 ceased to be the justification, the persistence of the naval interdiction was later reverted to Article 41 as the justification further supplemented by resolution 665.⁹² It is clear that the use of force can be implemented under an economic measure. The implication was that force could be authorized to implement economic sanctions without that use of force being viewed as military sanctions under Article 42. Just as a minimal use of force by the United Nations peacekeeping operations may be authorized by reference to Article 41 even though neither article envisages that possibility.

⁹¹ *Certain Expenses of the United Nations*, (1962), Advisory Opinion, ICGJ Reports 221, 167.

⁹² Murphy J, *The United States and the Rule Of Law in International Affairs*, Cambridge University Press, 148.

Resolution 665 on calling Member States to enforce the naval block authorizes them to use “*measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council*”. It is apparent that the use of Article 42 specifically within a broad interpretation of a resolution such as the one highlighted above invites Member States to make the most out of the situation. In order to discourage such exploitations it is prudent for the Council to consider omitting such vague and stiff language in the adoption of resolutions.

The Security Council as a vital organ within the Charter is bestowed with powers of authorizing the use of force and imposing obligations on Member States to implement their resolutions by virtue of Article 103 of the Charter. The ability of the Security Council to conduct military operations or establish a force under the United Nations must vest within itself strict command and operational control of such forces. Thus the vagueness of the phrase “use all necessary means” and lack of precise provisions to back up the requirements encapsulated within resolution 678, brings about uncertainty in the way them Council exercised their powers under the Charter. In relation to the ambiguity of the wording within Council resolutions the Courts in *Namibia* deliberated the construction of Resolution 276 in terms of the juridical implications of the contents within. There had been no reference made specifying the provisions within the UN Charter in the exercise of the Council’s powers. Therefore, the Court deemed it necessary to scrutinize the language of the resolutions within before making deductions as to the effects of the resolution. The Court further stated that the language of the Council should be analysed before conclusions are drawn as to its effect.⁹³

The Security Council did not specify any provision under resolution 678, instead it broadly referred to Chapter VII of the Charter. It may be argued that the lack of precision in specifying Charter provisions was to accord the Coalition flexibility and to some extent discretion in the conduct of their use of force.

The vague and carefree invocation of a provision within the Charter was also visible in Resolution 660 where the Council called upon intensive negotiations between Iraq and Kuwait. The Council loosely invoked Chapter VI of the Charter on pacific settlement of disputes by not catering for the U.N mechanisms in recommending and monitoring these negotiations.⁹⁴

⁹³Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa), (1970), Advisory Opinion, ICJ Reports 1971, 108-114.

⁹⁴Article 36, *United Nations Charter*.

The validity of the adoption of resolution can be challenged in terms of the voting procedure of the resolutions. As previously mentioned, Article 27 of the Charter stipulates that the decisions of the Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.⁹⁵ China abstained in the voting of resolution 678 and this did not constitute as a concurring vote of a permanent member, of which China forms a part of. Therefore the adoption and implementation of resolution 678 was a violation of the voting procedure set out in Article 27 of the U.N Charter.

The incessant adoption of resolutions and the observation of the economic sanctions imposed by the Council lacks consideration of the time it takes to ensure said observation. The continual adoption of resolutions stem from Iraq's stubbornness to withdraw from Kuwait. The Council imposed several constitutional tools and measures to ensure compliance from Iraq, it can be argued that even though the sanctions imposed failed in driving Iraq out of Kuwait, it would be prudent to exhibit patience as the Iraqi army was getting weaker with each passing day.

The implication was that force could be authorized to implement economic sanctions without that use of force being viewed as military sanctions under Article 42. Just as a minimal use of force by the United Nations peacekeeping operations may be authorized with reference to Article 41 even though neither article envisages that possibility.

3.5 Challenges

Ascertaining the validity and legality of the War is problematic when the conditions which exempt from a general prohibition of the use or threat of force are present. An attack on Kuwait's sovereignty and independence by Iraq warranted the need for Kuwait to invoke their inherent right to a self-defence.

