

NOTES

THE SECURITY COUNCIL COMES OF AGE: AN ANALYSIS OF THE INTERNATIONAL LEGAL RESPONSE TO THE IRAQI INVASION OF KUWAIT*

"International law is the law which the wicked do not obey and which the righteous do not enforce."

— Abba Eban.**

I. INTRODUCTION

The Iraqi invasion of Kuwait offered the United Nations Security Council an opportunity to prove to the community of nations that, as an organization charged with the maintenance of international peace and security, it was up to the job. Throughout the latter half of 1990, world attention focused on the banks of the East River, in addition to the Persian Gulf, as the Security Council rose to the occasion and systematically applied the authority granted by the Charter of the United Nations. In a series of twelve resolutions concerning the invasion—commencing with an initial order for withdrawal, continuing with comprehensive sanctions, and concluding with a historic resolution approving the use of military force—the Council demonstrated an ability to confront aggression in both word and deed.

Considering these extraordinary events, it now seems that early reports of the United Nations' demise were perhaps premature, if not exaggerated.¹ The decisive diplomacy that emerged as the Security

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** Former Israeli ambassador to the United States. Statement to Edward R. Murrow on *Person to Person* (NBC television broadcast, Sept. 20, 1957) *quoted in* G. VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 3-4 (3d ed. 1976).

¹ See, e.g., B. BECKER, *IS THE UNITED NATIONS DEAD?* (1969) and S. HAZZARD, *DEFEAT OF AN IDEAL: A STUDY OF THE SELF-DESTRUCTION OF THE UNITED NATIONS* (1973).

Council addressed the events in the Persian Gulf was the latest evidence that the forty-five-year-old organization was determined to fulfill its intended role.² While room may remain to discuss the wisdom of the Security Council's decisions concerning the invasion and annexation of Kuwait, of the Council's right to make those decisions, there should be no doubt.

II. THE INVASION OF KUWAIT

A. *Breach of the Peace*

In the early morning of 2 August 1990, an estimated 120,000 Iraqi troops crossed the border into the neighboring sheikdom of Kuwait.³ Within hours, the invading forces had seized the nation's abundant oil fields, occupied the capital city,⁴ and driven the ruler into exile.⁵

² In recent years the United Nations has been credited with overseeing the withdrawal of Soviet troops from Afghanistan, Cuban troops from Angola, and South African troops from Namibia. In addition, the Organization was responsible for negotiating a cease-fire in the decade-old Iran-Iraq War, monitoring free elections in Nicaragua, disarming the Nicaraguan Contras, and supervising negotiations between the government and Marxist rebels in El Salvador. Moreover, in what would have seemed to be an overly optimistic undertaking a few years ago, plans are underway for United Nations involvement to resolve the conflicts in the Western Sahara, Ethiopia, Haiti, Guatemala, the two Koreas, and Cambodia. Krondacke, *Javier of the U.N.: the Quietly Great Secretary-General*, NEW REPUBLIC, Aug. 13, 1990, at 20.

³ *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. Times, Aug. 2, 1990, § A, at 1, col. 6.

⁴ *Invading Iraqis Seize Kuwait and Its Oil*, N.Y. Times, Aug. 3, 1990, § A, at 1, col. 6. The invaders, led by more than 350 main battle tanks and supported by weapons supplied in large measure by the Soviet Union, France, and the People's Republic of China, quickly overwhelmed the Kuwaiti forces. *Id.*

An examination of the comparative strength of the two nations at the time of the invasion demonstrates the disproportionate advantage of Iraq:

	KUWAIT	IRAQ
Men Under Arms	20,300	1,000,000
Tanks	275	5,500
Towed Artillery	60	3,000
Support Artillery	36	500
Combat Aircraft	36	513
Armed Helicopters	18	160
Naval Vessels	8	38

Iraq's Invasion of Kuwait: Situation in Brief, Wash. Post, Aug. 3, 1990, at A27.

⁵ *Iraqi Invasion Forces Seize Control of Kuwait*, Wash. Post, Aug. 3, 1990, at A1. The Emir of Kuwait, Sheik Jabir al-Ahmed al-Sabah, left the country for Saudi Arabia shortly after Iraqi forces crossed the border. *Id.*

The invasion marked the culmination of two weeks of rapidly deteriorating relations between the two Persian Gulf states.⁶ Iraqi President Saddam Hussein⁷ initially proffered a justification for the invasion that feigned legal merit,⁸ but ultimately announced the annexation of Kuwait.⁹

The global reaction to Iraq's impudent disregard of international law was one of outrage; condemnations were exceptionally swift and

⁶ See *Iraqi Invasion, Step by Step*, N.Y. Times, Aug. 3, 1990, § A, at 9, col. 1. On July 17, 1990, Iraq alleged that Kuwait, along with the United Arab Emirates, was flooding the world oil market by exceeding oil-production quotas, thereby adversely affecting prices. Later, Iraq increased the tensions in the region by accusing Kuwait of stealing \$2.4 billion worth of oil from fields along a disputed border between the two nations as well as intentionally seeking to destroy the Iraqi economy by refusing to forgive \$10 billion in interest free loans made during the Iran-Iraq War. By July 25, 1990, Iraq had called the Kuwaiti foreign minister an American agent, accused the Kuwaiti rulers of taking part in a Zionist plot against Iraq, and threatened Kuwait with invasion. *Iraq and Kuwait: The Joys of Brotherhood*, ECONOMIST, July 28, 1990, at 33 (U.K. ed. at 59). Two days before the invasion, Iraq agreed to send a delegation to Jiddah, Saudi Arabia, to negotiate the dispute with Kuwait. Simultaneously, Iraq massed tanks and troops on Kuwait's border. After one session, the talks broke down and hostilities became imminent. *Iraqi Invasion, Step by Step*, *supra* at 9.

⁷ President Saddam Hussein of Iraq is known throughout the Arab world by his first name, which means "One Who Confronts." He is never referred to in the Arab press as President Hussein, but rather President Saddam. "One Who Confronts," N.Y. Times, Aug. 4, 1990, § 1, at 5, col. 1.

⁸ *Iraqi Army Invades Capital of Kuwait in Fierce Fighting*, *supra* note 3. Saddam maintained that the Kuwaiti government had been overthrown and that the invasion was in response to a request from the interim government of Kuwait. The Kuwaiti Embassy in Washington, however, denied that Kuwait's existing government had been replaced. *Id.*

⁹ *Excerpts from Iraq's Statement on Kuwait*, N.Y. Times, Aug. 9, 1990, § A, at 18, col. 1. The communiqué announced that Iraq had "decided to return the part and branch, Kuwait, to the whole and origin, Iraq, in a comprehensive, eternal and inseparable merger unity." *Id.* President Saddam claimed that "history has proved that Kuwait is part of Iraq." Press Statement of President Saddam Hussein in Baghdad, Iraq (Aug. 8, 1990) (excerpts available from Federal News Service, LEXIS, NEXIS library, Fednew file).

The Iraqi claim to Kuwait was first made in 1932 when Iraq called for Kuwait's annexation based upon the fact that both nations had been part of the Ottoman Empire, the legacy to which Baghdad lays claim. Gaier, *Hussein and the Arabs: A Quest for Identity*, Christian Sci. Monitor, Aug. 17, 1990, at 19. Iraq's proprietary interest was apparent when Britain granted independence to Kuwait in June 1961; Baghdad welcomed its new neighbor by claiming the territory for Iraq. Britain dispatched a expeditionary force in defense of the nation that had been its responsibility under the post World War I mandatory system. A confrontation was avoided when the Arab League recognized Kuwait a month later. By 1963, Iraq also acknowledged Kuwait's right to exist. *Experts Snub "History" Claim*, Newsday, Aug. 9, 1990, News §, at 12 (city ed. at 38).

virtually unanimous.¹⁰ In what would later be viewed as the foundation for international cooperation during the crisis, the Soviet Union and the United States issued an unprecedented joint statement¹¹ which denounced the invasion, urged a worldwide boycott of arms shipments to Iraq, and called for prompt action by the United Nations.¹²

B. Interruption of Economic Relations

The United Nations Security Council,¹³ in a meeting called to order

¹⁰ *Goodbye Kuwait*, *ECONOMIST*, Aug. 4, 1990, at 13 (U.K. ed. at 11). On the day of the invasion, President George Bush issued an order which froze all Iraqi assets in the United States and prohibited exports to and imports from Iraq. Executive Order No. 12,722, 55 Fed. Reg. 31,803 (1990). To protect the property of the legitimate Government of Kuwait from seizure, the President blocked those assets as well. Exec. Order No. 12,723, 55 Fed. Reg. 31,805 (1990); *See also U.S., Three Other Nations Take Steps to Freeze Assets of Kuwaitis*, *Wash. Post*, Aug. 3, 1990, at A25.

