

# INTERNATIONAL LAW AND THE UNITED NATIONS' ROLE IN THE GULF CRISIS

Shaw J. Dallal\*

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## I. INTRODUCTION

On August 2, 1990, after midnight, Iraq's armed forces crossed into Kuwait, moved toward Kuwait's capital and within seven hours occupied it.<sup>1</sup> The United States, Britain and France immediately condemned the Iraqi invasion, called for the immediate and unconditional withdrawal of all Iraqi troops from Kuwait and froze all Iraqi and Kuwaiti assets in their respective countries.<sup>2</sup> They also announced the immediate halting of all arms shipments to Iraq.<sup>3</sup> The Soviet Union, Iraq's main arms supplier, followed suit, halting all Soviet arms sales to Iraq, and called on the Iraqi government to withdraw all of its troops, unconditionally and immediately, from Kuwait.<sup>4</sup>

Iraq did not show any serious inclination to withdraw its military

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\* Adjunct professor of Political Science at the Maxwell School of Citizenship and Public Affairs, Syracuse University, Syracuse, New York. Former chief legal advisor to the Organization of Arab Petroleum Exporting Countries (OAPEC). Professor Dallal attended the College of Civil Engineering at Cornell University. He also has a B.A. in Economics from Ithaca College and a J.D. from Cornell University Law School.

1. See Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1. See also THE MIDDLE EAST 355-56 (Daniel C. Diller ed., 7th ed. 1991) (revised to include a Persian Gulf Crisis Supplement, Congressional Quarterly)[hereinafter THE MIDDLE EAST 7th].

2. Barbara Toman, *Several Countries Freeze Kuwait's Overseas Assets*, WALL ST. J., Aug. 3, 1990, at A4. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

3. Clyde Haberman, *The Iraqi Invasion*, N.Y. TIMES, Aug 6, 1990, at § 1. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

4. See Ved P. Nanda, *The Iraqi Invasion of Kuwait: The U.N. Response*, 15 S. ILL. U. L.J. 431 (1991). See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

forces from Kuwait.<sup>5</sup> On the same day, the United Nations Security Council, by a vote of fourteen to zero, with one member, Yemen, not participating in the vote,<sup>6</sup> passed Resolution 660 which condemned the Iraqi invasion, demanded Iraq's immediate and unconditional withdrawal and called upon Iraq and Kuwait to begin immediate negotiation of their dispute.<sup>7</sup> Iraq did not heed the Security Council's resolution.<sup>8</sup>

On August 3, 1990, the second day of Iraq's occupation of Kuwait, Soviet Foreign Minister Edward Shevardnadze and U.S. Secretary of State James Baker jointly called for unconditional Iraqi withdrawal from Kuwait. Pending that request, they urged the international community to halt all arms deliveries to Iraq.<sup>9</sup> On August 4, the European Community froze all Iraqi and Kuwaiti assets.<sup>10</sup>

On August 5, 1990, U.S. President George Bush declared that nothing short of Iraq's total withdrawal from Kuwait would be acceptable to the U.S.<sup>11</sup> On August 6, the U.S. began a massive deployment of warplanes and troops to Saudi Arabia,<sup>12</sup> reiterating that Iraq's occupation of Kuwait would not stand.<sup>13</sup>

In response, Iraqi troops began to round up hundreds of U.S. and other Western civilians in Kuwait and Iraq on August 6 and 7.<sup>14</sup> After an urgent meeting between King Fahd of Saudi Arabia and U.S. Secretary of Defense Richard Cheney,<sup>15</sup> Saudi Arabia invited the U.S. to send its forces into Saudi Arabia.<sup>16</sup> *Operation Desert Shield* was then expanded, with the United States, Britain, France and even the U.S.S.R. sending war ships to the Persian Gulf.<sup>17</sup> The U.N. Security

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5. Not only did Iraq refuse to withdraw from Kuwait, Iraq in fact annexed Kuwait, claiming it to be an integral part of Iraq. See Paul Lewis, *U.N. Council Declares Void Iraqi Annexation of Kuwait*, N.Y. TIMES, Aug. 10, 1990, at A11. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

6. See Nanda, *supra* note 4, at 435. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

7. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. (Aug. 2, 1990) reprinted in 29 I.L.M. 1325 (1990) [hereinafter S.C. Res. 660]. See also ACCESS GUIDE TO THE PERSIAN GULF CRISIS, Jan. 1991, at 15 [hereinafter ACCESS].

8. See Lewis, *supra* note 5; THE MIDDLE EAST 7th, *supra* note 1, at 356.

9. ACCESS, *supra* note 7, at 8; THE MIDDLE EAST 7th, *supra* note 1, at 356.

10. ACCESS, *supra* note 7, at 8; THE MIDDLE EAST 7th, *supra* note 1, at 356.

11. ACCESS, *supra* note 7, at 8; THE MIDDLE EAST 7th, *supra* note 1, at 356.

12. See Andrew Rosenthal, *Bush Sends U.S. Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, N.Y. TIMES, Aug. 8, 1990, at A1. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

13. See ACCESS, *supra* note 7, at 8. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

14. ACCESS, *supra* note 7, at 8. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

15. See Rosenthal, *supra* note 12. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

16. See Rosenthal, *supra* note 12. See also THE MIDDLE EAST 7th, *supra* note 1, at 356.

17. *Confrontation in the Gulf*, N.Y. TIMES, Aug. 25, 1990, at A5; *Supporting the U.S. in*

Council then passed Resolution 661, prohibiting all U.N. members from buying oil from, or having any commercial or financial dealings with Iraq and Kuwait.<sup>18</sup>

On August 8, 1990, Iraq formally annexed Kuwait, declaring it to be Iraq's nineteenth province.<sup>19</sup> Iraq also demanded that all foreign missions in Kuwait City be moved to Baghdad.<sup>20</sup>

Rejecting Iraq's annexation of Kuwait and defying its demand to move the U.S. Embassy in Kuwait to Baghdad, the U.S. called for a "multinational" force to join the U.S. troops it had deployed to Saudi Arabia and the Persian Gulf.<sup>21</sup> In response to this invitation, the Soviet Union announced that it would only join a U.N. force in the Gulf.<sup>22</sup>

The U.S. government then outlined its policy objectives in the developing crisis as follows: (1) the unconditional withdrawal of all Iraqi troops from Kuwait; (2) the restoration of the legitimate government of Kuwait; and (3) the protection of U.S. citizens and the maintenance of security in the Persian Gulf.<sup>23</sup>

On August 9, 1990, the U.N. Security Council adopted Resolution 662, which condemned Iraq's invasion of Kuwait and declared its annexation "illegal."<sup>24</sup>

On August 12, Iraq offered a "peace plan" to resolve "all issues of occupation" in the Middle East, including Israel's occupation of the West Bank, Gaza and the Golan Heights, as well as Syria's occu-

*the Gulf*, N.Y. TIMES, Sept. 18, 1990, at A12; James LeMoyné, *The World*, N.Y. TIMES, Oct. 21, 1990, § 4, at 2 (almost 200,000 troops from a dozen countries and 100 ships from 14 countries were assembled). See also Michael McQueen & John J. Fialka, *White House Announces New Deployment in Gulf*, WALL ST. J., Nov. 9, 1990, at A3 (a new deployment of U.S. forces, almost doubling the already deployed forces of nearly 230,000 U.S. troops in the region, was contemplated).

18. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. (Aug. 6, 1990) reprinted in 29 I.L.M. 1325 (1990) [hereinafter S.C. Res. 661]. See also ACCESS, *supra* note 7, at 15.

19. See Lewis, *supra* note 5. Iraq's representative to the U.N. described the annexation of Kuwait as an attempt to end the "splintering of the region" brought about by colonial powers which had "transformed the Arab nation into 22 Arab states, redrawing the map of the region." He also described the annexation of Kuwait as an act of reunifying Iraq. *Id.*

20. ACCESS, *supra* note 7, at 8; THE MIDDLE EAST 7th, *supra* note 1, at 356.

21. ACCESS, *supra* note 7, at 8. On August 9, 1990, in response to Iraq's declaration of a "comprehensive and eternal merger" with Kuwait, the United Nations Security Council reaffirmed its position, demanding Iraq's immediate and unconditional withdrawal, and declaring Iraq's "annexation" of Kuwait to be illegal, null and void. See S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg. (Aug. 9, 1990) reprinted in 29 I.L.M. 1327 (1990) [hereinafter S.C. Res. 662]. See also ACCESS, *supra* note 7, at 15.

22. ACCESS, *supra* note 7, at 8. See also Nanda, *supra* note 4, at 440-41.

23. ACCESS, *supra* note 7, at 8.

24. S.C. Res. 662, *supra* note 21.

pation of Lebanon.<sup>25</sup> The U.S. government rejected the Iraqi offer, calling the inclusion of other occupations an unacceptable "linkage."<sup>26</sup>

On August 18, the U.N. Security Council passed Resolution 664, which called on Iraq to release all the foreign nationals it had detained in Iraq and Kuwait.<sup>27</sup>

On August 25, the U.N. Security Council passed Resolution 665, authorizing the use of all "necessary measures" to enforce the economic sanctions against Iraq.<sup>28</sup> On September 26, it passed Resolution 670, which expanded the economic sanctions against Iraq and barred passenger and cargo traffic to and from Iraq, except for humanitarian purposes.<sup>29</sup> On October 29, 1990, it passed Resolution 674, which demanded that Iraq stop detaining foreign nationals.<sup>30</sup> Finally, on November 29, 1990, it adopted Resolution 678, which authorized the use of "all necessary means" to make Iraq comply with all previous Security Council resolutions by January 15, 1991.<sup>31</sup>

On January 12, 1991, the U.S. Congress authorized President

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25. ACCESS, *supra* note 7, at 9. See also *Proposal by Iraqi President*, N.Y. TIMES, Aug. 13, 1990, at A6.

26. ACCESS, *supra* note 7, at 9.

27. S.C. Res. 664, U.N. SCOR, 45th Sess., 2937th mtg. (Aug. 18, 1990) *reprinted in* 29 I.L.M. 1328 (1990) [hereinafter S.C. Res. 664]. See also ACCESS, *supra* note 7, at 15. The Security Council demanded "that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries" and that "Iraq take no action to jeopardize the safety, security or health of such nationals." *Id.*

28. S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg. (Aug. 25, 1990) *reprinted in* 29 I.L.M. 1329 (1990) [hereinafter S.C. Res. 665]. Security Council Resolution 665 called upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to insure strict implementation of the provisions relating to such shipping laid down in S.C. Res. 661. See also ACCESS, *supra* note 7, at 15.