Further supported by the authority of the binding resolutions of the Council on Member States, the validity and legality of the Persian Gulf War appears to be ostensible. While it is true for a fact that the prerequisite conditions to initiate and sustain the war were present, this does not extinguish the deliberation on the legality and validity altogether. One must analyse the War meticulously as opposed to glancing at the exteriors.

It is vital to take into account the contrary views given the debatable nature of this topic. Those with opposing view on the war contend that the military occupation and annexation

⁹⁵Article 27, *United Nations Charter*.

of Kuwait and the resulting humanitarian loss aggravated by Iraq's continuous and persistent failure to comply with the Councils resolutions imposed liabilities of grave breaches on Iraq. The death and loss of Kuwaiti civilians and severe humanitarian violations called for the need to rush this process.

The U.S and Coalition's use of force was in accordance with international laws either as an act of collective self-defence or a UN authorized collective security action.⁹⁶ The Charter does not account for force improperly used in self-defence, for this reason the Council as an authoritative figure through its resolutions should strive to guide the conduct of responsive force towards a self-defence considered lawful. The Courts in the *Nicaragua* Case recognised the use of force as a condition sine qua non in the exercise of the inherent right of self-defence. It further noted that the exercise of this right is subject to a State being subject to an armed attack. The United States immense involvement in the war is traced back to a request made by the Government of Kuwait to the Administration. From this request the coalition of forces was further developed.

3.6 Conclusion

Even though it can be argued that the action by the Bush administration and the Coalition, satisfied just war conditions, the authoritative decisions of the Council accompanied by the inherent right of self-defence does not discharge the Council of its duty to ensure peace and security. The US- led coalition of States explicitly based their military actions on resolution 678, fault comes in when the decisions reflected within the resolutions gives rise to doubts as to whether the force employed was within the scope contemplated by the resolutions and the principles within the Charter. The conduct of operations and the extent of force employed in a hostility to ensure compliance are externalities not accounted for by the Charter. Thus the dependence on the Security Council as a prudent organ tasked with the maintenance of international peace and security accompanies with itself the responsibility to address implementation in a scrupulous manner.

⁹⁶Murphy J, *The United States and the Rule Of Law in International Affairs*, Cambridge University Press,151.

CHAPTER 4

A COMPARATIVE STUDY: THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION

4. Introduction

The previous chapter probed into the Council's Resolutions adopted specifically for the Persian Gulf War and sought to address the main research question. The legality and validity of the War as seen through a series of Council resolutions was analysed. While contemplating the possibility of the UN as a political instrument as seen by the commanding position of the Bush administration, the authoritative framework and enforcement of the Council's decisions was scrutinized. Chapter 3 showed that the action by the administration was beyond the scope contemplated by the resolutions adopted and, the Council unlawfully exercised its powers under the Charter in Resolution 678 by vaguely authorizing force.

This chapter will dwell on a comparative framework using the Peace and Security Council of the African Union as a comparative organ against the United Nations Security Council. Justification for the contrast between the United Nations Security Council (UNSC) and the African Union's Peace and Security Council (PSC) will be provided for within this chapter.

4.1 Justification of the African Union as the comparative Organization

The United Nations Peace Keeping process is littered with shortfalls in terms of their peace keeping operations. The political influence stemming from the Member States proves to be a continuous failure in the peace and security maintenance regime of the Council.

The African Union has demonstrated a relative advantage in peace operations which it has mandated. Several operations were directed by the African Union following the year 2003, in which the African Union began initiating its own Peace Support Operations (PSO's) owing to the Burundi conflict.⁹⁷ The African Union has similarly released many PSO's in conflict ridden countries within the African continent such as Sudan, Somalia and Mali.⁹⁸ Embarking on such operations validates the determination of the African Union as a regional organization to combat breaches in peace and security.

⁹⁷ FOI, *African Union Mission in Somalia (AMISOM)*, 2008, 10, -<<https://www.foi.se/rest-api/report/FOI-R--2596--SE>>

⁹⁸ FOI, *African Union Mission in Somalia (AMISOM)*, 2008, 13.

The African Union reserves the right to intervene in a Member State in respect to grave circumstances such as war crimes, genocide and crimes against humanity,⁹⁹ as provided for within the Constitutive Act of the African Union. The African Union in discharging this right always ensures that it involves itself in such situations as opposed to the United Nations which has showed reluctance in taking action due to political influence.