In addition to an outcry from the United States and other Western Nations, Iraq met with disapproving pronouncements from the Soviet Union and the People's Republic of China, both longtime allies of and significant arms suppliers to Baghdad. Jordan was the sole nation voicing support for the invasion. *Id.* Even historically neutral Switzerland sided against Iraq. *Switzerland Joining the World*, *ECONOMIST*, Aug. 11, 1990, at 48 (U.K. ed. at 42). For additional discussion of international reaction to the invasion, see *Trade Sanctions Against Baghdad Imposed by European Community*, *N.Y. Times*, Aug. 5, 1990, § 1, at 1, col. 4. *Arab Nations Break Silence, Condemn Iraq*, *Wash. Post*, Aug. 4, 1990, at A13; *Arms Flow to Iraq Halted by Soviets*, *N.Y. Times*, Aug. 3, 1990, § A, at 10, col. 6. *West Europeans Join U.S. in Condemning Invasion*, *N.Y. Times*, Aug. 3, 1990, § A, at 10, col. 2; *Israelis Condemn Baghdad's Strike*, *N.Y. Times*, Aug. 3, 1990, § A, at 10, col. 5.

¹¹ *U.S., Soviets Call for World Cutoff of Arms to Iraq*, *Wash. Post*, Aug. 4, 1990, at A13. United States Secretary of State, James A. Baker III, underscoring the unusual nature of the joint communiqué, acknowledged that in the past both superpowers would have likely viewed such "tragic action" through an "East-West prism." *Moscow Joins U.S. in Criticizing Iraq*, *N.Y. Times*, Aug. 4, 1990, § 1, at 6, col. 1.

¹² *Moscow Joins U.S. in Criticizing Iraq*, *supra* note 11. In their statement, the two nations labeled the Iraqi action as running "counter to the fundamental principles of the U.N. Charter and international law." They called on the United Nations Security Council to "promptly and decisively condemn the brutal and illegal invasion of Kuwait by Iraqi military forces." Joint Statement by Secretary of State Baker and Foreign Minister Shevardnadze, The Telegraph Agency of the Soviet Union (TASS), Aug. 3, 1990 (available on LEXIS, NEXIS library, TASS File).

¹³ The United Nations Security Council is composed of fifteen members. Five are permanent: China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The ten non-permanent members are elected by the General Assembly to serve two-year terms. At the time of the crisis in the Gulf, the non-permanent members of the Security Council were: Canada, Colombia, Côte d'Ivoire, Cuba, Ethiopia, Finland, Malaysia, Romania, Yemen, and Zaire. N.Z. MINISTRY OF EXTERNAL RELATIONS & TRADE, 1990 U.N. HANDBOOK 37-39 (1990).

within hours of the aggression, approved resolution 660 (1990), condemning the invasion and demanding the immediate and unconditional withdrawal of Iraqi forces from Kuwait.¹⁴ On 6 August 1990 the Security Council, responding to Iraq's refusal to withdraw from Kuwait,¹⁵ and invoking the sweeping authority granted by Chapter VII¹⁶ of the Charter of the United Nations for the third time in history,¹⁷ approved resolution 661 (1990) which imposed economic sanctions on Iraq.¹⁸

¹⁴ S.C. Res. 660, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Security Council Resolution 660 was adopted on 2 August 1990 by a vote of fourteen in favor and zero against. One member, Yemen, did not participate in the vote, citing lack of instruction from its government. *The Iraqi Invasion: U.N. Condemns the Invasion with Threat to Punish Iraq*, N.Y. Times, Aug. 3, 1990, § A, at 10, col. 1. The full text of the resolution is contained in Appendix A.

¹⁵ See *supra* note 9 and accompanying text.

¹⁶ Chapter VII is entitled: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. U.N. CHARTER ch. VII.

¹⁷ *Sanctions Against Iraq Mark Only the Third U.N. Imposed Embargo*, Reuter Lib. Rep., Aug. 6, 1990 (available on LEXIS, NEXIS library, Lbyrpt file). Earlier uses of mandatory sanctions under Chapter VII occurred between 1966 and 1977 against the breakaway British colony of Southern Rhodesia (now known as Zimbabwe) and again in 1977 against South Africa. In both cases, the main aim of the sanctions was to prevent certain items from reaching the targeted countries. In the situation, however, the prime objective was to prevent Iraq and occupied Kuwait from exporting oil, the commodity upon which both nations were financially dependent. *Id.*

A significant distinction from earlier sanctions can be drawn in the case of Iraq. Prior to the imposition of sanctions, Iraq was a "state in good standing," while prior U.N. sanctions were against the "outlaw states" of Southern Rhodesia and South Africa. *United Nations Testing New Role in Latest Crisis*, The Boston Globe, Aug. 16, 1990, National/Foreign §, at 2.

In further contrast to the previous impositions of sanctions, which were selective and limited to enumerated goods, the sanctions against Iraq were absolute. For background on the earlier use of sanctions by the Security Council, see Note, *U.N. Application of Selective, Mandatory Sanctions Against Rhodesia: A Brief Legal and Political Analysis*, 7 VA. J. INT'L L. 147 (1967) (providing a detailed discussion of the particulars of the Southern Rhodesian sanctions) and Comment, *Sanctions and South Africa*, 19 HARV. INT'L L. J. 887 (1978) (providing an overview of the U.N. sanctions imposed on South Africa).

Finally, on two occasions—the Arab-Israeli War of 1948 and the Iran-Iraq War of 1980—the Security Council threatened sanctions against both sides of the conflicts unless a cease fire was agreed to; in both cases, fighting ended before any trade restrictions were imposed. *The Iraqi Invasion: U.N. Expected to Approve Iraq and Kuwait Trade Ban*, N.Y. Times, Aug. 6, 1990, § A, at 6, col. 1.

¹⁸ S.C. Res. 661, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). For the text of the resolution, see Appendix B.

The sanctions prohibited member states of the United Nations from buying oil from either Iraq or Kuwait,¹⁹ and restricted all financial and commercial dealings except those directly related to humanitarian aid. The Security Council conditioned the duration of the sanctions only upon the withdrawal of Iraqi troops and the restoration of Kuwait's legitimate government.²⁰ The resolution, legally binding upon all members of the United Nations,²¹ passed by a vote of thirteen to zero, with Cuba and Yemen abstaining.²²

Two days later, Iraq defied the Council's directive by announcing it had formally annexed Kuwait.²³ The Council unanimously declared this action null and void.²⁴ Resolution 664 (1990), the fourth passed during the crisis, demanding that Iraq permit the departure of foreign nationals from Iraq and Kuwait and condemning Iraq's order to close diplomatic missions in Kuwait,²⁵ also passed without objection.²⁶

The rapid response by the Security Council²⁷ in addressing the invasion of Kuwait immediately raised hopes the Security Council was returning to the role intended by its founders.²⁸ In a textbook

¹⁹ Prior to the invasion, Iraq was heavily dependent on the export of oil. Recent estimates ran as high as 99% of all commodity exports. LIBRARY OF CONGRESS, FED. RESEARCH DIV., AREA HANDBOOK SERIES NO. 550-31, IRAQ: A COUNTRY STUDY 142 (1990). Experts on Middle East oil issues agreed that the goal of increased revenues from oil exports figured heavily into Iraq's decision to invade Kuwait. *Overnight, Iraq is OPEC's Most Important Member*, Aug. 3, 1990, Wash. Post, at A27.