29. S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg. (Sept. 25, 1990) *reprinted in* 29 I.L.M. 1334 (1990) [hereinafter S.C. Res. 670]. See also ACCESS, *supra* note 7, at 16. Security Council Resolution 670 provided that "all states . . . shall deny permission to any aircraft to take off from their territory if the aircraft would carry cargo to or from Iraq or Kuwait other than food in humanitarian circumstances . . ."

30. ACCESS, *supra* note 7, at 16. See also THE MIDDLE EAST 7th, *supra* note 1, at 366.

31. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. (Nov. 29, 1990) *reprinted in* 29 I.L.M. 1565 (1990) [hereinafter S.C. Res. 678]. See also ACCESS, *supra* note 7, at 16. In Resolution 678 the Security Council demanded that Iraq comply fully with Resolution 660 and all subsequent relevant resolutions, and decided while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so; "[and] authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the foregoing resolutions, to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security to the area."

Bush to implement U.N. Security Council Resolution 678<sup>32</sup> and on January 16, the President ordered air attacks by the allied forces against Iraq.<sup>33</sup>

In light of the above events, this article will examine the historical background which precipitated Iraq's invasion, occupation and annexation of Kuwait. It will also examine the political and legal aspects of the U.N. Security Council's resolutions pertaining to Iraq's actions against Kuwait. Finally, it will examine the legitimacy in international law of the use of force against Iraq by the U.S. and its coalition partners.

## II. HISTORICAL BACKGROUND

While it may seem difficult to defend Iraq's use of force against the Sheikdom of Kuwait,<sup>34</sup> an independent sovereign state<sup>35</sup> and a member state of the United Nations<sup>36</sup> as well as of the Arab League,<sup>37</sup> with whom Iraq had had diplomatic relations,<sup>38</sup> it is important to understand the underlying tensions which led to the outbreak of hostilities on August 2, 1990.<sup>39</sup> For almost a century, Iraq has maintained that Kuwait<sup>40</sup> is an integral part of Iraq and that Kuwait therefore

32. See Adam Clymer, *Congress Acts to Authorize War in Gulf*, N.Y. TIMES, Jan. 13, 1991, § 1, at 2. See also THE MIDDLE EAST 7th, *supra* note 1, at 363.

33. See Michael R. Gordon, *War in the Gulf*, N.Y. TIMES, Jan. 18, 1991, at A1.

34. Article 2(4) of the U.N. Charter provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

35. Kuwait attained full independence from Great Britain on June 19, 1961. See HUMPHREY TREVELYAN, *THE MIDDLE EAST IN REVOLUTION 186-91* (1970).

36. See THE PERSIAN GULF STATES 175, 179 (Alvin J. Cottrell ed., 1980). Although Kuwait gained its independence from Great Britain in 1961, its admission to the U.N. was initially blocked by the Soviet Union, which sympathized with Iraq's contention that Kuwait was part of the Iraqi Province of Basra and had been stolen from the Ottomans during their rule of Iraq by Great Britain. When, in 1963, Iraq dropped its claim to Kuwait, the Soviets dropped their opposition and Kuwait gained admission to the U.N. on May 7, 1963. See *id.*

37. Kuwait was admitted to membership in the Arab League on July 20, 1961. *Id.* at 179.

38. Iraq recognized Kuwait in 1963, after the overthrow of the Iraqi regime of Abdul-Karim Qasim and after Iraq dropped its claim to Kuwait. *Id.* at 67, 175.

39. See Shaw J. Dallal, *Has the U.S. Been Wise?*, MIDDLE EAST INT'L, Oct. 12, 1990, at 20-21.

40. The name "Kuwait" is the Arabic diminutive of "Kut," a Portuguese word meaning a small fort, which crept into the Arabic language. There were two small settlements of Iraqi Bedouins in the Province of Basra, one around Kut, which was a major Ottoman fort, and the other around Kuwait, which was a smaller fort. In the early 18th century, after a harsh drought in the desert in 1710, a small group of Bedouins migrated from Najd to the Basra area in Iraq in search of water. They settled around the small fort known as Kuwait where there was a Turkish garrison. The Bedouins' chieftain, named Al-Sabah, sought permission from

should not have been carved out of the Iraqi Province of Basra by Great Britain while Iraq was under Ottoman rule.<sup>41</sup>

In 1899, Great Britain made a deal with a Bedouin Chieftain, Sheikh Mubarak Al-Sabah, who had "murdered his way to the Sheikdom" shortly before the turn of the Twentieth Century.<sup>42</sup> Great Britain's deal with the Bedouin Chieftain was motivated by its desire to prevent the German Kaiser, Wilhelm II, from building the terminus of the Berlin-Baghdad railway, which would expand to the then small and obscure Iraqi port of Kuwait on the Persian Gulf, thereby jeopardizing Britain's access to India.<sup>43</sup>

After some discussions with Sheikh Mubarak Al-Sabah, Great Britain concluded a secret agreement with him which provided for British control of foreign affairs and non-alienation of the Bedouin settlement in and around the port of Kuwait. In effect, an informal protectorate Sheikdom was established and the desolate Iraqi port of Kuwait, seemingly, had quietly passed from the Ottoman sphere of influence to that of Great Britain, thereby sowing the seeds of conflict over the fate of that territory. The secret agreement provided:

The object of writing this lawful and honourable bond is that it is hereby covenanted and agreed between Lieutenant - Colonel Malcolm John Meade, I.S.C., Her Britannic Majesty's Political Resident, on behalf of the British Government on the one part, and Sheikh Mubarak-bin-Sheikh Subah, Sheikh of Koweit, on the other part, that the said Sheikh Mubarak-bin-Sheikh Subah of his own free will and desire does hereby pledge and bind himself, his heirs and successors not to receive the Agent or Representative of any Power or Government at Koweit, or at any other place within the limits of his territory, without the previous sanction of the British Government;

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the Turkish commander to stay put. The commander granted the Bedouin chieftain permission. The Al-Sabah family has been in and around Kuwait ever since. See THE MIDDLE EAST 191 (Michael D. Wormser ed., 5th ed. 1981).

41. Relations between Great Britain and Kuwait actually go back to 1775, when for a brief period, with the consent of the Ottoman authorities, the British Government used the main port of that Iraqi desert territory, which was part of the Province of Basra, as a station on an overland mail service from India to the Mediterranean. However, Great Britain repeatedly turned down requests by various Bedouin chieftains in and around Kuwait and Kut for cooperation with Great Britain and protection from the oppressive Ottoman rule. See J.C. HUREWITZ, DOCUMENTS OF NEAR EAST DIPLOMATIC HISTORY 127 (1951).

42. After murdering his half brother, Sheikh Mubarak Al-Sabah sought protection from Great Britain, fearing his own people who resented his ascension to power and fearing punishment from the Turks who wanted their authority to be effective. See THE PERSIAN GULF STATES, *supra* note 36, at 57-58. See also ALAN VILLIERS, SONS OF SINBAD 381 (1969).

43. See Ghada Talhami, *The Ideology of Arab Nationalism and The Persian Gulf Crisis*, 15 S. ILL. U. L.J. 511 (1991). See also BRITON C. BUSCH, BRITAIN AND THE PERSIAN GULF, 1884-1914, 330-47 (1967); PHILIP GRAVES, LIFE OF SIR PERCY COX 168-70 (1941).

and he further binds himself, his heirs and successors not to cede, sell, lease, mortgage, or give for occupation or for any other purpose any portion of his territory to the Government or subjects of any other Power without the previous consent of Her Majesty's Government for these purposes. This engagement also to extend to any portion of the territory of the said Sheikh Mubarak, which may now be in the possession of the subjects of any other Government.<sup>44</sup>

On July 29, 1913, still opposed to the German-Turkish program of constructing the Baghdad railway,<sup>45</sup> Great Britain entered into a convention with Turkey regarding the Persian Gulf. The convention provided:

**Kuwait:**

Article 1: The territory of Kuwait, as it is defined by Articles 5 and 7 of this Convention, shall form an area which is autonomous from the Ottoman Empire.

Article 2: The Sheikh of Kuwait shall display, as in the past, an Ottoman flag, with, if so desired, the word 'Kuwait' written in the corner, and he shall enjoy a total administrative autonomy in the territorial zone defined by Article 5 of this Convention. The Imperial Ottoman Government shall abstain from all interference in the affairs of Kuwait, including the question of succession, and all administrative acts, as well as any occupation, or military acts, in the described territories. In case of vacancy, the Imperial Ottoman Government shall name a Successor, by Imperial Decree, to succeed the deceased Sheikh. It shall also have the option to name a delegate to the Sheikh to protect the interests and the natives of other parts of the Empire.

Article 3: The Imperial Ottoman Government shall recognize the validity of the agreements which the Sheikh of Kuwait has previously concluded with the Government of His Britannic Majesty. . . .

Article 4: In order to confirm the Agreement already entered into between the two governments, by the promises exchanged on September 6, 1901, between the Embassy of His Britannic Majesty in Constantinople and the Imperial Ministry of Foreign Affairs, the Government of His Britannic Majesty declares that as long as no changes are made by the Imperial Ottoman Government to the status of Kuwait, as it is defined in this Convention, the Government of His Britannic Majesty shall not change the nature of its relations with the Government of Kuwait, and shall not establish a protectorate on the territory which has been given to it. The Imperial Ottoman Government formally records this declaration.

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44. C.U. AITCHISON, A COLLECTION OF TREATIES, ENGAGEMENTS AND SANADS RELATING TO INDIA AND NEIGHBOURING COUNTRIES 262 (5th ed. 1933).

45. See Talhami, *supra* note 43; BUSCH, *supra* note 43; GRAVES, *supra* note 43, at 170 - 72.

. . . .

**Article 8:** In case of an agreement between the Imperial Ottoman Government and the Government of His Britannic Majesty allowing the establishment of a railway from Baghdad to Basra to the sea, with a terminal at Kuwait, or at any other part of the autonomous territory, then the two governments shall agree on the arrangements to be made with respect to guarding the line and the stations, as well as the setting up of custom houses, warehouses and any other auxiliary installations, which may be necessary to the railway.