Furthermore the deployment of forces and missions undertaken by the African Union primarily aim to prevent humanitarian loss which result from armed conflicts.¹⁰⁰ The African Union in efficiently maintaining peace and security are able to devise appropriate foreseeing and operational initiatives centred on ensuring civilian safety.

Subject to the general structure of the African Union's mechanisms for combating disruptions in peace and security in Africa which will be provided below, the premises for the justification as to the selection of this body as a comparative analysis is based on the likeness of the UN and AU.

The construction of the PSC is patterned somewhat after the UNSC, the extent of likenesses between these two organs is expounded by successful attempts made towards a cooperation between their governing bodies. The United Nations Office to the African Union (UNOAU) established by the General Assembly resolution 64/288, reaffirmed the need to pursue and reinforce ongoing measures to improve effectiveness and efficiency of the United Nations and African Union cooperation.¹⁰¹ The UNOAU enhances a partnership between the United Nations and the African Union in peace and security matters. The establishment of UNOAU is traced back to the 2004 launch of APSA which fostered the establishment of UNOAU and cooperation between both organizations.

The African Union is not the sole regional body which exists within the international arena, the other regional bodies mentioned above were not included within the comparative analysis in this research. For that reason, it becomes compulsory to justify the reasons as to why these regional bodies were not selected to be part of this comparative analysis and why the African Union was shortlisted as the qualified organ for a comparative study. The shortfalls of each regional body as provided below, will supplement the choice of using the AU in the comparative analysis.

⁹⁹ Article 4h, *Constitutive Act of the African Union*.

¹⁰⁰ Peace and Security Council, 'Communique', PSC/RP Comm. (LXIX), January 2007.

¹⁰¹ Resolution 64/288 UNGA 64/288 (2010).

The Eurasian Economic Union's military security structure is governed by the Collective Security Treaty Organization which is a military alliance comprised of Member States of the Eurasian Economic Union and other states which are not members of this Union.¹⁰² Therefore, this arrangement cannot be exclusively claimed by the Eurasian Economic Union. Such security structures are susceptible to conditions which fall outside the mandate and governance of the Union.

Lastly, the Union of South American Nations demonstrates a silver line as there is established a South American Defense Council comprised of defense ministers from the Member States.¹⁰³ The Defence Council is responsible for developing joint defense policies, engaging in the exchange of personnel between the armed forces of Member States, facilitates joint military operations and participates in U.N peace operations.

The commonality between the above three regional organizations in the use of force in armed conflicts is that their ideals on the concept of peace keeping serves a more aggressive approach. As compared to the architecture of the U.N peacekeeping mandate which relies on an evasive approach seeking to uphold the general prohibition on the use or threat of force. Therefore, the Peace and Security Council of the African Union comes closest in line to being the preferred comparative organ.

4.2 African Union's Peace and Security Council: A Historical Analysis

The origin story of the Peace and Security Council stretches further back than the Protocol which established it. Primarily, the Organization of African Unity (OAU) had adopted a reform mechanism for conflict prevention, management and resolution¹⁰⁴ which was short lived because of the severity of the mass tribal killings in Burundi and Rwanda.¹⁰⁵ The OAU was engaged in several debates after the mass killings in Burundi and Rwanda, prompting the need for better peace keeping mechanisms.

¹⁰² Dragneva R & Wolczuk K, 'The Eurasian Economic Union: Deals, Rules and the Exercise of Power', The Royal Institute of International Affairs Development, 2017, 7, <https://www.chathamhouse.org/sites/default/files/publications/research/2017-05-02-eurasian-economic-union-dragneva-wolczuk.pdf> 17 October, 2019.

¹⁰³ -< <http://www.coha.org/the-south-american-defense-council-unasur-the-latin-american-military-and-the-region%E2%80%99s-political-process/>>- 18 October 2019.