²⁰ *Security Council Votes 13 to 0 to Block Trade with Baghdad*, N.Y. Times, Aug. 7, 1990, § A, at 1, col. 6.

²¹ See *infra* note 113 & note 114 and accompanying text. See generally J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969).

²² *U.N. Security Council Votes Embargo on Iraq*, Wash. Post, Aug. 7, 1990, at A1. The indecision on the part of Yemen, the only Arab member of the Security Council and close ally of Iraq, revealed the disagreement among Arab states over whether to confront or support Iraq. *Id.*

²³ See *supra* note 9 and accompanying text.

²⁴ S.C. Res. 662, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). See also *U.N. Council Declares Void Iraqi Annexation of Kuwait*, N.Y. Times, Aug. 10, 1990, § A, at 11, col. 1. For the text of the resolution, see Appendix C.

²⁵ *Kuwait: The Crisis*, U.N. MONTHLY CHRON., Dec. 1991, at 4, 15.

²⁶ S.C. Res. 664, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Resolution 664 (1990) concerned, *inter alia*, the nationals of third countries in Iraq and Kuwait as well as diplomatic missions in Kuwait. Adopted by unanimous vote of the Security Council at its 2937th meeting on 18 August 1990. *The United Nations: Security Council Resolutions Concerning Iraqi Aggression*, 29 INT'L LEGAL MAT. 1323, 1323 n.* (1990) [hereinafter *Security Council Resolutions*]. For the text of the resolution, see Appendix D.

²⁷ The Security Council, in the meeting convened at 5:00 a.m., Eastern Daylight

example of international cooperation,²⁹ the Security Council quickly coordinated a clear condemnation of the Iraqi onslaught into Kuwait.³⁰

Conspicuously absent was the customary rivalry between the Soviet Union and United States. At the time of Iraq's invasion, the two superpowers were enjoying a post-Cold War comity, having overcome forty-five years of mistrust which had derailed previous attempts by the Security Council to check acts of aggression.³¹

Notwithstanding the unprecedented unity, the initial consensus was ephemeral, quickly showing signs of dissension. Disagreement developed over the exact implications of the Security Council resolutions, as well as the precise limitations upon a member of the United Nations in enforcing the Chapter VII sanctions.³²

The dispute centered on two interpretations of the United Nations Charter. The United States cited a request from the Emir of Kuwait, the Security Council resolutions, and Article 51 of the Charter,³³ as providing the legal justification for a unilateral decision to enforce sanctions by intercepting ships on the high seas suspected of violating resolution 661 (1990).³⁴

Time, took one hour to produce resolution 660 (1990), condemning the Iraqi invasion. *Goodbye Kuwait*, *supra* note 10.

²⁸ *Action on Gulf Raises Hopes U.N. Will Return to Intended Path*, Reuter, Aug. 7, 1990 (available on LEXIS, NEXIS library, Reuter file) (quoting "one prominent ambassador" as predicting, "[t]he U.N. now has a reasonable chance of going back to what was originally planned for it, if the great powers agree.").

²⁹ Jeffery Laurenti of the United Nations Association stated in an interview, "This is the classic kind of aggression that the U.N. Charter was written to prevent: State A attacks State B with no messy domestic complications. Now that we have an end to the Stalin-era vision that paralyzed the Security Council, the entire world can be marshalled against [the aggressor]." *United Nations Testing New Role in Latest Crisis*, *supra* note 17, at 2.

³⁰ In stark contrast, when Iraq invaded Iran in 1980, the Security Council merely called for a cease-fire, failing to demand the withdrawal of Iraqi forces. *Security Council Chance to Fulfill Intended Role*, *The Times* (London), Aug. 6, 1990, *Overseas News* §, at 2.

³¹ For example, in 1989 the United States vetoed an attempt to condemn its invasion of Panama. A decade earlier, the Soviet Union cast its own veto when the Security Council addressed the invasion of Afghanistan. *Speedy Condemnation of Invasion Shows New U.N. Strength*, *The Independent*, Aug. 3, 1990, at 9.

³² *Security Council's Rare Unity May Be Threatened Over U.S. Warships in the Gulf*, *N.Y. Times*, Aug. 11, 1990, § 1, at 7, col. 2.

³³ Article 51 provides for the inherent right of individual or collective self defense while waiting for Security Council action. See *infra* note 195 and accompanying text.

³⁴ *Transcript of U.S. Statement About Measures Against Iraq*, *N.Y. Times*, Aug. 13, 1990, § A, at 11, col. 1. Secretary of State Baker explained:

The other Council members held one of several differing positions, all variations on the same theme: only the Security Council, through additional and explicit resolutions, can authorize additional measures.³⁵ Startled by the United States' announcement, they asserted that an impatient Bush Administration was imposing a blockade,³⁶

Sec. Baker: The Government of Kuwait—the legitimate Government of Kuwait—has just requested of us and of other nations support for enforcement of the U.N. economic sanctions. In other words, they've made the formal request now that is needed under Article 51 of the United Nations [C]harter for the United States and other Countries to have a legal basis for stopping the . . . export of oil and that sort of thing.

This Week with David Brinkley: An Interview with Secretary of State James A. Baker III (ABC Television Broadcast, Aug. 12, 1990) (transcript available from Federal News Service, LEXIS, NEXIS library, Fednew file).

³⁵ *Don't Lose the Consensus*, Fin. Times, Aug. 15, 1990, § I, at 14. The Secretary-General of the United Nations, Javier Pérez de Cuéllar, warned the United States against unilateral action: "Any intervention, whatever the country, would not be in accordance with either the letter or the spirit of the United Nations Charter." *U.N. Chief Argues Blockade is Hasty*, N.Y. Times, Aug. 17, 1990, § A, at 12, col. 1.

³⁶ The United States, however, denied a "blockade" was planned, insisting the proper word was "interdiction." *And Now the "B Word" (Do Not Say Blockade)*, N.Y. Times, Aug. 13, 1990, § A, at 8, col. 1. For examples of the double-speak involved, compare *This Week with David Brinkley: An Interview with Secretary of State James A. Baker III*, *supra* note 34 (Sec. Baker repeatedly avoids the term "blockade", preferring the term "interdiction" instead.) with White House Briefing from Marlin Fitzwater, (Office of the Press Secretary, Kennebunkport, ME, Aug. 17, 1990) (transcript available from the Federal News Service, LEXIS, NEXIS library, Fednew file.). The relevant excerpt of the briefing reads as follows:

Mr. Fitzwater: We obviously believe that Article 51 authorizes our intercept activities

Questioner: Why the word "intercept" instead of the word you had been using, "interdict"?

Mr. Fitzwater: It just turns out that semantics is an interesting exercise for the government as well as the press, and that the word they chose as being the most descriptive of what we're actually doing, which is to say intercepting ships, seeing what kind of cargo they have if they're not willing to turn away, and if they violate the UN sanctions, then ask them to turn away.

Questioner: Is [intercept] a more military term or less military term than interdict? (Laughter.) If somebody asked you, is it closer to the "B" [blockade] word?

Mr. Fitzwater: I don't know.

Id.

A credible rationale for precision in the word choice is that the United States desired to avoid the terminology of war; language with legal meaning in both the international and the domestic arena. Internationally, a *blockade* would require the establishment of special courts to change vessel and property titles. Domestically, the word could be used by Members of Congress to force the President into compliance with the War Powers Act of 1973. *Why the Word Blockade Won't Pass U.S. Lips*, Boston Globe, Aug. 14, 1990, National §, at 3. Both the international

creating a tenuous legal justification, and disregarding the systematic procedure for such actions set forth in the Charter.³⁷

Given that creatively expansive interpretations of the United Nations Charter were not new for the United States,³⁸ as well as its prior history of broad applications of the inherent right of self-defense in the Western Hemisphere,³⁹ it was not surprising that the United States was ready to move more quickly than others.⁴⁰ It was clear, however, that such action by the United States risked alienating its allies, and thereby the Security Council.⁴¹

and domestic implications of the legal meaning of *blockade* are beyond the scope of this writing. For an analysis of the former, see Comment, *The Case for Legitimate Interdiction of Commerce During Peacetime*, 10 GEO. MASON U. L. REV. 191 (1987). For an examination of the latter, see Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988).