**Article 9:** The Sheikh of Kuwait shall enjoy, with full security, the rights of private property, to the properties he owns in the territory of the Province of Basra. He shall exercise these rights of private ownership in accordance with Ottoman law. The real estate affected shall be subject to taxes and fees, the method of conservation and transmission and the jurisdiction established by Ottoman law.<sup>46</sup>

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46. English text was translated by, Dr. Pasquale and Mrs. Jaqueline Ciaglia, from the following French text:

I. - - Koueit

**ARTICLE 1er.** Le Territoire de Koueit, tel qu'il est délimité par les articles 5 et 7 de cette convention, forme un kaza autonome de l'Empire ottoman.

**ARTICLE 2.** Le cheikh de Koueit arborera comme par le passé le drapeau ottoman, avec, s'il le désire, le mot "Koueit" inscrit au coin, et il jouira d'une autonomie administrative complète dans la zone territoriale définie à l'article 5 de cette convention. Le Gouvernement Impérial ottoman s'abstiendra de toute immixtion dans les affaires de Koueit, y compris la question de la succession, et de tout acte d'administration ainsi que de toute occupation et tout acte militaire, dans les territoires qui en font partie. En cas de vacance, le Gouvernement Impérial ottoman nommera kaimakam, par firman Impérial, le successeur du cheikh défunt. Il aura aussi la faculté de nommer auprès du cheikh un commissaire pour protéger les intérêts et les indigènes des autres parties de l'Empire.

**ARTICLE 3.** Le Gouvernement Impérial ottoman reconnaît la validité des conventions que le cheikh de Koueit a conclues précédemment avec le Gouvernement de Sa Majesté britannique . . . .

**ARTICLE 4.** En vue de confirmer l'entente déjà établie entre les deux Gouvernements par les assurances échangées le 6 septembre 1901, entre l'ambassade de Sa Majesté britannique à Constantinople et le Ministère Impérial des affaires étrangères, le Gouvernement de Sa Majesté britannique déclare qu'en tant qu'aucun changement ne sera apporté par le Gouvernement Impérial ottoman au statu quo de Koueit, tel qu'il se trouve défini par la présente convention, il ne changera en rien la nature de ses relations avec le Gouvernement de Koueit et n'établira pas de protectorat sur le territoire qui lui est attribué. Le Gouvernement Impérial ottoman prend acte de cette déclaration.

. . . .

**ARTICLE 8.** Dans le cas où le Gouvernement Impérial ottoman s'entendrait avec le Gouvernement de Sa Majesté britannique pour faire aboutir la ligne ferrée de Bagdad-Basra à la mer au terminus de Koueit ou à tout autre terminus dans le territoire autonome, les deux Gouvernements s'entendront sur les dispositions à prendre touchant la garde de la ligne et des stations ainsi que l'établissement de bureaux douaniers, dépôts de marchandises et toute autre installation accessoire au service de la voie ferrée.

**ARTICLE 9.** Le cheikh de Koueit jouira en pleine sécurité des droits de propriété



It is the above convention, as well as the documents attached to it, all of which remained unratified,<sup>47</sup> that Iraq, until this day, feels was entered into at its expense.<sup>48</sup>

Germany and Turkey, on the other hand, felt compelled to sign the Convention in order to give Great Britain the protection it sought in the Persian Gulf, thereby overcoming the diplomatic obstacle which Great Britain had mounted to the full execution of the Baghdad railway project.<sup>49</sup>

When World War I broke out in 1914, however, and Turkey entered the war on the side of the Central Powers, Great Britain immediately recognized the desert Sheikdom of Kuwait as an independent state under British protection. The British Political Resident in the Persian Gulf addressed a note to Sheikh Mubarak-Al-Sabah promising Great Britain's recognition of the complete severance of ties between the Sheikdom of Kuwait and the Ottoman Empire in return for Sheikh Mubarak's support in the war against the Ottoman Empire. The note provided:

In continuation of previous letters intimating the out-break of war between the British Government and Turkey, I am ordered by the British Government to convey to Your Excellency gratitude for your loyalty and your offer of assistance, and to request you to attack Umm Qasr, Safwan and Bubiyan and to occupy them . . . that the British Government does recognise and admit that the Shaikdom [sic] of Kuwait is an independent Government under British protection . . . .<sup>50</sup>

In 1922, in the aftermath of World War I, Great Britain formally carved Kuwait out of the Iraqi Province of Basra, creating new borders for Iraq, thereby depriving it of an effective outlet to the sea.<sup>51</sup>

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privée qu'il possède dans le territoire du vilayet de Basra. Ces droits de propriété privée devront s'exercer en conformité de la loi ottomane et les biens immobiliers qu'ils concernent seront soumis aux impôts et charges, au mode de conservation et de transmission et à la juridiction établis par les lois ottomanes manes.

10 GOOCH AND TEMPERELY, *BRITISH DOCUMENTS*, part II, at 190-94, *reprinted in* HUREWITZ, *supra* note 41, at 146 - 47.

47. *See id.* at 146.

48. *See* Lewis, *supra* note 5.

49. "We have only got two objects as regards the Baghdad Railway," explained British Foreign Secretary Sir Edward Grey to the British Committee of Imperial Defense on May 26, 1911. "[O]ne is to secure that when that railway is made British trade shall not be at a disadvantage," and the other "is that the situation in the Persian Gulf . . . should not be altered in a way which would damage our strategical [sic] position." HUREWITZ, *supra* note 41, at 146 (citing *BRITISH DOCUMENTS* Vol. VI at 786-87).

50. For full text, *see* AITCHISON, *supra* note 44, at 265-66.

51. In 1922, Great Britain, at Uqair, finalized Kuwait's frontiers, giving Saudi Arabia

In 1961, the rising financial cost of policing the Persian Gulf persuaded Great Britain to withdraw from the region, and to grant the now oil-rich Sheikdom of Kuwait full independence.<sup>52</sup> Iraq immediately made its first serious military bid to recover Kuwait, claiming it to be an integral part of its historical territory, massing troops on Kuwait's borders and demanding its integration into Iraqi territory. On July 1 and 2, 1961, at the Sheikdom's request, Great Britain introduced 3,000 British troops to defend the Sheikdom. Iraq, now fearful of engaging the air, naval and land forces of Great Britain, and possibly of others, did not invade Kuwait.<sup>53</sup>

Then on September 10, 1961, the Arab League dispatched a symbolic force of 3,000 men to defend Kuwait against possible future Iraqi attack.<sup>54</sup> When, in 1963, the Iraqi Government finally and formally recognized the Sheikdom as an independent state,<sup>55</sup> that recognition seemed to put an end to Iraq's historic claim to Kuwait.<sup>56</sup> Iraq, however, its formal recognition of the Sheikdom notwithstanding, continued to covet Kuwait and consider it a stolen territory of Iraq.<sup>57</sup> Border tensions between Iraq and the Sheikdom of Kuwait

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two-thirds of the territory claimed by Kuwait under the unratified Anglo Ottoman Agreement of 1913 to compensate Saudi Arabia for surrendering part of its territory to Iraq, but still depriving Iraq of its natural outlet to the sea. See H.R.P. DICKSON, *KUWAIT AND HER NEIGHBOURS* 345-51 (1956).

52. See *THE PERSIAN GULF STATES*, *supra* note 36, at 95.

53. See *TREVELYAN*, *supra* note 35.

54. These troops were from Saudi Arabia, the United Arab Republic which was made up of Egypt and Syria at that time, the Sudan, Jordan and Tunisia. They were under the command of a Saudi General. See *THE PERSIAN GULF STATES*, *supra* note 36, at 179.

55. *Id.* at 175, 179.

56. Historically, Western intervention in disputes between states in the Persian Gulf has frozen, rather than solved such disputes. Iraq may now be deterred from pressing its claim for Kuwait. Unless an honest effort is made to address Iraq's legitimate claim to Kuwait, however, there is an obvious possibility that Iraq may still seek a more violent solution in the not too distant future, thereby destabilizing the region further and endangering world peace. For a comprehensive study of the various territorial disputes of the Gulf region, see HUSAIN M. ALBAHARNA, *THE LEGAL STATUS OF THE ARABIAN GULF STATES* (1968). See also JOSEPH CHURBA, *CONFLICT AND TENSION AMONG THE STATES OF THE PERSIAN GULF, OMAN AND SOUTH ARABIA* (1971); J.B. KELLY, *EASTERN ARABIAN FRONTIER* (1964); and Majid Khaduri, *Iran's Claim to the Sovereignty of Bahrain*, 45 AM. J. INT'L L. 631 (1951).

57. Since Iraq laid claim to Kuwait on June 25, 1961 and actively pursued that claim until deterred by Great Britain and the Arab League, the Iraqi claim was revived intermittently, though on a modified basis, between 1961 and 1984. The 100 mile border between Iraq and Kuwait remained in dispute. In 1973, Iraqi forces briefly entered and occupied a Kuwaiti outpost along the border. Hostilities resurfaced in November of 1984, when Iraqi forces crossed the disputed border region and briefly occupied a strip of land. Sovereignty over the Kuwaiti islands of Bubiyan and Warbah, which flank Iraq's naval base in Basra, were always a bone of contention. Iraq did not only consider the two islands as Iraqi territory, it in fact viewed them as crucial protection against Iranian seaborne attack. See *THE MIDDLE EAST*

continued unabated as the Sheikdom pleaded with its powerful neighbor to settle the border problem once and for all. Iraq, however, always refused, telling the Sheikdom that all of Kuwait is Iraq's territory.<sup>58</sup> Then came Iraq's now unforgettable invasion of Kuwait on August 2, 1990, demonstrating, once again, that Iraq's historic claim to Kuwait cannot only be resisted, but also that the underlying tensions must be solved.<sup>59</sup>

### III. THE LEGAL DIMENSIONS OF THE UNITED NATIONS SECURITY COUNCIL'S RESOLUTIONS

At first flush, all the United Nations Security Council's resolutions adopted in response to Iraq's invasion of Kuwait on August 2, 1990, may appear to be legitimate and proper responses under the Charter of the United Nations.<sup>60</sup> A closer examination of these resolutions, however, may reveal that several were adopted in the heat of the crisis and perhaps under political, military and financial pressures from the governments of the United States,<sup>61</sup> the United Kingdom<sup>62</sup>

219-20 (David R. Tarr & Bryan R. Daves eds., 6th ed. 1986). See also ALBAHARNA, *supra* note 56, at 250 - 57.