¹⁰⁴ The South African Institute of International Affairs, *APRM Governance Standards*, 2017, 29, -<<https://aprmtoolkit.saiia.org.za/documents/saiia-training-and-assistance/426-atkt-aprm-governance-standards-2007-en/file>>

¹⁰⁵ -<<https://www.theatlantic.com/past/docs/unbound/flashbks/rwanda/meisler.htm>> accessed on 18 November 2019.

These debates stressed the need for conflict prevention mechanisms, however the OAU argued that the United Nations bore the primary responsibility of peace keeping in Africa.¹⁰⁶ The reliance on the UN as a peace keeper in Africa proved to be expensive as a conflict prevention body. As a result of this West African States formed ad hoc regional community to deal with conflict prevention. The rise of these self-established communities rendered the OAU mechanisms inadequate, eventually they integrated into the OAU and after a series of debates the idea of a Peace and Security Council emerged. Eventually the OAU disbanded in 2002.

4.3 The Peace and Security Council of the AU and the UN Security Council: Comparative Analysis

The selection of the African Union's Peace and Security Council as a basis for a comparative study cannot be realized without providing a brief contextual introduction as to the establishment, nature, and structure and accompanying obligations of this organ.

4.3.1 Architecture for Promotion of Peace, Security and Stability in the AU

The African Peace and Security Architecture (APSA) is a framework for promoting peace, security and stability in the African continent. It serves as a regional mechanism in the enforcement and operationalization of peace and security in Africa.¹⁰⁷ APSA is composed of five pillars which are essential in the discharge of its mandate, the key pillar being the Peace and Security Council of the African Union (PSC). The PSC also functions as the standing organ of the African Union, tasked with a decision making mandate on peace and security matters. The other pillars include: the Continental Early warning System (CEWS), the African Standby Force (ASF), the Panel of the Wise and the Peace Fund.¹⁰⁸

4.3.2 Formation of mechanisms and collaborative measures

The Protocol Relating to the Establishment of the Peace and Security Council of the African Union is legislation solely dedicated to the PSC, as the title suggests this piece of legislation contains provisions on the establishment, nature, objectives, powers and procedure of the PSC. The establishment of the PSC as an early warning arrangement is provided for within the Protocol.¹⁰⁹

¹⁰⁶ Williams P, 'The Peace and Security Council of the African Union: Evaluating an Embryonic International Institution', *Journal of Modern African Studies*, 2009, 605.

¹⁰⁷ African Union, *African Peace and Security Architecture (APSA): Assessment Study*, 2010, 16□□

¹⁰⁸ African Union, *African Peace and Security Architecture (APSA): Assessment Study*, 2010, 8.

¹⁰⁹ Article 2, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

The membership within the Peace and Security Council stems from countries within the African continent on a regional basis: There are 15 members, three from Central African, three from East Africa, two from North Africa, and three from Southern Africa and four from West Africa.¹¹⁰

The formation of the UNOAU signifying the collaboration between the UN and AU, specifically on matters relating to peace and security is suggestive of the fact that both organizations share an objective. As a result, they believe that the desired outcome can be achieved when the expertise and skills possessed by each are shared for the common cause. The need for coming together as one to battle the disruption of peace emanate from the instability caused by terrorist groups such as the AL-Shabab in Somalia and Boko Haram activities organized in Lake Chad Basin. Furthermore, the political instability caused by elections in Somalia, offences carried out by terrorist groups in South Sudan and the effect of the Gulf Crisis on the Horn of Africa pressured the need for an association.¹¹¹ Despite the fact that the unifying body, UNOAU, is mandated to advise AU on long term capacity building and short-term operational support matters,¹¹² the aims of the unification are more oriented towards fostering peace in Africa. However, it is disputed that the functions carried out by the collaboration provide assistance to both bodies.¹¹³

The African Union is a regional continental body which contains membership of African Countries. A vague comparison would suggest that the African Union is a continental version of the United Nations. There exist other regional organizations such as the Union of South American Nations and the Eurasian Economic Union, the triumph of the African Union as the comparative organization over these other regional organizations emanates from numerous efforts and mechanisms to plan peace operations by the AU.

Other regional organization fall short from the lack of organs established for the sole purposes of maintaining peace and security, unlike the Peace and Security Council of the African Union, the maintenance of peace and security of under these organizations does not fall within the contemporary view under the U.N regime.