³⁷ *Putting Teeth in an Embargo: How the U.S. Convinced the U.N.*, N.Y. Times, Aug. 30, 1990, § A, at 1, col. 4. The Canadian representative to the United Nations cautioned the United States against unilateral action, noting "there are no precedents, so why not play it as the framers of the Charter had envisioned it." *Id.*

³⁸ At times the United States developed creative arguments to justify a particular viewpoint. For an examination of the logic behind the United States' position on the mandate of the Security Council relevant to four decisions by the International Court of Justice that make up what is commonly referred to as the Nicaragua Case, i.e., *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Judgement on the Merits, June 27, 1986); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Judgement of Nov. 26 on Jurisdiction and Admissibility); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 215 (Declaration of Intervention, Order of Oct. 4); and *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 169 (Provisional Measures, Order of May 10), see Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1453-69 (1985).

³⁹ *Scholars Question U.S. Interdiction*, Newsday, Aug. 15, 1990, News §, at 2. For example, the United States claimed to be exercising the right of self-defense when it invaded Panama in December of 1989. *Excerpts from Statement by Baker on U.S. Policy*, N.Y. Times, Dec. 21, 1989, § A, at 19, col. 3. See also *Deal is Reached at U.N. on Panama Seat as Invasion is Condemned*, N.Y. Times, § 1, at 6, col. 1.

⁴⁰ Within days of the invasion, the waters of the Persian Gulf and the desert of Saudi Arabia were transformed into war zones as the United States deployed air, land, and sea forces to check further Iraqi aggression in the region. *Bush Sends U.S. Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, N.Y. Times, Aug. 8, 1990, § A, at 1, col. 6. Although there were strong indications that the United States was ready, willing, and able to enforce the various Security Council resolutions, the Bush Administration acknowledged the unprecedented international cooperation in the matter and encouraged its continuation. *U.S. Is Ready to Ask Soviets to Help with Naval Blockade of Iraq*, N.Y. Times, Aug. 8, 1990, § A, at 8, col. 1.

⁴¹ *Security Council's Rare Unity May Be Threatened Over U.S. Warships in the Gulf*, *supra* note 32.

C. *Actions By Air, Sea, or Land Forces*

The controversy over the legality of unilateral enforcement of mandatory sanctions would remain unsettled. On 25 August 1990 the question became moot when the Security Council passed resolution 665 (1990), which authorized military action to halt maritime trade with Iraq.⁴² Such approval is rare: of the two prior occasions when the United Nations imposed sanctions,⁴³ only in the case of Southern Rhodesia did the Security Council authorize military enforcement.⁴⁴

⁴² S.C. Res. 665, 45 U.N. SCOR (2938th mtg.) (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Resolution 665 (1990) related, *inter alia*, to measures aimed at the implementation of resolution 661 (1990). Adopted on 25 August 1990 by a vote of thirteen in favor, zero against. Two nations—Cuba and Yemen—abstained. *Security Council Resolutions*, *supra* note 26. For the text of the resolution, see Appendix D.

⁴³ See *supra* note 17. For the text of the prior resolutions imposing sanctions on South Africa see S.C. Res. 418, 32 U.N. SCOR (Resolutions and Decisions of the Security Council) at 5-6, U.N. Doc. S/INF/33 (1977) (imposing a mandatory arms embargo on South Africa). For the text of the various resolutions addressing the situation in Southern Rhodesia and imposing gradually more restrictive trade sanctions see the following resolutions, cited in chronological order to convey the trend in the Security Council: S.C. Res. 217, 20 U.N. SCOR (Resolutions and Decisions of the Security Council) at 8-9, U.N. Doc. S/INF/20/Rev.I (1965) (imposing voluntary embargo on oil and oil products); S.C. Res. 221, 21 U.N. SCOR (Resolutions and Decisions of the Security Council) at 5-6, U.N. Doc. S/INF/21/Rev.I (1966) (declaring Southern Rhodesia a threat to international security and providing for the use of force if necessary to enforce resolution 217 (1965)); S.C. Res. 232, 21 U.N. SCOR (Resolutions and Decisions of the Security Council) at 7-9, U.N. Doc. S/INF/21/Rev.I (1966) (imposing mandatory economic sanctions under Article 41 of the U.N. Charter); S.C. Res. 253, 23 U.N. SCOR (Resolutions and Decisions of the Security Council) at 5-7, U.N. Doc. S/INF/23/Rev.I (1968) (establishing a monitoring committee, ordering further trade restrictions, and declaring illegality of Southern Rhodesian passports); S.C. Res. 277, 25 U.N. SCOR (Resolutions and Decisions of the Security Council) at 5-6, U.N. Doc. S/INF/26 (1970) (ordering severance of all, e.g., diplomatic, trade, consular, military, etc., relations with Southern Rhodesia and banning all travel to and from the nation); S.C. Res. 318, 27 U.N. SCOR (Resolutions and Decisions of the Security Council) at 8, U.N. Doc. S/INF/28 (1972) (expanding the sanctions monitoring committee's powers); S.C. Res. 333, 28 U.N. SCOR (Resolutions and Decisions of the Security Council) at 14, U.N. Doc. S/INF/29 (1973) (calling for the termination of insurance on passengers and freight bound for or originating from Southern Rhodesia); S.C. Res. 388, 29 U.N. SCOR (Resolutions and Decisions of the Security Council) at 6, U.N. Doc. S/INF/30 (1974) (expanding insurance embargo established by S.C. Res. 333 (1973)); S.C. Res. 409, 32 U.N. SCOR (Resolutions and Decisions of the Security Council) at 8, U.N. Doc. S/INF/33 (1977) (prohibition on funding of foreign Southern Rhodesian agencies).

⁴⁴ When the British colony of Southern Rhodesia made its unilateral declaration of independence and established a racist government, the British government enlisted the help of the United Nations to force Southern Rhodesia to adopt majority rule.

Over a two week period in September, the Security Council approved three additional resolutions. With resolution 666 (1990),⁴⁵ the Council addressed the potential humanitarian needs created by the imposition of sanctions and instructed the Secretary-General to collect information on such situations.⁴⁶ Next, responding to reports that Iraqi troops had entered the embassy of France and other countries in Kuwait, the Council unanimously approved resolution 667 (1990),⁴⁷ which demanded the protection of all diplomatic and consular personnel.⁴⁸ An eighth Council action, resolution 669 (1990),⁴⁹ delegated to the Sanctions Committee primary responsibility for examining requests for relief from those nations facing economic hardship in carrying out the sanctions against Iraq.⁵⁰

The sanctions, while taking their toll, were by no means airtight, and concern grew that Iraq could construct a network of airlifts to

The result was a series of Security Council resolutions designed to isolate Southern Rhodesia among nations, beginning with resolution 217 (1965), *supra* note 43, instituting an embargo of oil.

In May of 1966, Britain suspected a particular tanker, the *Joanna V*, of continuing deliveries of oil to Southern Rhodesia, and asked the Security Council for authorization to use force to ensure international compliance with resolution 217 (1965). The Security Council responded with resolution 221 (1966), *supra* note 43, permitting the selective use of force to prevent the arrival of tankers as well an explicit authorization for the detention of the *Joanna V* if she was found to have delivered her oil. *Record of the Month*, U.N. MONTHLY CHRON., May 1966, at 3. *See generally*, J. NKALA, *THE UNITED NATIONS, INTERNATIONAL LAW, AND THE RHODESIAN INDEPENDENCE CRISIS* (1985).

⁴⁵ S.C. Res. 666, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Resolution 666 (1990) related, *inter alia*, the determination of humanitarian circumstances referred to in resolution 660 (1990). Adopted at the 2939th meeting of the Security Council on 13 September 1990 by a vote of thirteen in favor and two against, Cuba and Yemen opposed. *Security Council Resolutions*, *supra* note 26. For the text of the resolution, see Appendix F.