58. See ALBAHARNA, *supra* note 56, at 250 - 57.

59. See *supra* notes 56-57.

60. On Dec. 14, 1974, the U.N. General Assembly resolved:

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances

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G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 1, at 143, U.N. Doc. A/9631 (1974)[hereinafter G.A. Res. 3314]. See also U.N. CHARTER art. 2, para. 4.

61. See Donald Neff, *The Bush Initiative*, MIDDLE EAST INT'L, Dec. 7, 1990, at 3-4, where Neff wrote:

The cost of 678:

Beyond the moral depravity caused by Washington's intimate relations with Israel has been the cost of keeping the "Gulfbuster" coalition together. How extraordinarily manifold these costs are became evident during the past fortnight, as Bush and Baker circled the globe in an extraordinary effort to find support for the UN deadline resolution they ultimately achieved. The concessions Bush was willing to make were quite remarkable, ranging from a highly controversial meeting with Syria's President Assad in Geneva to receiving China's foreign minister, anathema because of the Tiananmen Square massacre . . . . Other Bush concessions involved Baker holding a rare meeting with that arch enemy Cuba, supporting the Soviet Union's successful effort to keep the Baltic states of Estonia, Latvia and Lithuania out of the Paris peace conference in mid-November, preparing to approve new emergency food supplies for Romania, allowing Turkey a 50 per cent increase in its textile sales to the US market, and encouraging Britain to resume diplomatic relations with Syria on 28 November after a four-year break. Nor was that all. The benefits for the Soviet Union are proving bountiful too in reward for its close cooperation so far in the crisis. Saudi Arabia and the Gulf emirates have promised, with US prodding, a \$4 billion loan to Moscow, and Bush is now con-

and perhaps others.<sup>63</sup> Thus, these U.N. Security Council Resolutions (S.C. Res.) may have been, at the very least, tainted by such pressures<sup>64</sup> and their legitimacy rendered doubtful at best.<sup>65</sup> More seriously, they may even have been in violation of the U.N. Charter, the very document they purported to comply with and uphold.<sup>66</sup>

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sidering waiving laws so that the Soviet Union could receive most favoured nation status in receiving US loans and access to US grain and corn exports.

62. See Jules Kagian, *The UN, MIDDLE EAST INT'L*, Aug. 31, 1990, at 23, where Kagian wrote:

Although the US and Britain maintain that they are empowered anyway to use force under Article 51 of the UN Charter (the right of collective and single self-defence) following an appeal from the ruler of Kuwait, the adoption of Security Council Resolution 665 would grant them wider powers and the mandatory cooperation of other countries. Experts in international law believe that the text of the resolution is vague and subject to interpretation. It is noted that the resolution is not strictly based on Article 42 of the Charter, which allows military measures should Article 41 prove to be inadequate. The Soviet Union reluctantly supported the resolution after introducing a number of amendments to the original US text. As it stands, the resolution does not provide for a unified command or a UN flag. It allows the use of 'measures commensurate to the specific circumstances.'

63. See Nadim Jaber, *Saudia Arabia: Thwarting Peace Bids*, *MIDDLE EAST INT'L*, Dec. 21, 1990, at 3, where Jaber wrote:

The new-found assertiveness has also been employed with considerable effect in bringing the Soviet Union into line. Moscow abruptly stopped calling for inter-Arab dialogue on the Gulf at around the time it received a \$4 billion loan from Riyadh. Another \$8 bn [sic] is reportedly promised when Gorbachev visits the kingdom next month. Saudi influence is also said to be behind the scrapping of a planned meeting last week between the Soviet foreign minister and PLO Chairman Yassir Arafat.

64. See Jules Kagian, *The United Nations: Countdown to War or Peace*, *MIDDLE EAST INT'L*, Dec. 7, 1990, at 9, where Kagian wrote:

The UN resolution was the climax of a relentless diplomatic mission undertaken by Mr. Baker who travelled 36,000 miles to 12 countries in 24 days meeting 18 foreign ministers. The resolution was supported by 12 of the Council's 15 members. China, one of the five permanent members, abstained rather than exercise its veto; Yemen and Cuba opposed the resolution.

... It is ironic that while US Congressional leaders are calling for patience to give sanctions more time (a year or more), the Council, which imposed the trade embargo, has now decided, under US pressure, that 15 January "force" may be used. Iraq's ambassador, Abd al-Amir al-Anbari, called the resolution 'an act of aggression' against Iraq. He accused the US of arm-twisting to get the resolution through the Council . . .

65. Clearly, the validity of U.N. resolutions cannot be separated from the way they were adopted. A U.N. resolution, improperly adopted, may be invalid *ab initio*. Improper actions, such as fraud, bribery, or duress, employed in order to persuade or coerce members of the U.N. Security Council to improperly adopt a resolution which would improperly authorize the use of force against another state may be considered an act of aggression. See GEORG SCHWARZENBERGER, *MANUAL OF INTERNATIONAL LAW* 128 -29 (6th ed. 1976). See also A. VERDROSS, *VOLKERRECHT* 146 (3d ed. 1959). Verdross refers to this kind of activity as "a clearcut classical example of a force employed against a state contrary to international law and, at the same time, a confirmation of the theory of the significance of an illegal force used against the state itself."

66. Article 33(1) of Chapter VI of the U.N. Charter provides:

The parties to any dispute, the continuance of which is likely to endanger the mainte-

For the purposes of this inquiry, I will deal mainly with S.C. Res. 660, S.C. Res. 661 and S.C. Res. 678. All other U.N. Security Council Resolutions relating to Iraq's invasion of Kuwait are directly or indirectly connected with these three resolutions.<sup>67</sup>

#### A. U.N. Security Council Resolution 660

From the initial stages of the crisis, the U.N. Security Council's action did not seem totally measured,<sup>68</sup> as S.C. Res. 660 of August 2, 1990, was quick to condemn the Iraqi invasion of Kuwait under articles 39<sup>69</sup> and 40<sup>70</sup> of the U.N. Charter. United Nations S.C. Res. 660 also demanded that Iraq withdraw all its forces, immediately and unconditionally, to the positions it had held on August 1, 1990. The resolution further called on Iraq and Kuwait to begin immediate and

nance of international peace and security, shall, *first of all*, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice.

U.N. CHARTER art. 33, para. 1 (emphasis added). It is regrettable that the U.N. Security Council, perhaps under pressure from the U.S. and the United Kingdom, failed to utilize the provisions of Chapter VI of the U.N. Charter. Such utilization may have allowed a peaceful resolution of the conflict.

67. In particular, S.C. Res. 665 gave permission to the states cooperating with the U.S. and its coalition partners to use force if necessary to enforce the embargo against Iraq. See S.C. Res. 665, *supra* note 28; ACCESS, *supra* note 7, at 10. United Nations S.C. Res. 670 prohibited aircraft from bringing prohibited cargo to Iraq. See S.C. Res. 670, *supra* note 29; ACCESS, *supra* note 7, at 10.

68. Article 1 of Chapter I of the U.N. Charter describes the purposes and principles of the U.N. as follows:

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

U.N. CHARTER art. 1 (emphasis added).

69. Article 39 of the U.N. Charter provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

U.N. CHARTER art. 39.

70. Article 40 of the U.N. Charter provides:

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or positions of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

U.N. CHARTER art. 40.

intensive negotiations to resolve their differences.<sup>71</sup>

Politically, members of the U.N. Security Council probably had no alternative but to condemn a purported act of unprovoked aggression<sup>72</sup> by one U.N. member against another and to demand of the presumed aggressor immediate and unconditional withdrawal from the territory which had been the subject of the claimed aggression. By calling on the parties to the dispute, the purported aggressor and the claimed aggrieved, to begin immediate and intensive negotiations to resolve their differences,<sup>73</sup> however, the U.N. Security Council wisely sought to prevent further aggravation of the situation<sup>74</sup> and to allow itself more time to determine that a legally verified act of aggression by Iraq against Kuwait had in fact been committed.<sup>75</sup>

Under article 39 of the U.N. Charter, the Security Council "shall determine the existence of any . . . act of aggression and shall make

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71. These differences stem from Iraq's claim that Kuwait is part of Iraqi territory. See Elaine Sciolino, *Unto Itself: Iraq Yearns for Greatness*, N.Y. TIMES, Aug. 25, 1990, § 4. They also stem from Iraq's claim that Kuwait was waging "economic war" against Iraq. See William Drozdiak, *Baker, Aziz Describe Six Hours of Talking Past Each Other*, WASH. POST, Jan. 10, 1991, at A23.

72. Such condemnation tended to aggravate the situation. It was probably hasty and contrary to the letter and spirit of article 40 of the U.N. Charter. See U.N. CHARTER art. 40.

73. See S.C. Res. 660, *supra* note 7. See also *Crisis in the Persian Gulf: Sanctions, Diplomacy and War: Hearings Before the Comm. on Armed Services*, 101st Cong., 2d Sess., 740 (1990)[hereinafter *Crisis*](statement of Edward Heath, a member of the British Parliament and former Prime Minister). Mr. Heath stated:

The point I would like to submit to you at the beginning is that paragraph three [of S.C. Res. 660] has from the beginning been completely ignored in the United Nations and by the main powers who have forces in the Gulf. The important word in both paragraph two and paragraph three is "immediately" . . . because . . . immediately . . . arrangements have got to be made for Iraq and Kuwait to settle their differences . . . by some intermediary or international court . . . . If it is true that Kuwait has been stealing lands and stealing oil, then there is no reason they should not be made to make it good

. . . .

*Id.* at 740-75.

74. It was probably too late at that point, however. The premature condemnation of Iraq, under pressure from the U.S. and the United Kingdom, with continuous threat to use force unilaterally, tended to paralyze the orderly conduct of business in the U.N. Security Council. While some members of the Security Council were attempting to take measures to ensure the peace from the inception of the crisis, the U.S. and the United Kingdom were threatening to use force without Security Council authorization, thereby coercing members of the Security Council to take half-baked compromise measures in order to avert further violence. See Thomas L. Friedman, *Allies Tell Baker Use of Force Need U.N. Backing*, N.Y. TIMES, Nov. 8, 1990, at A14.