¹¹⁰ – <<http://www.peaceau.org/en/page/38-peace-and-security-council>>- on 2 November 2019.

¹¹¹ -<https://unoau.unmissions.org/sites/default/files/unoau_bulletin-aug-oct_2017.pdf > accessed on 17th November.

¹¹² Resolution 64/288 UNGA 64/288 (2010).

¹¹³-< <https://www.crisisgroup.org/africa/279-tale-two-councils-strengthening-au-un-cooperation>> accessed on 17th November.

4.3.3 General Rubric of Legislative rules and structure

Now that it is definitive that the PSC is comparable against the SC, it is necessary to look into additional aspects which call for a practical comparison. It is worth to note the outstanding framework and mechanisms adopted by the PSC in the promotion of peace and security.

With reference to the mechanisms and structure, the PSC emphasizes on the need for early warning arrangements for purposes of reducing impacts of threats.¹¹⁴ The PSC is supported by commissions of Panel of the Wise, CEWS, ASF and the Peace Fund. The Panel of the Wise serves as a consultative body which provides opinions on conflict prevention. It was created through Article 11 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union. Appointed members stemming from five highly esteemed African personalities who have made substantial contributions to the cause of peace, security and development comprise within this consultative body.¹¹⁵ Their opinions on conflict prevention is respected as it enhances the aim of promoting security and stability in Africa.

The Continental Early warning System appeals to a more calculative and technical approach in the anticipation and prevention of conflicts. The establishment of this system involves data collection and analysis based on an early warning indicators module to ensure computation of a more effective and practical method of peace and security enforcement. The collected information further advises the Panel on potential conflicts and threats to peace.¹¹⁶

Deployment of operations within the United Nations frameworks is dependent upon Member States military capabilities, the obligatory imposition and casual coalition of forces enforce the need for enforcing peace through military operation. A parallel but differentiated approach is seen from the establishment of the African Standby Force, the modus operandi and deployment of this Force is heavily managed by the Peace and Security Council.

¹¹⁴ Article 2, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (2003).

¹¹⁵ Article 11 (2), *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

¹¹⁶ Article 12, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

The Protocol Relating to the Establishment lays down a detailed mandate highlighting performance functions of the Force, of which its participation in operations is restricted into classifications authored by the Peace and Security Council and the ones highlighted by the above Protocol. There are provisions concerning the command chain and personnel authored to be part of the Force, also known as the Military Staff Committee.¹¹⁷

The contrasting approach would suggest that unlike the Security Council, the Peace and Security Council does not provide a *carte blanche* for the organization and enforcement of military operations. Further suggestions embraces the African Union's preventive approach in situations which call for the need of armed conflicts. Preventive actions and precautionary approaches as seen through their pre-emptive mechanisms of early warning systems in a bid to ensure stability of peace and security.

Lastly, APSA as the prevailing framework for the prevention, management and resolution of crises and conflicts, post conflict reconstructions and continental development is a special legislation dedicated to international areas of use of force.¹¹⁸ While the United Nations has not devoted a supplementary piece of legislation to direct this area of law, it has simply embodied a few provisions to its governing constitution to deal with this matter.

¹¹⁷ Article 12, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

¹¹⁸ Bah A, Nyangoro E, Dersso S, Mofya B and Murithi T, *African Peace and Security Architecture: A Handbook*, Friedrich-Ebert-Stiftung, 2014, 16.

4.4 Conclusion

The peace and security model envisioned by APSA departs from the traditional state oriented concept of security to a more human rights oriented approach. The responsibility of states to ensure that the use of force is directed towards situations which desperately call for the need to utilize the use of force, that is to maintain peace and security. While it is true that the scale of maintenance for the United Nations and the African Union varies, one sheltering the international community and the other maintaining a continent. The African Union is able to be at the helm of efficient maintenance of peace and security with an additional concept of stability.

Overtime, imperialism and civil wars within the continent of Africa brought about systematic violations on human rights which rejected the interference of other neighbouring African countries on the basis of the principle of neutrality. The confluence of the mandates shared between the UN and the AU leading to a partnership between the two bodies are differentiated in their approach of tackling peace and security concerns. The superiority of the UN as an international organization does not diminish the AU'S intricate framework in the sphere of peace and security.