⁴⁶ *Kuwait: The Crisis*, *supra* note 25, at 18.

⁴⁷ S.C. Res. 667, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Resolution 667 (1990) related, *inter alia*, diplomatic personnel and premises. Adopted by unanimous vote of the Security Council at its 2940th meeting on 16 September 1990. *Security Council Resolutions*, *supra* note 26. For the text of the resolution, see Appendix G.

⁴⁸ *Kuwait: The Crisis*, *supra* note 25, at 18.

⁴⁹ S.C. Res. 669, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Resolution 669 (1990) related, *inter alia*, to requests for assistance from nations experiencing economic difficulty in carrying out resolution 661 (1990) as provided by Article 50. Adopted by unanimous vote of the Security Council at its 2942nd on 24 September 1990. *Security Council Resolutions*, *supra* note 26. For the text of the resolution, see Appendix H.

⁵⁰ *Kuwait: The Crisis*, *supra* note 25, at 20.

lessen the impact of the embargo on its economy.⁵¹ To address such possibilities, and to quash contentions that the sanctions mandated by resolution 661 (1990) were not absolute,⁵² the Security Council approved resolution 670 (1990) and gradually tightened the economic isolation of Iraq.⁵³ The resolution called on countries to cooperate in preventing violations of the embargo, but to do so in accordance with the Chicago Convention⁵⁴ governing civil aviation.⁵⁵ The meeting that produced resolution 670 (1990) was attended by the Foreign Ministers of thirteen of its fifteen members, including all five permanent members, underscoring the determination of the world community.⁵⁶

Repeated refusal by Iraq to comply with the orders to withdraw compelled the approval of resolution 674 (1990),⁵⁷ adopted on 29 October 1990. This resolution cautioned the Iraqis that continued disregard of the Security Council's directives would result in additional action under the Charter.⁵⁸ The resolution also asked countries to document human rights violations and economic damage resulting

⁵¹ See, e.g., *Loophole in the Skies*, ECONOMIST, Sept. 8, 1990, at 46 (U.K. ed. at 88).

⁵² *U.N. Near Accord to Assure Cutoff of Iraqi Air Links*, N.Y. Times, Sept. 20, 1990, § A, at 1, col. 6.

⁵³ S.C. Res. 670, 45 U.N. SCOR (2943d mtg.) (Resolutions and Decisions of the Security Council) para. 13, U.N. Doc. S/RES/670/2943 (1990). Resolution 670 related, *inter alia*, the applicability of sanctions to all means of transport, including aircraft. Adopted by the Security Council at its 2943rd meeting on 25 September 1990 by a vote of fourteen in favor, Cuba against. *Security Council Resolutions*, *supra* note 26. For the text of the resolution, see Appendix I.

⁵⁴ Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

⁵⁵ *U.N. Near Accord to Assure Cutoff of Iraqi Air Links*, *supra* note 52. This meant that while a country could intercept an aircraft and request that it land for inspection, it could not shoot the aircraft down, as this is explicitly forbidden by the Chicago Convention. *Id.*

⁵⁶ *Kuwait: The Crisis*, *supra* note 25, at 21.

⁵⁷ S.C. Res. 674, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Resolution 674 related, *inter alia*, the situation of Kuwaiti and third-state nationals in Iraq and Kuwait, to further measures in the event of Iraqi non-compliance with Security Council resolutions, and to the good offices of the Secretary-General. Adopted by the Security Council at its 2951st meeting on 29 October 1990 by a vote of thirteen in favor and zero against, Cuba and Yemen abstaining. *Mideast Tensions: Text of Security Council Resolution*, N.Y. Times, Oct. 30, 1990, § A, at 12, col. 4. For the text of the resolution, see Appendix J.

⁵⁸ *U.N. Council Holds the Iraqis Liable on Kuwait Damage*, N.Y. Times, Oct. 30, 1990, § A, at 1, col. 6.

from the invasion of Kuwait.⁵⁹ An eleventh Council action, resolution 677 (1990),⁶⁰ addressed allegations that Iraq was attempting to repopulate Kuwait with its own citizens.⁶¹ The resolution instructed the Secretary-General to take possession of population records, smuggled out of Kuwait immediately after the invasion.⁶²

On 29 November 1990, after continued Iraqi disregard for the United Nations' demand of immediate withdrawal from Kuwait, the Security Council invoked the ultimate authority of Chapter VII and approved resolution 678 (1990),⁶³ authorizing the use of force to expel Iraq from Kuwait if President Saddam Hussein had not removed his forces by 15 January 1991. The vote marked the second time that the Security Council had exercised its power to approve the use of force to counter aggression.⁶⁴ To reemphasize the resolve of the Council, all but two of the members were represented by their Foreign Ministers.⁶⁵

⁵⁹ *Id.*

⁶⁰ S.C. Res. 677, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Resolution 677 (1990) related, *inter alia*, the population files of Kuwait. Adopted by unanimous vote of the Security Council at its 2962nd meeting on 28 November 1990. For the text of the resolution, see Appendix K.

S.C. Res. 678, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990). Resolution 678 (1990) related, *inter alia*, to the authorization members of the United Nations to use "all necessary means" to fully implement related Security Council resolutions absent an Iraqi indication to do so prior to 15 January 1991. Adopted by the Security Council at its 2963rd meeting on 29 November 1990 by a vote of twelve in favor, two against (Cuba and Yemen), and one abstention (China). *The United Nations: Security Council Resolutions Concerning Iraqi Aggression*, 29 Int'l Legal Mat. 1560 (1990). The text of the resolution is contained in Appendix L.

⁶¹ *Security Council Plans Resolution of Kuwaiti Population Files*, Reuter Lib. Rep., Nov. 28, 1990 (available on LEXIS, NEXIS library, Lbyrpt file).

⁶² *Id.*

⁶³ See *supra* note 60.

⁶⁴ *U.N. Gives Iraq Until Jan. 15 to Retreat of Face Force; Hussein Says He Will Fight*, N.Y. Times, Nov. 30, 1990, § A, at 1, col. 6. The first instance was in 1950 when the Security Council adopted a resolution endorsing force to repel the North Korean invasion of South Korea. For an overview of that resolution and subsequent action by the General Assembly, see generally Reicher, *The Uniting for Peace Resolution on the Thirtieth Anniversary of Its Passage*, 20 COLUM. J. TRANSNAT'L L. 1 (1981). For relevant portions of the debates see L. SOHN, CASES ON UNITED NATIONS LAW 491-509 (2d ed. 1967).

⁶⁵ *U.N. Gives Iraq Until Jan. 15 to Retreat of Face Force; Hussein Says He Will Fight*, *supra* note 64. As the United States held the Council's rotating Presidency at the time, Secretary of State James A. Baker III presided over the dramatic meeting. *Id.* Thirteen Foreign Ministers also attended the Council meeting that approved resolution 670 (1990). See *supra* text accompanying note 56.

While the resolution provided for a forty-seven day pause of good will, the resolve of the Council to meet the threat to peace caused by the invasion of Kuwait was clear. The resolution made no explicit authorization of military force; rather, it empowered members "to use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."⁶⁶

The six-week period provided for by the resolution featured intensive diplomacy which reached a crescendo as the deadline neared. All efforts proved futile, however, as each and every initiative failed to persuade Iraq to comply with the resolutions.⁶⁷ At a late night meeting held 16 January 1991, the United States, Britain, and France informed the other members of the Security Council that, based on the authority granted by resolution 678 (1990), military action against Iraq had begun.⁶⁸

The invasion and annexation of Kuwait evoked an unparalleled response from the community of nations. Through a series of resolutions that methodically navigated the uncharted waters of Chapter VII, the Council established that aggressive war, as condemned by the United Nations Charter, cannot be waged with impunity.

III. LEGAL BACKGROUND OF THE COLLECTIVE USE OF FORCE

A. *Sources of International Law Concerning the Use of Force*

International law derives from several sources; primary among these are treaty and custom.⁶⁹ While it was once held that nations, like

⁶⁶ S.C. Res. 678, *supra* note 63, operative para. 2.