75. Iraq's main justification for invading, occupying and annexing Kuwait is that Kuwait is part of Iraqi territory. See Sciolino, *supra* note 71. This is not an uncommon justification for the use of force to claim territory. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1627-28 (1984).

recommendations, or decide what measures shall be taken . . . .”<sup>76</sup> However, because the U.N. Security Council is a political body and not a court of justice,<sup>77</sup> its actions are of necessity political and not judicial. While the U.N. Security Council’s decision to condemn Iraq’s invasion of Kuwait may have been unavoidable politically, such condemnation was probably premature and perhaps unjustified legally. It would have been justified legally only if it were coupled with an advisory opinion by the International Court of Justice (ICJ) that Iraq’s invasion of Kuwait was in fact an act of aggression. This paper, therefore, does not presume to examine the political wisdom of the U.N. Security Council’s resolutions; it will only examine their legal propriety.

On December 14, 1974, the U.N. General Assembly defined aggression as follows:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . . .<sup>78</sup>

As was stated earlier, Iraq was never adjudicated an “aggressor” by the proper U.N. tribunal, the ICJ, which is “the principal judicial organ of the United Nations.”<sup>79</sup> Both the U.N. General Assembly and the U.N. Security Council have the authority to “request the International Court of Justice to give an advisory opinion on any legal question.”<sup>80</sup> It is regrettable that no such request was made to the ICJ by the U.N. Security Council. By verifying that Iraq had in fact committed an act of aggression against Kuwait within the meaning of the above legal definition of aggression and allowing the parties to the dispute an opportunity to present their claims and counterclaims, it would have removed all doubt about Iraq’s action and would have lent more credence to the condemnation against Iraq embodied in S.C. Res. 660. Without such legal verification, however, the condem-

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76. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 392 (jurisdiction and admissibility of the application opinion of Nov. 26). The ICJ explained that it is an essential step to refer a dispute to the U.N. Security Council before submitting the case to the court.

77. The Security Council is designed to address settlements which are primarily of a political nature. This does not mean that the Security Council, even when it does not seek the aid of the ICJ, operates in isolation from rules of international law, but rather that its primary task is to handle the political aspects of a dispute that lie outside the competence of a court of law. WESLEY L. GOULD, *AN INTRODUCTION TO INTERNATIONAL LAW* 569 (1957).

78. See G.A. Res. 3314, *supra* note 60.

79. U.N. CHARTER art. 29.

80. U.N. CHARTER art. 96.

nation seems unjustifiable, since the issue of "aggression" is a legal question, not solely a political one.<sup>81</sup>

Thus, Iraq's claim that Kuwait is part of its territory<sup>82</sup> and that Iraq's invasion, occupation and annexation of Kuwait were not, therefore, in violation of the prohibition on the use of force against the territorial integrity of Kuwait, remains adjudicated in the proper organ of the U.N. and, therefore, remains legally unsettled, perhaps until the next crisis concerning it erupts.<sup>83</sup>

Iraq, in fact, does appear to have a legitimate claim to the territory of Kuwait. The assertion that the Sheikhdom has been in control of the territory of Kuwait since the turn of the century, enough time to defeat Iraq's adverse claim under the principle of prescription advanced by the Sheikhdom and others,<sup>84</sup> is not supported by historical evidence.<sup>85</sup> The territory of Kuwait, in fact, first passed surreptitiously and without Iraqi consent from the Ottoman sphere of influence to that of the British in 1899, thus, becoming an informal British protectorate Sheikhdom, unable to "give for occupation or for any other purpose any portion of [the] territory . . . without the previous consent of Her Majesty's Government . . . ."<sup>86</sup> This and other restrictions<sup>87</sup> on the Sheikhdom's control of Kuwait's territory continued uninterrupted until June 19, 1961.<sup>88</sup> Hence, the Sheikhdom had no control over the territory of Kuwait until that date, when Great Britain relinquished its belligerent control. This lack of control by the Sheikhdom over the territory of Kuwait until 1961 would seem to render the principle of prescription inapplicable in this case, because the Sheikhdom's actual control over the territory of Kuwait has lasted only thirty years, a relatively short period.<sup>89</sup> When the British gov-

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81. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 - 04 (June 27)[hereinafter *Nicaragua Case*].

82. See Sciolino, *supra* note 71.

83. The ICJ found that the U.S. had violated international law by encouraging several specific attacks on Nicaragua territory. *Nicaragua Case*, *supra* note 81, at 146 - 47. Subsequently, the U.S. denounced the ICJ and continued to support attacks against the government of Nicaragua. See Robert Parry & Brian Barger, *Reagan's Shadow CIA: White House Ran the Secret Contra War*, THE NEW REPUBLIC, Nov. 24, 1986, at 23. It is doubtful that the U.S. would have accepted an ICJ ruling that Kuwait is Iraqi territory.

84. See Mary E. O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 469 n. 87 (1991).

85. See *supra* notes 42-43.

86. See AITCHISON, *supra* note 44.

87. See *supra* note 43.

88. See TREVELYAN, *supra* note 35.

89. The principle of prescription can never operate unless the territory in question is held "for a fairly long time," peacefully, publicly and uninterruptedly. Prescription does not operate in the event that territory is transferred by treaty. Such a transfer constitutes a simple act



ernment gave up its belligerent control over the territory of Kuwait, Iraq immediately laid claim to its usurped territory.<sup>90</sup>

More importantly, the principle of prescription can never operate unless the original possessor tolerates or acquiesces in the deprivation.<sup>91</sup> Since neither Iraq nor its people, who are the ultimate authority, ever acquiesced or ratified the usurpation of Kuwait, it is, at the very least, doubtful that the present Sheikdom of Kuwait can successfully claim the territory of Kuwait by prescription.

It is true that in 1963 a former Iraqi government for the first time recognized the Sheikdom of Kuwait and established diplomatic relations with it.<sup>92</sup> That recognition, however, was made by an unrepresentative Iraqi government<sup>93</sup> and was, in fact, neither ratified by an Iraqi representative body, nor supported by a popular plebiscite.<sup>94</sup>

Iraq also claims that during the Iran-Iraq War, when Iraq was preoccupied with that war, the Sheikdom had committed aggression when it entered about eighty kilometers inside Iraq and began drilling for oil.<sup>95</sup> That Iraqi claim, which merits examination, was never adju-

of cession, which is usually subject to ratification and plebiscite, in order to give effect to the principle of self-determination. See 1 OPPENHEIM'S INTERNATIONAL LAW 434-35, 455-57 (H. Lauterpacht ed., 5th ed. 1937).

90. See TREVELYAN, *supra* note 35.

91. See 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 89, at 455-57. See also CHARLES C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES Vol. 1, 192 - 96; GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 140-41 (2d ed. 1949).

92. See THE PERSIAN GULF STATES, *supra* note 36, at 67, 175.

93. Iraq has not had a representative government for decades. Foreign influences have shaped its recent history until July 14, 1958 when a group of army officers, led by Brig. Gen. Abdul-Karim Kassim, overthrew the Hashemite Monarchy. Ironically, it was a short-lived Iraqi Ba'athist dictatorship which recognized the Sheikdom of Kuwait in 1963, headed by Maj. Gen. Ahmad Hassan al-Bakr, as prime minister. That dictatorship ruled for only nine months before it was overthrown. Its recognition of the Sheikdom of Kuwait was never ratified. The Ba'ath party returned to power in 1968, with Ahmad Hassan al-Bakr as president. It is an Iraqi Ba'ath government, under Saddam Hussein, which has now reclaimed Kuwait.

94. See TREVELYAN, *supra* note 35.

95. See *Iraqi Transcript of Hussein-Glaspie Meeting*, reprinted in THE MIDDLE EAST 7th, *supra* note 1, at 375-77. On July 25, 1990, President Saddam Hussein told April Glaspie, U.S. Ambassador to Iraq:

On top of all that, while we were busy at war, the state of Kuwait began to expand at the expense of our territory . . . . But go and look for yourselves. You will see the Kuwaiti border patrols, the Kuwaiti farms, the Kuwaiti oil installations - all built as closely as possible to this line to establish that land as Kuwaiti territory . . . .

*Id.* See also *Crisis*, *supra* note 73. Edward Heath stated:

But now the argument is that during the Iranian War, the Kuwaitis moved some 60 to 80 kilometers up into Iraq and the Iraqis were too busy fighting to do anything about it. The purpose was to be able to get more oil out of the field which runs under the boundary in Kuwait. The Kuwaitis have been siphoning this off at the expense of Iraq. I don't know whether this is true or not, but it is a matter that ought to be thrashed out

dicated. If it were to be determined by a proper tribunal that the Sheikhdom had in fact entered Iraq, then Iraq's action against the Sheikhdom may be defended under the legal doctrine of self-defense.<sup>96</sup> Generally, an act of aggression or military attack must take place before self-defense can be justified.<sup>97</sup> However, while Iraq was not subjected to a military attack by Kuwait, there are perhaps other justifications for Iraq's actions under international law.

Iraqi Foreign Minister Tariq Aziz claimed that "Iraq's action was defensive in nature, because Iraq felt threatened by 'economic war' from the Sheikhdom's policies, which were driving down oil prices and bankrupting Iraq."<sup>98</sup> This legal issue was not adjudicated by the proper U.N. tribunal.<sup>99</sup>

The definition of aggression does not specifically mention economic pressure. However, the *1952 Report on the Question of Defin-*

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by debate, discussion, by experts and by some intermediary or international court . . . . We have international problems which were mentioned in the first resolution of the United Nations as having to be resolved, and you are absolutely justified in carrying on negotiations to resolve them. If it is true that Kuwait has been stealing lands and stealing oil, then there is no reason they should not be made to make it good, otherwise you are sanctioning theft by a sovereign country during a time when its neighbors are engaged in war.

*Id.* at 744, 775.

96. The international law doctrine of self-defense has been distinguished from aggression, provided it is based on actual necessity, as opposed to a sham or pretense to justify the use of force. Before resorting to self-defense with the use of force, however, a state is expected to use peaceful procedures. Furthermore, the action of self-defense must be proportional to the original offense. See W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 296 - 97 (1986).

97. See Diana Vincent-Daviss & Radu Popa, *The International Legal Implications of Iraq's Invasion of Kuwait: A Research Guide*, 23 N.Y.U. J. INT'L L. & POL. 231 (1990).