CHAPTER 5

CONCLUSIONS AND RECCOMENDATIONS

5. Introduction

The cold war era instigated the need for stringent maintenance of international peace and security, as an outcome the UN had to play an active role in ensuring that the international arena isn't misplaced in the shadows of the cold war. The role played by the Security Council in the settlement of the Persian Gulf War led to reservations in the effective fulfillment of its duty of maintaining peace.

The findings of this research mainly sought to answer the legality and validity of the action taken against Iraq by the Coalition of forces. This question mainly arose because of the significant intrusion by the US led coalition in the settlement of this dispute. It is apparent that the UN Security Council takes pre-dominant control in ensuring peaceful settlement of disputes, however the exercise of this control wasn't backed by moral authority which ought to stem from the Security Council. Leading one to question whether the action against Iraq was a proper application of collective security.

Adoption of several Council resolutions in the Gulf matter simply reiterated the procedures set out in the Charter, the operations of the US coalition weren't contemplated and controlled by the resolutions.

This chapter will then proceed to provide recommendations to ensure effective peaceful settlement of disputes within the U.N framework. The contents within the Council's resolutions provides room for misinterpretations and misconceptions from Member States. This issue was discussed earlier in the research, it provides Member States with a *carte blanche* to harmonize the resolutions in line with their own interests. Keeping in line with the issues identified, recommendations for improvement of the Security Council as a peacekeeping organ and its institutional role will be made.

5.1 Summary of findings

Three research questions prompted this research. In addition to the main research question, three secondary questions arose during this research. First, was the force used against Iraq to ensure compliance justified under the criteria of just war? Second, did the military action against Iraq fall within the scope contemplated by the resolution? Lastly, can the Security Council through its resolution give Member States a *carte blanche*?

Furthermore, this research formulated three hypothesis which it aimed to test. Firstly, the Security Council in authorizing the use or threat of force was acting under *Jus ad Bellum* and international laws. Secondly, the Council in authorising the use of force has stern command over that use. Lastly, Security Council resolutions were the legal basis for the action taken by the Bush administration against Iraq, not the just war principles of public international law.

Chapter 2 provided an elaborate discussion on the status of the use of force as a *jus cogens* norm. The occupation of Kuwait by Iraq was accomplished by aggressive means however the presence of aggression does not necessarily call for use of military action to counter it. Thus, the customary prohibition on the use of force is one of strict application, however there are certain exceptions where the Council may authorize the use of force only if other means to resolve the dispute fail.

While it is correct to assume that the resolutions adopted by the Council in respect to the Gulf war followed precisely the procedures set out within the Charter and the rules of just war. The outcome of the Persian Gulf War exceeded the limits set out in the Charter and humanitarian laws.

Analysis of the research questions was undertaken in chapter 3 of this research. The Council's authoritative mandate with regard to deciding the use of force was not appropriately employed in effecting the withdrawal of Iraq.

Several findings were made in chapter 3, exhibiting the existence of a disparity in the adoption, interpretation and implementation of the Council's resolutions. In particular, resolution 678/1990 calls for the "use of any means necessary" in the implementation of previous resolutions. The vagueness of this wording and the scope it provides for misapplication by Member States, resulted in the use of more military force by the Coalition, than was required and contemplated by the Council.

A line was drawn between two types of peace operations; peace enforcement and peace keeping. The former is more severe in nature as it attempts to induce cease-fire from belligerent States, as a result of this the Charter provides for the Security Council to utilize military capabilities of Member States to conduct such operations. Such use shifts the control of peace enforcement operations on to Member States, debunking the second hypothesis of this research whereby an assumption of strict control of the Council in these operations was made.

Furthermore, the procedure opted in the passage of resolution 678/1990 was not in line with the voting procedures provided within Article 27 of the Charter. The validity of this resolution comes into interrogation because the required process was not observed, a permanent member of the Security Council had abstained from voting in this matter.