⁶⁷ On 9 January 1991, the Foreign Minister Tariq Aziz of Iraq and Secretary of State James A. Baker III of the United States met in Geneva, Switzerland. After six and one-half hours of talks, both men reported that Iraq was unwilling to implement the Security Council Resolutions. On 13 January 1991, the Secretary-General of the United Nations went to Baghdad, but failed to obtain any concessions from Iraq. *Excerpts from U.S. Report of Its Attempts to Avoid War*, N.Y. Times, Jan. 17, 1991, § A, at 16, col. 5. An initiative by France to reach a negotiated end to the crisis was similarly ignored by Baghdad. *Paris Says Its Last-Ditch Peace Effort Has Failed*, N.Y. Times, Jan. 16, 1991, § A, at 13, col. 4. Hours before the deadline passed, a final plea for Iraqi compliance was made by the Secretary-General, speaking for himself, after the Security Council failed to agree on a final message of its own. *Last-Minute Debating, Then Final Plea to Iraq*, N.Y. Times, Jan. 16, 1991, § A, at 13, col. 1.

⁶⁸ *Allies Tell U.N. Security Council of Attack*, N.Y. Times, Jan. 17, 1991, § A, at 17, col. 1.

⁶⁹ STATUTE I.C.J. art. 38, para 1. This provision is commonly treated as an

individuals, were subject to a preexisting code, i.e., "the Laws of Nature, and of Nature's God,"⁷⁰ in current practice, international law has for the most part become what modern nations have agreed to in writing.⁷¹ In theory, such international agreements only create obligations between those nations that are the contracting parties.⁷² Multilateral agreements, however, to the extent that a large number of states actually accept their provisions as binding, can be viewed as a general source of international law.⁷³

B. *The Use of Force in Traditional International Law*

War is conflict among states carried on by their armed forces⁷⁴ and can exist regardless of a formal declaration.⁷⁵ Under traditional international law, the ritual of war was an inherent function of the

authoritative statement of the sources of international law. Along with "international conventions" and "international custom," Article 38 includes in its listing "general principles of law recognized by civilized nations," as well as "judicial decisions and the teachings of the most highly qualified publicists." *Id.* See also RESTATEMENT (THIRD), RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986) [hereinafter RESTATEMENT (THIRD)]. See generally L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 36 (2d ed. 1987) [hereinafter L. HENKIN]; 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 25 (H. Lauterpacht, 8th ed. 1955); G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 32 (5th ed. 1967); G. VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW (3d. ed. 1976).

With respect to the primacy of treaties and custom over the other sources delineated, e.g., domestic and international judicial decisions or scholarly writings, while it is true that each of these sources have contributed to the evolution of international law, rules from such sources do not become general international law until they are accepted by the community of nations, presumably through either custom or treaty. Riggs, *The United Nations and the Development of International Law*, 1985 B.Y.U. L. REV. 411, 414 n.9 (1985).

⁷⁰ The Declaration of Independence para. 1 (U.S. 1776).

⁷¹ D. MOYNIHAN, ON THE LAW OF NATIONS 9 (1990). See also G. VON GLAHN, *supra* note 69, at 11 (noting that "[i]n contrast to commentaries of a hundred years ago, treaties are now generally accepted as a major (and by some the major) source of international law.").

⁷² RESTATEMENT (THIRD), *supra* note 69, § 102 comment f.

⁷³ T. BUERGENTHAL & H. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 25 (2d ed. 1990).

⁷⁴ D. ZIEGLER, WAR, PEACE, AND INTERNATIONAL POLITICS 2, (2d ed. 1981)

⁷⁵ R. BLEDSOE & B. BOCZEK, THE INTERNATIONAL LAW DICTIONARY, 343 (1987). Traditionally, the declaration of war was evidence that a state of war existed. In modern times, however, *de facto* wars have occurred in the absence of a formal declaration: the Korean War, The Suez conflict of 1956, the Sino-Indian border war of 1962, the Indo-Pakistani clashes of 1965 and 1971, the Sino-Vietnamese border war in 1979, the Falkland War in 1982, and the Iran-Iraq war can all be cited as examples. *Id.* at 344.

state and a prerogative of its unfettered sovereignty.⁷⁶ The right to go to war was not only considered acceptable behavior by a sovereign nation, but a defining characteristic as well.⁷⁷

Nations were entitled to resort to war either as a means of self-help in enforcing an existing or alleged claim based on international law, or as a justifiable means of altering existing rules of international law in the name of national interest, regardless of the objective merits.⁷⁸ The latter use of war seemed particularly defensible when viewed in light of the absence of formal organizations of international legislation.⁷⁹ War waged for either purpose was not considered illegal under traditional international law.⁸⁰ Not until the twentieth century was the perceived legality of war to undergo fundamental change.⁸¹

C. Early Efforts to Discourage or Outlaw the Use of Force

The Hague Conference of 1899 and the Second Hague Conference of 1907 were the first formal attempts to limit the use of war as a justified instrument of foreign policy and an accepted method of changing the rule of law.⁸² The resulting agreement⁸³ restricted the use of force in the recovery of debts, and while limited in scope, was the first treaty to delimit the heretofore uncontrolled sovereignty of states.⁸⁴

The creation of the League of Nations, an international organization committed to the preservation of peace, realized a long sought goal of many legal scholars.⁸⁵ The League aimed "to promote international co-operation and to achieve international peace and security."⁸⁶ The Covenant of the League of Nations did not purport to prohibit war; rather, the League's members agreed not to resort to war against a member who complied with the requirements of the Covenant re-

⁷⁶ 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 178 (H. Lauterpacht, 7th ed. 1952).

⁷⁷ "To declare war is the one of the highest acts of sovereignty." Letter from Secretary of State Robert Lansing to President Woodrow Wilson (August 16, 1919), reprinted in H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 5, n.1 (1947).

⁷⁸ 2 OPPENHEIM, *supra* note 76, at 177.

⁷⁹ VON GLAHN, *supra* note 69, at 518.

⁸⁰ 2 OPPENHEIM, *supra* note 76, at 178.

⁸¹ L. BLED SOE & B. BOCZEK, *supra* note 75, at 345.

⁸² VON GLAHN, *supra* note 69, at 518.

⁸³ Hague Convention II of 1907, 36 Stat. 2241, T.S. No. 537, 205 Parry's T.S. 250.

⁸⁴ VON GLAHN, *supra* note 69, at 518.

⁸⁵ BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 15 (1963).

⁸⁶ LEAGUE OF NATIONS COVENANT preamble.

garding the pacific settlement of disputes.⁸⁷ A state violating the provisions for the pacific settlement of disputes was deemed to have committed an act of war against the other members of the League who were then obligated to apply economic sanctions.⁸⁸ The question of whether a provision had been violated, however, was left to the determination of each individual member. A military response to an act of aggression could be recommended, but the decision on whether to accept, and how to implement, such a recommendation rested with each member.⁸⁹

The system of collective security as conceived in the Covenant was not unworkable.⁹⁰ The decisive test came when Italy invaded Ethiopia in 1934.⁹¹ The failure of the Covenant to provide for centralized implementation and enforcement,⁹² coupled with reluctance of its members to enforce the recommended sanctions, contributed to the demise of the League.⁹³

⁸⁷ BOWETT, *supra* note 85, at 16

⁸⁸ The relevant passage reads:

ARTICLE 16(1) Should any Member of the League resort to war in disregard of its covenants under Article 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking state and the nationals of any other state, whether a Member of the League or not.

LEAGUE OF NATIONS COVENANT art. 16, para. 1. A detailed discussion on how the Article 16 mandatory sanctions mechanism functioned is found in M. DOXEY, ECONOMIC SANCTIONS AND ECONOMIC ENFORCEMENT 6-8 (1971) [hereinafter DOXEY, ENFORCEMENT].

⁸⁹ BOWETT, *supra* note 85, at 16.