98. See Drozdziak, *supra* note 71. See also *Iraqi Transcript of Hussein-Glaspie Meeting*, THE MIDDLE EAST 7th, *supra* note 1, at 375 (held on July 25, 1990). President Hussein told April Glaspie, U.S. Ambassador to Iraq:

Iraq came out of the war burdened with \$40 billion debts . . . . We began to face the policy of the drop in the price of oil . . . . But when planned and deliberate policy forces the price of oil down without good commercial reasons, then that means another war against Iraq. Because military war kills people by bleeding them, and economic war kills their humanity by depriving them of their chance to have a good standard of living . . . . Kuwait . . . [was] at the front of this policy aimed at lowering Iraq's position and depriving its people of higher economic standards . . . .

*Id.*

99. Although neither Iraq nor Kuwait seems to have declared "that they recognize as compulsory *ipso facto* and without special agreement" the jurisdiction of the ICJ, under article 36 of the Statute of the International Court, the ICJ "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." See Statute of the International Court of Justice, art. 65, June 26, 1945, 59 Stat. 1055.

*ing Aggression*<sup>100</sup> maintains that unilateral action to deprive a state of the economic resources derived from the fair practice of international trade, or to endanger its basic economy, is a form of aggression.<sup>101</sup>

As far back as 1954, the International Law Commission, in pursuance of a U.N. General Assembly resolution, judged intervention in another state's internal or external affairs by means of economic or political coercion in order to "obtain advantages of any kind" to be an "[o]ffense against the peace and security of mankind . . . for which responsible individuals shall be punished."<sup>102</sup> Economic pressure has never been accepted as justifiable grounds for the use of military force under the doctrine of self-defense. Yet, this is a developing area of international law which the ICJ would have had an opportunity to examine had the case been brought before it.

Additionally, Iraq has claimed that a group of Kuwaitis seeking to overthrow Kuwait's unrepresentative Sheikdom had invited Iraq to invade Kuwait and liberate it from the grip of a corrupt and feudalistic regime.<sup>103</sup> Under the doctrine of humanitarian intervention, a state may have the right to use force against another sovereign to protect its inhabitants from inhumane treatment by their governing sovereign.<sup>104</sup> This claim should also have been examined more closely and adjudicated by the International Court of Justice.

As a matter of record, the U.S. Department of State has recently issued its annual country reports on human rights practices and has, in fact, taken the Sheikdom of pre-invasion Kuwait to task for its feudalistic and unrepresentative structure and, above all, for its gross human rights abuses.<sup>105</sup>

Not only did the Sheikdom of Kuwait restrict "freedom of as-

100. O'Connell, *supra* note 84, at 472 n.105 (citing U.N. Doc. A/2211, at 58, *quoted in* L. HENKIN ET AL., *INTERNATIONAL LAW* 688 (2d ed. 1987)).

101. *Id.*

102. *See Report of the International Law Commission*, U.N. GAOR, 9th Sess., Supp. No. 9, U.N. Doc. A/2693 (1954).

103. *See* John Kifner, *Iraq Proposes Peace Talks, then Lashes Out at the U.S.*, N.Y. TIMES, Aug. 22, 1990, at A9.

104. *See* Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 547-48 (1987); Laura K. Wheeler, *The Grenada Invasion: Expanding the Scope of Humanitarian Intervention*, 13 B.C. INT'L & COMP. L.R. 413, 415-17 (1985).

105. *See* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990: REPORT SUBMITTED TO THE COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE, AND THE COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES BY THE DEPARTMENT OF STATE 1507-21 (February 1991)[hereinafter THE REPORT]. *See also* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991: REPORT SUBMITTED TO THE COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE, AND THE COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES BY THE DEPARTMENT OF STATE (February 1992).

sembly and speech," it denied its citizens the right "to change their government" by peaceful means.<sup>106</sup> The Sheikhdom was characterized by "arbitrary arrest, mistreatment of prisoners, and lack of due process in its trials."<sup>107</sup> The Emir, "always a descendent of al-Sabah family,"<sup>108</sup> had dissolved Kuwait's National Assembly and "had ruled by decree,"<sup>109</sup> thus imposing "censorship on the press"<sup>110</sup> and "restrictions on the political and civil rights of all Kuwaiti residents."<sup>111</sup> The Sheikhdom of Kuwait had also engaged in acts of "torture," according to the Department of State.<sup>112</sup> The report states that prior to the invasion of Kuwait, the Sheikhdom had engaged in "physical violence in apprehending and interrogating"<sup>113</sup> a number "of prominent Kuwaiti opposition leaders,"<sup>114</sup> some of whom were ex-parliamentarians, charging them with participating in "unlicensed activities."<sup>115</sup> In pre-invasion Kuwait, "political parties were banned"<sup>116</sup> by the Sheikhdom and the police were often sent to citizens' homes to "arrest vocal opposition" to the Sheikhdom's rule.<sup>117</sup>

Iraq's claim, therefore, that it invaded Kuwait at the invitation of the Sheikhdom's oppressed opposition should not have been taken lightly and dismissed out of hand.<sup>118</sup> Furthermore, the claim of invasion by invitation is not an Iraqi invention. Both the former Soviet Union and the U.S. have used the claim to justify recent invasions, the

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106. THE REPORT, *supra* note 105, at 1507, 1509-11, 1516-17. The Report actually gave a disturbing account of the conduct of the Sheikhdom prior to Iraq's invasion of Kuwait. It would seem odd that the government of the United States would make the fuss it did about rescuing a Sheikhdom with a record of oppression and lack of representation it already knew about. Instances of arbitrary arrest, mistreatment of prisoners, lack of due process, abuse of women and workers and torture actually border on the barbaric, according to the Department of State account.

107. *Id.* at 1507.

108. *Id.*

109. THE REPORT, *supra* note 105, at 1507.

110. *Id.*

111. *Id.*

112. *Id.* at 1509.

113. THE REPORT, *supra* note 105, at 1509.

114. *Id.* at 1510.

115. *Id.*

116. *Id.* at 1513.

117. THE REPORT, *supra* note 105, at 1513.

118. Iraq's hands in the area of human rights are not exactly clean, however.

Iraq's abysmal record of repression of human rights was even more flagrant in 1990 . . . . Iraq flaunted the Fourth Geneva Convention on Civilians and other established norms of civilized behavior by arbitrarily detaining hundreds of foreign civilians in both Iraq and Kuwait . . . . Almost every category of human rights dealt with in this report is severely restricted or nonexistent in Iraq . . . .

*Id.* at 1457.

Soviet Union in its invasion of Afghanistan<sup>119</sup> and the U.S. in its invasion of Grenada.<sup>120</sup>

Iraq, however, did not claim that its invitation had come from a properly installed government,<sup>121</sup> but from an oppressed group within a territory Iraq claims to be its own.<sup>122</sup> In view of the Sheikhdome's oppressive and undeniably unrepresentative regime, Iraq's claim may very well have been justified under the doctrine of humanitarian intervention. At the very least, it merited adjudication.<sup>123</sup>

Because none of Iraq's claims, all of which seem to contain legal issues, had been presented to the ICJ for an advisory opinion or for adjudication, the legal propriety of S.C. Res. 660, which condemned Iraq for its invasion of Kuwait, remains in doubt.

### B. U.N. Security Council Resolution 661

If I am correct in concluding that the condemnatory part of S.C. Res. 660<sup>124</sup> was prematurely adopted<sup>125</sup> and that it was, therefore, legally unsupportable,<sup>126</sup> it would then seem that S.C. Res. 661,<sup>127</sup> which was based on S.C. Res. 660, was automatically without legal

119. See *The Russians Reach the Khyber Pass at Last*, THE ECONOMIST, Jan. 5, 1980, at 25.

120. See *Say Something, If Only Goodbye*, THE ECONOMIST, Mar. 10, 1984, at 31.

121. As a general rule, even invitations by governments have been regarded as suspect. See O'Connell, *supra* note 84, at 463 n. 63.

122. See Lewis, *supra* notes 5; MIDDLE EAST 7TH, *supra* note 1, at 355.

123. Ironically, it is the government of the U.S. which advocates intervention in order to depose unrepresentative governments. See O'Connell, *supra* note 84, at 472-75. Yet it is this very intervention which brought it the condemnation of the U.N. General Assembly by a vote of 108 to 9, for its invasion of Grenada in 1983. See U.N. GAOR, 38th Sess., 43 plen. mtg., at 45, U.N. Doc. A/38/PV. 43 (prov. ed. 1983). This policy also brought the U.S. condemnation for its invasion of Panama. *The Effects of the Military Intervention by the United States of America in Panama on the Situation in Central America*, G.A. Res. 44/240, 44th Sess., U.N. Doc. A/Res/44/240 (1989). The ICJ has of course characterized U.S. activities in Nicaragua as "aggression." See *Nicaragua Case*, *supra* note 81.

124. See ACCESS, *supra* note 7.

125. See text *supra* part III.A. and accompanying notes.

126. See text *supra* part III and accompanying notes.

127. United Nations S.C. Res. 661, among other things, required the following sanctions to be imposed against Iraq and Kuwait:

- (a) A ban on imports of Iraqi or Kuwaiti origin, exported from these areas after the date of the resolution.
- (b) A prohibition on acts of member states' nationals, or within their territories, in promotion of the export or transshipment of any commodities or products from Iraq or Kuwait, including dealing in such commodities or products, and the transfer of funds to Iraq or Kuwait for the purpose of such activities.
- (c) A prohibition on the sale or supply of any commodities or products to any person or body in, or for the purpose of carrying on any business in or operated from, Iraq or Kuwait, or the promotion of such prohibited activities, except that these prohibitions

foundation because sanctions, economic and financial, should only be the consequence of a legally determined act of aggression.<sup>128</sup>

Under domestic law in the U.S., the state usually exacts a fine from an offender or it may imprison him. If the offense is extreme, such as the unjust taking of a life, the state may even impose corporal or capital punishment. This is because the criminal sanction is regarded as a payment to the national society, rather than to the injured party. The offense itself is regarded as one against the national society. An accused under these circumstances, however, is presumed innocent until he is proven guilty and is given a fair trial, by which his constitutional right to due process of law is guaranteed.<sup>129</sup>

Economic or financial sanctions, whereby the U.N. attempts to disrupt the commercial and financial activities of a member state and its nationals, are such severe measures that they should never be imposed on a member state without affording that member "due process of law."<sup>130</sup> These sanctions are a relatively new form of reprisal. They are not intended to be a payment to the international society as in the case of a legally proven domestic offense. They are an extreme

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did not apply to "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs;" and,

(d) A prohibition on the provision of funds "or any other financial or economic resources" to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, by the member states or their nationals or any person within their respective territories, except that the prohibition does not apply to payments "exclusively for strictly medical or humanitarian purposes, and, in humanitarian circumstances, foodstuffs.