Testing the first hypothesis would require one to probe into the just war criteria's, mentioned earlier in chapter 3; firstly, the Security Council as the legitimate authority may determine the use of force. Secondly, the aim was to secure the withdrawal of Iraq from Kuwait. This can be considered a legitimate aim as waging a war would re-establish Kuwait's sovereignty and independence. Lastly, taking into consideration the above criteria's, the authorization of the action taken against Iraq by the Council was not adequately performed under just war conditions. The action taken against Iraq exceeded the legitimate aim and the amount of force utilized in the realization of that aim was in excess.

5.2 Recommendations

The findings above clearly present a problem in the exercise of power by the Security Council and the institutional mechanisms in terms of granting broad authority to Member States in the conduct of peace operations. Furthermore, the role of the Council in responding to acts of aggression or breach of peace was unassertive.

The following recommendations shall provide an effective conflict stabilization mechanism and maintenance.

5.2.1 Legal reforms

a) Enactment of secondary legislation

Secondary legislation consists of detailed provisions covering specific areas. The enactment of a secondary legislation would mean that the Charter would be primary to the proposed enactment. The use of force in dispute settlement is a measure of last resort, it is not encouraged in the maintenance of peace and security in the international arena. The UN Charter in line with this view encourages pacific settlements, failure of pacific methods would compel the Council to invoke economic sanctions against a party.¹¹⁹ Failure of the economic sanctions would compel the Council to consider the use of force.¹²⁰

The above is standard procedure set forth within the Charter, the Council is given discretionary powers and flexibility in making determinations of measures to adopt in the

¹¹⁹ Article 41, *United Nations Charter*.

¹²⁰ Article 42, *United Nation Charter*.

resolution of a dispute. The Council in the Gulf dispute followed the procedures set out within the Charter, however the Council was hasty in making determinations that the measures failed. The Council did not exhibit patience in determining whether the economic sanctions would fail, roughly two months after imposing economic sanctions the Council adopted resolution 678/1990. Furthermore, the military action was under resilient control of the Coalition of States led by the Bush administration.

Therefore such scenarios cannot be contemplated by the Charter, as a result the Council enjoys certain discretionary powers. Conversely the Council is not well equipped with systematic decisions in sensitive cases, thus there is need to enact secondary legislation which deals with the gaps in the standard procedures set out within the Charter, so as to not over rely on the discretion of the Council. Furthermore, the secondary legislation should contain provisions to let the Council to play an active role in collective action operations.

5.2.2 Institutional reforms

a) Creation of early warning systems

Early warning systems would function in two ways; first, through information gathering of raw data so as to discern accurately the scene of the incident. Second, analysis of the raw data gathered. The Gulf war presented many opportunities for misconceptions as the Council was not equipped with sufficient ground report. The Bush administration was a major influence in the events which carried out during each phase of the adoption of the resolutions. The Council within its resolutions tasked Member States to report their observations and recommendations.¹²¹ This presents a weak system as the Coalition composed of the Member States could effortlessly report erroneous findings in the implementation of the resolutions.

b) Establishment of an inquiry panelist

An inquiry panelist would operate as a group of legal experts and professionals who would investigate and lead discussions as to the legality and validity of any steps to be undertaken in the use of force. Such a panelist can work hand in hand with the Council and aid them in making reasonable determinations in peace and security matters. The panelist could formulate peaceful options to be adopted and determine the gravity of the threat imposed by belligerent States.

¹²¹ UNSCR 661(1990).

5.3 Conclusion

The collective action taken against Iraq in a bid to ensure compliance with the resolutions adopted was undertaken rashly and made under substandard circumstances. The leading role undertaken by the Security Council granted with authority from the Charter proved to be unsuccessful, as the events which unfolded after the invasion of Kuwait was domineered by collective action. The action taken against Iraq was undertaken on the terms dictated by the Bush administration. The Council in this case took a back seat while the Bush administration resumed control of the operations. The resolutions passed by the Council failed in portraying its assertiveness over the matter and instead proved to be a basis upon which military actions would be justified.

The Security Council and its decisions passed through resolutions miscarried the powers and authority given to it by the Charter. It further rendered the Charter insufficient in dictating provisions for effective preservation of peace and security.

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