⁹⁰ *Id.* In 1925 the League settled a border dispute between Greece and Bulgaria. Greek troops had invaded Bulgaria and were shelling a Bulgarian city when the League ordered the Greeks to withdraw or face a naval blockade. The Greeks eventually withdrew and paid reparations to Bulgaria. The League is credited with averting a full scale war between the two nations. See generally J. BARROS, THE LEAGUE OF NATIONS AND THE GREAT POWERS: THE GREEK-BULGARIAN CRISIS, 1925 (1970).

⁹¹ L. HENKIN, *supra* note 69, at 670.

⁹² While the implementation of the sanctions was collective, actual enforcement was left in the hands of the Member States. P. KUYPER, THE IMPLEMENTATION OF INTERNATIONAL SANCTIONS 3 (1978), cited in Note, *Economic Sanctions: An Effective Alternative to Military Coercion?*, 6 BROOKLYN J. INT'L L. 289, 292 n.10 (1980).

⁹³ L. HENKIN, *supra* note 69. In December 1942, Italian and Ethiopian forces engaged in border skirmishes near Italian Somaliland. Ethiopia appealed to the League to implement Article 16, but the League deferred to arbitrators. These

The General Treaty for the Renunciation of War (Kellogg-Briand Pact or Pact of Paris)⁹⁴ broadened the League's partial ban on war.⁹⁵ The Pact prohibited recourse to war as a means of resolving international controversies and renounced the use of war as an instrument of foreign policy.⁹⁶ Under its terms, resort to war was lawful only in circumstances justifying self-defense and as an instrument of collective response to restrain an aggressor.⁹⁷

The Pact failed, however, to establish any means of enforcement.⁹⁸ While it can be argued that the absence of such provisions did not

measures failed to prevent the Italian invasion of Ethiopia on 3 October 1935. After Ethiopia appealed again for League action, the Council appointed a Committee of Six to investigate Italy's actions and prepare a report. Within 16 days of the invasion, the Committee of Six submitted a report concluding that Italy had indeed resorted to war in violation of the Covenant and recommended sweeping embargoes. Despite the swift response to the aggression, the subsequent failure of the League to effectively implement the proscribed sanctions exposed its weakness. This weakness led to Italy's successful defiance of the League and conquest of Ethiopia. The deficiency of the League of Nations was not in the legal mechanisms of the Covenant, but in the refusal of the members to enforce those mechanisms. *Id.* at 670. For a complete account of the League of Nations and the Italian invasion of Ethiopia, see R. SONTAG, *A BROKEN WORLD 1919-1939*, at 285-294 (1971) and Spencer, *The Italian-Ethiopian Dispute and the League of Nations*, 31 AM. J. INT'L L. 614 (1937).

⁹⁴ Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 2137, 94 L.N.T.S. 57

⁹⁵ L. BLEDSOE & B. BOCZEK, *supra* note 75, at 519.

⁹⁶ The relevant text reads as follows:

ARTICLE I The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ARTICLE II The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Kellogg-Briand Pact, *supra* note 94, arts. I & II. The treaty became effective on 24 July 1929 and is currently in force. As of 30 June 1986, 64 nations were parties. L. HENKIN, *supra* note 69, at 671.

⁹⁷ VON GLAHN, *supra* note 69, at 520. It is interesting to note that because only "war" was mentioned in the Pact, it was possible to circumvent the agreement by not presenting one's military actions as war. *Id.* at 522. The framers of the United Nations attempted to avoid the possibility of such semantical justifications by addressing the "use of force" rather than "war" in drafting the Charter. *See infra* note 105 and accompanying text.

⁹⁸ VON GLAHN, *supra* note 69, at 520. For a contemporary discussion of the interpretation of the Pact, see Morris, *The Pact of Paris for the Renunciation of War: Its Meaning and Effect in International Law*, 1929 PROC. AM. SOC'Y INT'L L. 88-91 cited in VON GLAHN, *supra* note 69, at 520 n.4.

leave the Pact entirely impotent,⁹⁹ the drafters of the Pact ignored a fundamental principle of international law: to be effective, a rule must correspond to the practice of states.¹⁰⁰

D. The Use of Force and the Law of the United Nations

The experience of the Second World War, coupled with the failings of the League of Nations, combined to renew the effort to restrict the use of force in resolving international conflicts.¹⁰¹ The Charter of the United Nations was drafted by the winners of one world war determined to prevent another.¹⁰² The nations that signed the Charter on 26 June 1945 did so with the hope that a primary function of the new organization would be the maintenance of international peace and security.¹⁰³ Furthermore, the Charter moved beyond the Kellogg-Briand Pact,¹⁰⁴ as the signatories renounced not only their right to go to war, absent circumstances of individual or collective self-defense, but their right to resort to the threat or use of force as well.¹⁰⁵ These

⁹⁹ As von Glahn points out:

To be sure, eminent jurists such as Justice Robert H. Jackson of the United States Supreme Court upheld the Pact, stating that . . . "despite the absence of an express legal *duty* of enforcement . . . [i]t created substantive law of national conduct and there resulted a *right* to enforce it by general sanctions of international law."

VON GLAHN, *supra* note 69, at 520 (footnote omitted).

¹⁰⁰ *Id.* In the words of Justice Oliver Wendell Holmes: "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *Ex Parte United States*, 257 U.S. 419, 433 (1922), *quoted in* VON GLAHN, *supra* note 69, at 521 & n.8.

¹⁰¹ VON GLAHN, *supra* note 69, at 523.

¹⁰² Blodgett, *The Future of U.N. Peacekeeping*, WASH. Q., Winter 1991, at 204.

¹⁰³ The Charter provides that one of the purposes of the United Nations is: ARTICLE 1(1) 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, para. 1.

¹⁰⁴ VON GLAHN, *supra* note 69, at 523. It is worth noting that the Charter only uses the word "war" once—in the preamble ("determined to save succeeding generations from the scourge of war."). Subsequent references use the terms "threat or use of force" and "threat to the peace, breach of the peace, or act of aggression" in place of the term "war". *Id.* at 523-24.

¹⁰⁵ The relevant text provides:

ARTICLE 2(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

proscriptions on aggression were to be enforced through a systematic procedure authorizing collective force against an aggressor nation.¹⁰⁶

The Charter of the United Nations, having been ratified by virtually every nation on earth,¹⁰⁷ can be viewed as an example of a law-making treaty. As a result, its provision prohibiting the use of force¹⁰⁸ is considered binding upon all states.¹⁰⁹

The Charter vested primary responsibility for the maintenance of peace and security in the Security Council.¹¹⁰ The duties of the Council are two-fold: first, to facilitate peaceful settlements of international disputes; and second, failing a nonviolent solution, to apply diplomatic, economic, and political sanctions, in order to restore the peace.¹¹¹ Far more decisively than the League of Nations,¹¹² the Security Council was meant to have both the mandate and authority¹¹³

independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

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

¹⁰⁶ L. HENKIN, *supra* note 69, at 772.

¹⁰⁷ RESTATEMENT (THIRD) *supra* note 69, § 102 comment h. Even the few non-member nations that remain have tacitly assented to its principles. *Id.* Incidentally, Iraq was an original signatory of the Charter. L. GOODRICH & A. SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 672 (1955).

¹⁰⁸ *See supra* note 105.

¹⁰⁹ RESTATEMENT (THIRD) *supra* note 69, § 102 comment h. The Charter itself provides for the extension of such provisions to non-members:

ARTICLE 2(6) The Organization shall ensure that states which are not Members of the Organization act in accordance with these principles so far as may be for the maintenance of international peace and security.

U.N. CHARTER art. 2, para. 6. It is accepted that Article 2(4) has become a principle of customary international law, binding on all states, with the preemptory character of *jus cogens*. *See* RESTATEMENT (THIRD) *supra* note 69, § 102 comment k; L. BLEDSOE & B. BOCZEK, *supra* note 75, at 15-16; L. HENKIN, *supra* note 69, at 677.

¹¹⁰ The charge of the Security Council is set out by the Charter as follows:

ARTICLE 24(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

U.N. CHARTER art. 24, para. 1.

¹¹¹ DEPARTMENT OF STATE, REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 67 (1945 & photo. reprint 1969) [hereinafter REPORT TO THE PRESIDENT].