S.C. Res. 661, *supra* note 18. The Resolution even went so far as to call upon members and non-members of the U.N. to break existing contracts, with Iraq, in order to strengthen the implementations of the sanctions. At the same time it kept an important role for the Security Council to oversee the proper execution of the sanctions. *Id.* On its face, such a request is most likely illegal.

128. Chapter VII, articles 39-51 of the U.N. Charter are the main authority for the imposition of sanctions. See U.N. CHARTER arts. 39-51. The essential element, however, is that this drastic coercive measure must be used legally and responsibly and not at the whim of one powerful or influential state or group of states in order to advance their special interests. As former Senator J.W. Fulbright once wrote: "The crucial distinction is not between coercion and voluntarism, but between duly constituted force, applied through law . . . and the arbitrary coercion of the weak by the strong." J. WILLIAM FULBRIGHT, *THE CRIPPLED GIANT* 108 (1972). For an analysis of the existing sanctioning process under Chapter VII of the U.N. Charter, see MYRES S. McDONALD & FLORENTINO O. FELECiano, *LAW AND MINIMUM WORLD PUBLIC ORDER* 261-383 (1961). See also MALLISON & MALLISON, *supra* note 96, at 419-24.

129. U.S. CONST. amend. V. For a general discussion see WAYNE R. LAFAVE, *MODERN CRIMINAL LAW* (2d ed. 1988).

130. See H. Lauterpacht, *The Boycott in International Relations*, 1933 BRIT. Y. B. INT'L L. 125. See also GEORGE A. FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* 44-58 (1937). See also text *supra* part III.

and coercive measure, designed to force a state which has been legally adjudicated to have committed an act of aggression to behave in a manner dictated by the international community, through the organ of the U.N.<sup>131</sup>

Because of the severity of economic and financial sanctions and the hardships they can bring to the innocent nationals of an accused state, they should not be imposed lightly.<sup>132</sup> If they are imposed against a state which has not committed a legally determined act of aggression under international law<sup>133</sup> or against one whose "aggression" has been determined summarily and without "due process of law,"<sup>134</sup> then these sanctions themselves might be illegal acts<sup>135</sup> and might not be supported by article 42 of the U.N. Charter.<sup>136</sup> Members of the U.N. may not be bound to comply with them.<sup>137</sup>

Thus, the imposition of sanctions by the U.N. Security Council, in and of itself, does not make that imposition legal.<sup>138</sup> In fact, the U.N. Security Council's role in the Gulf Crisis fell far short of gaining the character of legality,<sup>139</sup> which tended to undermine the moral authority of the U.N.<sup>140</sup> Just as a state can violate its own constitution, so too can members of the U.N. Security Council collectively violate the U.N. Charter, thus rendering a collective decision of that body illegal.<sup>141</sup>

Regrettably, this appears to be the course of action taken by the

131. See U.N. CHARTER arts. 36, 39-51. While article 41 authorizes the Security Council to use "measures not involving the use of armed force to be employed" in order "to give effect to its decision," the Security Council, before making a decision, is under an obligation to refer legal disputes "to the International Court of Justice in accordance with the provisions of the Statute of the Court" under article 36(3) of the U.N. Charter.

132. See text *supra* part III.

133. See Nicaragua Case, *supra* note 81, at 103-04.

134. See FULBRIGHT, *supra* note 128. See also McDONALD & FELECIANO, *supra* note 128, 261-383; MALLISON & MALLISON, *supra* note 96.

135. The severe imposition of economic and financial sanctions should not be the product of a hasty or coerced political action, but should be a reaction to a deliberated and properly adjudicated legal determination by the International Court of Justice. Because the Security Council itself is not a court of law and Iraq was never adjudicated as an aggressor by the U.N. Court, the Security Council seems to have exceeded its authority by imposing economic sanctions against Iraq. See GOULD, *supra* note 77.

136. See text *supra* part II and accompanying notes.

137. See text *supra* part III.A. and accompanying notes.

138. See GOULD, *supra* note 77, at 597; Nicaragua Case, *supra* note 81.

139. See *supra* notes 61-65 and the accompanying text.

140. See Neff, *supra* note 61.

141. In order to avoid illegal Security Council action, the Security Council should have referred the Iraqi invasion of Kuwait to the International Court of Justice, as it did in the Corfu Channel Dispute, and as advocated in article 36(3) of the U.N. Charter. See GOULD, *supra* note 77.

U.N. Security Council. It imposed unprecedentedly harsh economic and financial sanctions against Iraq for its clumsy effort to restore to its control a vital part of its territory which had been stolen from Iraq and governed by an unrepresentative Sheikhdom.

C. *U.N. Security Council Resolution 678*

On November 29, 1990, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, "adopted" S.C. Res. 678, by a vote of 12-2, with Cuba and Yemen against, and China abstaining.<sup>142</sup>

It is doubtful that S.C. Res. 678 was in fact properly and legally adopted by the U.N. Security Council, in view of the abstention rather than a concurrence by China, one of the five permanent members of the U.N. Security Council. China's abstention must have been legally fatal to the proper adoption of the resolution under article 27 of the U.N. Charter, which provides: "Decisions of the Security Council . . . shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . . ."<sup>143</sup>

United Nations S.C. Res. 678 provided that:

- (1) Iraq should comply fully with S/RES/660 (1990), and all subsequent resolutions;
- (2) Member states cooperating with the Government of Kuwait are authorized to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area, if Iraq does not on or before 15 January 1991 fully implement all the relevant resolutions pertaining to its invasion, occupation and annexation of Kuwait;
- (3) All states should provide appropriate support for actions undertaken pursuant to this resolution;
- (4) The states concerned should keep the Security Council regularly

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142. S.C. Res. 678, *supra* note 31. ACCESS, *supra* note 7, at 16.

143. In his address to the Security Council, Qian Qichen, China's Foreign Minister, stated:

[T]he United Nations, as the international organization for the maintenance of peace and security, is responsible both to international security and to history. It should act with great caution and avoid taking hasty actions on such a major question as authorizing the member states to take military actions against another member state . . . . [I]n this draft resolution . . . the wording "use all necessary means" is used, which in essence permits the use of military actions. This runs counter to the consistent position of the Chinese Government - namely, to try our utmost to seek a peaceful solution. Therefore, the Chinese delegation has difficulty voting in favor of this draft resolution . . . . *Mideast Tensions*, N.Y. TIMES, Nov. 30, 1990, at A10. Commenting on China's abstention, Louis Jay Herman, in a Letter to the Editor of The New York Times, wrote: "Thus a draft resolution is killed just as effectively by an abstention as by a negative vote or 'veto' . . . [of a permanent member of the U.N. Security Council]. See Louis Jay Herman, *Legal Fiction Oils U.N.'s Iraq Resolution*, N.Y. TIMES, Dec. 14, 1990, at A38.



informed on the progress of actions taken pursuant to this resolution.<sup>144</sup>

In effect, S.C. Res. 678 was an ultimatum issued to Iraq by the U.N. Security Council. It stated that unless Iraq complied with all the U.N. Security Council resolutions pertaining to Iraq's invasion, occupation and annexation of Kuwait by January 15, 1991, certain U.N. members would use "all necessary means," interpreted by these states to mean force,<sup>145</sup> to coerce Iraq to implement these resolutions.<sup>146</sup>

Yet article 2 of the U.N. Charter requires all members of the U.N. to "settle their international disputes by peaceful means"<sup>147</sup> and to "refrain in their international relations from the threat or use of force"<sup>148</sup> which, in effect, is the issuing of ultimatums. The Charter of the U.N. seems to seek the avoidance of the indiscriminate use of force or the threat to use force, in an effort to prevent extortion under the guise of compelling respect for legal rights.<sup>149</sup>

On its face, therefore, S.C. Res. 678 would seem to violate article 2 of the U.N. Charter and the norms of international law, if the phrase "all necessary means" were to be interpreted, as the U.S. and

144. See S.C. Res. 678, *supra* note 31.

145. Secretary of State James Baker, in addressing the members of the Security Council, during deliberations on S.C. Res. 678, stated:

Our aim today must be to convince Saddam Hussein that the just and humane demands of this Council, and of the international community, cannot be ignored. If Iraq does not reverse its course peacefully, then other necessary measures, including the use of force, should be authorized. We must put the choice to Saddam Hussein, in unmistakable terms.

*Mideast Tensions*, N.Y. TIMES, Nov. 30, 1990, at A10.

146. This is not the first time in which the U.S. played the dominant role in producing U.N. resolutions allowing it to use force against another state which attempted to retake part of its claimed territory. In 1950, when North Korea invaded South Korea, the U.S., utilizing the unexpected absence of the Soviet Union from the U.N. Security Council, succeeded in obtaining U.N. Security Council authority to use U.S. force in the Korean War, under U.N. flag, terming such use of force "police action." During the Korean War in 1950, the Soviet Union blocked further action by the U.N. Security Council. The U.S., however, succeeded in having the U.N. General Assembly adopt the famous Uniting for Peace Resolution on November 3, 1950, by more than the two-thirds majority required by article 2(3) of the U.N. Charter. See G.A. Res. 377, U.N. GAOR, 5th Sess., Supp. No. 20, at 10-12, U.N. Doc. A/1775 (1954). This resolution allowed the U.S. to conduct military action in Korea under U.N. flag. See also *British Back U.S. on Korea Stand; French Doubt Adequacy of Help*, N.Y. TIMES, June 26, 1950, at A1, where it is reported that the European allies of the U.S. were of the opinion that the U.N. actions in Korea were in fact U.S. actions.

147. U.N. CHARTER art. 2(3).

148. U.N. CHARTER art. 2(4).

149. See SCHWARZENBERGER, *supra* note 65, at 128 - 29.

its coalition partners had obviously already done, to include the use of force or the threat to use force.

It is significant, however, that S.C. Res. 678 had not specifically authorized the use of force. In the past, when the Security Council called for the use of military force to restore international peace, it made its position clear, not ambiguous or subject to interpretation.<sup>150</sup> Yet, had it specifically done so here, that would have been a blatant violation of the U.N. Charter and might even have prompted Soviet and possibly Chinese vetoes. This is because the use of force by individual states is not permitted under Chapter VII of the U.N. Charter. Force under Chapter VII of the U.N. Charter could be used only under a U.N. force, pursuant to articles 46<sup>151</sup> and 47<sup>152</sup> of the U.N. Charter. In this connection, it is important to note that at a very early stage of the crisis the Soviet Union announced that it would only participate in the use of force in the Gulf if all the forces were under U.N. command, pursuant to Chapter VII of the U.N. Charter.<sup>153</sup>

Article 51 of Chapter VII of the U.N. Charter, however, does not

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150. As part of the U.N. response to the North Korean's invasion of the South in 1950, the U.N. Security Council issued several resolutions. See JOSEPH M. SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 1305-11 (3d ed. 1988). In S.C. Res. 84 issued on July 7, 1950, the Security Council recommended that "all [U.N.] Members providing *military forces* and other assistance . . . make such forces . . . available to a unified command." S.C. Res. 84, para. 3, U.N. SCOR, 5th Sess., 476th mtg. (July 7, 1950) *reprinted in* SWEENEY, *id.* at 1307-08 (emphasis added).

151. Article 46 of the U.N. Charter provides: "Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee." U.N. CHARTER art. 46.

152. Article 47 of the U.N. Charter provides:

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

U.N. CHARTER art. 47.

153. See ACCESS, *supra* note 7, at 8. See also Nanda, *supra* note 4, at 440-41.

“impair the inherent right of individual or collective self-defence . . . until the Security Council has taken measures necessary to maintain peace and security . . . .”<sup>154</sup> It is doubtful that the use of force against Iraq could be successfully defended under the provisions of this Chapter VII article. This is because the U.N. Security Council had already taken the “necessary measures to maintain peace and security” by imposing economic and financial sanctions against Iraq,<sup>155</sup> illegal though these sanctions might have been,<sup>156</sup> thus preempting the use of force under the pretext of self-defense. Hence, the use of force by the U.S. and its coalition partners against Iraq, by necessity, has to be characterized as “a first use of force.”<sup>157</sup> It is this “first use of force” which the U.N. Security Council had obviously sought to avoid authorizing. Had it done so, specifically authorizing the use of force by individual members of the U.N. against Iraq, the U.N. Security Council would have been guilty of an unprecedented and flagrant violation of the U.N. Charter.<sup>158</sup>

Despite the clearly conscious decision of the U.N. Security Council to deny individual members of the U.N. specific authority to use force against Iraq,<sup>159</sup> the U.S. and its coalition partners utilized S.C. Res. 678, employed massive air and naval forces and attacked Iraq on January 16, 1991.<sup>160</sup> Such attack was not sanctioned by S.C. Res. 678 and was probably a violation of the U.N. Charter and of the norms of international law.

The attack against Iraq was not sanctioned by the provisions of S.C. Res. 678. This Resolution clearly and deliberately denied individual members of the U.N. specific authority to use force against Iraq, since the U.N. Security Council itself probably felt that it did not have the authority to do so under the circumstances of the conflict.<sup>161</sup> The use of force against Iraq could have been authorized only

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154. Article 51 of the U.N. Charter further provides:

Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

155. See text *supra* part III.B. and accompanying notes.

156. See *id.*

157. See O'Connell, *supra* note 84, at 475, n. 123.

158. See *supra* notes 142-44 and accompanying text.

159. *Id.*

160. See Gordon, *supra* note 33.

161. See *supra* notes 142-44.

under U.N. command and U.N. force, pursuant to article 42<sup>162</sup> of Chapter VII of the U.N. Charter. It is nonetheless significant that in more than forty days of constant and massive air and naval bombardment against Iraq, the U.S. and its coalition partners, who had declared that S.C. Res. 678 authorized them to liberate Kuwait by force, did not use the initial force to liberate Kuwait, but to destroy Iraq.<sup>163</sup>

The attack against Iraq was a violation of the U.N. Charter. Article 2 of the Charter calls on all members of the U.N. to "settle their international disputes by peaceful means" and to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ."<sup>164</sup>

The attack against Iraq was a violation of the norms of international law because the massive use of force by the U.S. and its coalition partners against Iraqi cities, infrastructure, industry and civilians<sup>165</sup> was ample proof that neither a good faith effort to liberate Kuwait, nor a good faith effort to find a solution to the conflict, was the main purpose of the attack. The main purpose of the attack seemed to be the total destruction of Iraq.<sup>166</sup> Hence, there was not the slightest effort on the part of the U.S. and its coalition partners to adhere to the international law doctrine of proportionality.<sup>167</sup> Adherence to this doctrine is usually required when a state or group of states use force under the principle of collective self-defense, which the U.S. and its partners invoked as justification for their attack against Iraq<sup>168</sup> pursuant to article 51 of the U.N. Charter.<sup>169</sup>

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162. See U.N. CHARTER art. 42.

163. See Thomas L. Friedman, *What the United States has Taken on in the Gulf, Besides A War*, N.Y. TIMES, Jan. 20, 1991, § 4. Friedman wrote: "The goal is to render Iraq unable to project power beyond its borders for years to come." *Id.*

164. See U.N. CHARTER art. 2, para. 4.

165. See MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR (1991).

166. See Gordon, *supra* note 33.

167. "Proportionality means putting a stop to the provocation, not taking revenge." See O'Connell, *supra* note 84, at 480. See also Schachter, *supra* note 75, at 1637-38.

168. See Paul Lewis, *U.S. Preparing U.N. Draft on Claims Against Baghdad*, N.Y. TIMES, Nov. 1, 1990, at A12. This is not the first time that the U.S. has invoked the principle of "collective self-defense" to justify a military attack against another state. It used it to justify its campaign against Nicaragua. But by a vote of 12 to 3, the I.C.J. rejected the U.S. claim of collective self-defense and ruled that the U.S. campaign against Nicaragua was an act of aggression in violation of international law. The I.C.J. also ruled that the U.S. trade embargo against Nicaragua was in violation of U.S. obligations under its own Treaty of Friendship, Commerce, and Navigation with Nicaragua. The U.S., however, dismissed the ruling. When Nicaragua went to the U.N. Security Council for a resolution demanding compliance with the I.C.J.'s judgment, the U.S. vetoed the resolution. Nicaragua then appealed to the U.N. General Assembly which passed a resolution by a vote of 94 to 3, with 47 abstentions. The U.S. continued to refuse to abide by the I.C.J.'s decision, however. See JEFFREY LAURENTI, A

The doctrine of proportionality is:

but one specific form of the more general principle of economy in coercion and as a logical corollary of the fundamental community policy against change by destructive modes. Coercion that is grossly in excess of what, in a particular context, may be reasonably required for conservation of values against a particular attack, or that is obviously irrelevant or unrelated to this purpose, itself constitutes an unlawful initiation of coercive or violent change.<sup>170</sup>

#### IV. CONCLUSION

The use of force for the settlement of disputes, even if it is legally defensible, is rarely politically or morally justifiable. It is always risky militarily.

Iraq's use of force to repossess the territory of Kuwait, which belonged to it historically, but which was usurped from it illegally and unjustifiably, was no doubt unwise politically and militarily. It was at best morally doubtful.

Instead of resorting to the use of force to recover its stolen territory, Iraq would have been well advised to submit its claim to Kuwait for arbitration or for adjudication before the International Court of Justice.<sup>171</sup>

The use of force against Iraq by the U.S. and its coalition partners, under color of authority from the U.N. Security Council, has also been unwise. More seriously, however, it has been morally and legally indefensible. It has wreaked near total destruction on Kuwait and Iraq, far exceeding the purported authority which allowed the use of force. Instead of resorting to the use of force, the U.S. and its partners should have utilized the U.N. to find a peaceful solution, in accordance with the U.N. Charter and the norms of international law.

The Iraqi invasion of Kuwait and the international crisis it generated, also demonstrated, regrettably, that the U.N. is a weak interna-

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STRONGER HAND: SHAPING AN AMERICAN AGENDA FOR A MORE EFFECTIVE UNITED NATIONS 25 (1988). However, recently Nicaragua withdrew the case from the ICJ on September 26, 1991. See *Discontinuance by Nicaragua of Case against the United States*, 86 AM. J. INT'L L. 173 (1992).

169. See U.N. CHARTER art. 51.

170. See McDONALD & FELECIANO, *supra* note 128, at 243. See also MALLISON & MALLISON, *supra* note 96.

171. A discussion of an ICJ case between Iraq and Kuwait is beyond the scope of this paper which addresses only advisory opinions. The viability of such a suit will be addressed by the author in a forthcoming paper.

tional body, lacking the strength and resourcefulness to manage serious international conflicts peacefully and responsibly.

The demise of the Cold War in the wake of the Soviet Union's internal economic and political collapse, has further weakened the United Nations. Absent the Cold War, the U.N. is deprived of the tacit but fragile system of checks and balances which was derived from this long-standing polarization of the great powers. By default, the U.S. has become the only military and economic power to guide the course of the U.N.

Practically unchallenged when the Gulf Crisis erupted, the U.S. could not rise to the occasion. Instead, it only managed, through an unprecedented scheme of bribery, coercion and manipulation, to get a series of legally questionable resolutions "adopted" by the U.N. Security Council. These tactics provided political justification for it and for its coalition partners to launch a disproportionately massive and merciless attack against Iraqi cities, infrastructure, industry and civilian population. This infraction was a violation of the U.N. Charter and of the norms of international law and served to undermine the moral and legal stature of the international organization.

A sober, clear-thinking and representative Iraqi government could bring the U.S. and its coalition partners to the International Court of Justice, as Nicaragua has done, to account for the violent destruction of Iraq and for the infliction of starvation and disease upon millions of Iraqi civilians. It is also conceivable that those responsible for this wanton and indiscriminate activity could be charged individually with crimes against humanity. The present Iraqi regime could also be held to account for a series of illegal acts, including the seizure of innocent foreign civilians in Kuwait and in Iraq.