¹¹² L. HENKIN, *supra* note 69, at 772.

¹¹³ The intent of the drafters of the Charter for the role and procedure of the Security Council in general is discussed in *Report of Rapporteur of Committee III/1 to Commission III*, reprinted in U.S. DEP'T OF STATE, CONFERENCE SERIES 83, No. 2490, THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION:

to act quickly in response to threats to world peace in order to bring about an expeditious resolution of the conflict.¹¹⁴ Moreover, the Charter clearly recognized the authority of the Security Council over such matters as binding.¹¹⁵ It was for the Security Council to decide whether or when, as well as to what degree, collective action should be taken.¹¹⁶ Such far reaching powers, entrusted to the Security Council by the drafters of the Charter, represented a major innovation over prior attempts at international organization.¹¹⁷

E. THE CHARTER, THE COUNCIL, AND THE COLLECTIVE USE OF FORCE

The powers of the Security Council—as they relate to the existence of a threat to the peace, breach of the peace, or act of aggression—are set forth in Chapter VII of the Charter of the United Nations.¹¹⁸ Consisting of thirteen articles numbered 39 to 51, Chapter VII outlines

SELECTED DOCUMENTS AT 734-754 (1946) [hereinafter SELECTED DOCUMENTS]. The "Chapter VIII" discussed in the above referenced work was later designated "Chapter VII" in the final draft of the U.N. Charter.

¹¹⁴ "The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XI." U.N. CHARTER art. 24, para. 2. Considering the Security Council's "primary responsibility for the maintenance of international peace and security," U.N. CHARTER art. 24, para. 1, there is wide discretion at the disposal of the Council in the determination of violations, Doxey, *International Sanctions: A Framework for Analysis*, 26 INT'L ORG. 527, 548 (1972) [hereinafter Doxey, *Framework*].

¹¹⁵ The relevant article of the Charter of the United Nations states:

ARTICLE 25 The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

U.N. CHARTER art. 25.

¹¹⁶ N. BENTWICH & A. MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS at XVI (2d impression 1951 & reprint 1969). This arrangement, when invoked, involved a radical change in status between the Member States and the United Nations. Ordinarily, the Member States were to retain their full sovereignty and the Security Council was merely an agent, acting on behalf of these sovereign states. In contrast, under Chapter VII as conceived by the drafters of the Charter, the relationship amounted to an irrevocable delegation of authority to the Security Council and compliance with its decisions became a bounden duty of the Member States. *Id.*

¹¹⁷ J. BRIERLY, THE LAW OF NATIONS 111 (6th ed. 1963).

¹¹⁸ Chapter VII is entitled: "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." U.N. CHARTER ch. VII. The intent of the drafters of Chapter VII can be ascertained from *Report of Rapporteur of Committee III/3 to Commission III on Chapter VIII, Section B*, reprinted in SELECTED DOCUMENTS, *supra* note 111, at 761-771. As noted above, the "Chapter VIII" discussed in the above referenced work was later designated "Chapter VII" in the final draft of the U.N. Charter.

the procedure by which the Security Council is to exercise its authority to restore international peace and security.

The Charter, in the abstract, limits the sovereignty of the membership of the United Nations in at least two ways: first, the Charter forbids the use of force except in cases of self-defense, thereby denying member states their historical power to declare war;¹¹⁹ and second, the Charter gives the Security Council the power to commit forces collectively, in the name of all members,¹²⁰ thereby denying member states their customary right to remain neutral.¹²¹

1. *The Composition of the Council and the Rule of Unanimity*

The Security Council originally consisted of eleven members, but eventually expanded to fifteen.¹²² Of these fifteen members, five received permanent representation.¹²³ These five permanent members were either actual, or potential great powers.¹²⁴ Article 27 requires the concurrence of these permanent members on matters affecting international peace and security; this safeguard was designed to forestall the self-destruction of the organization.¹²⁵ Practice and general agreement, however, have established that neither an absence, nor an abstention, by a permanent member is treated as a veto, even though that member has failed to concur.¹²⁶ Throughout the super-

¹¹⁹ D. ZIEGLER, *supra* note 74, at 304 (although Ziegler also suggests another limitation, i.e., relating to internal matters of a state perceived by the Council to be a "threat to the peace," for the purposes of this writing, another source has been chosen to provide the second limitation). See also *supra* notes 74-81 and accompanying text.

¹²⁰ See *supra* note 115.

¹²¹ Norton, *Between the Ideology and the Reality: The Shadow and the Law of Neutrality*, 17 HARV. INT'L L.J. 249, 251 n.7 (1976). The implications of the customary law of neutrality as it relates to the events of Autumn 1990 is beyond the scope of this writing, however, for a general overview of neutrality under the Charter, see generally *Id.*

¹²² 122 S. BAILEY, THE PROCEDURE OF THE U.N. SECURITY COUNCIL at 4 (1988).

¹²³ See *supra* note 13 and accompanying text.

¹²⁴ D. ZIEGLER, *supra* note 74, at 306.

¹²⁵ The relevant passage of Article 27 reads:

ARTICLE 27(3) Decisions of the Security Council on all [non-procedural] matters shall be made by an affirmative vote . . . including the concurring votes of the permanent members

U.N. CHARTER art. 27, para. 3. An extensive examination of the rule of unanimity and other aspects of Security Council voting procedure is contained in S. BAILEY, VOTING IN THE SECURITY COUNCIL (1969).

¹²⁶ Riggs, *supra* note 69, at 420 n.28.

power disputes of the Cold War, the rule of unanimity has prevented such disagreements from consuming the Council.¹²⁷

2. Article 39 - Determining When to Impose Sanctions

Article 39 directs the Security Council to determine the existence of circumstances that warrant intervention by the United Nations.¹²⁸ The determination of either a threat to the peace, a breach of the peace, or an act of aggression is crucial and serves as a precondition to the exercise of the extraordinary coercive powers provided for by Chapter VII.¹²⁹ The making of such a determination is treated as an

¹²⁷ Ziegler has noted:

[The veto provision] was not an oversight. It was a deliberate plan to keep the organization from destroying itself on the opposition of the major states. There is little point in trying to mount collective action against a state that is threatening peace if the major states are not giving that action their support. The League of Nations discovered this in Manchuria, the Chaco, and Ethiopia. There is also no point in trying to mount collective action against a major state. Even before the power of nuclear weapons was evident, states were aware that such an attempt could end only in a major war. The unanimity principle acts as a fuse for the U.N. machinery—when too great a load is placed on the machine, the fuse blows out and keeps the overload from destroying the machine. The U.N., like the League of Nations before it, has failed to solve some major international conflicts; unlike the League, the U.N. was not itself destroyed by this failure.

D. ZIEGLER, *supra* note 74, at 306-07.

¹²⁸ The text of this article provides:

ARTICLE 39 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.

¹²⁹ L. GOODRICH & A. SIMONS, *supra* note 107, at 346. The three terms—threat to peace, breach of the peace, and act of aggression—are often used loosely and, at times, interchangeably. There are, however, subtle shades of meaning that differentiate the three, but these distinctions are not necessarily dispositive. A *threat to the peace* implies a situation of potential danger, e.g., one state massing troops along its border with another state. Conversely, *act of aggression* implies a threat to the peace that is no longer potential, but that hostilities have actually taken place and are of an aggressive nature, e.g., an invasion of one state by another. Finally, *breach of the peace* implies a situation between the two others, where hostilities have erupted, but the Security Council is unwilling, for whatever reason, to impute the more serious implications that accrue from a finding of aggression. *See id.* at 354-60.

Incidentally, the problem in defining the term “aggression” has long stymied those who have tried. *See, e.g.,* W. GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 606-18 (1957) and L. HENKIN, *supra* note 69, at 682-86. No attempted definition proved acceptable to the drafters of the Charter. They proceeded under the as-

action of considerable importance in the function of the Security Council,¹³⁰ but does not necessarily require sanctions.¹³¹ Even after such a determination, the Security Council may decide that it need do nothing more than make recommendations and continue efforts for the peaceful resolution of the dispute.¹³² On the other hand, once such recommendations have been established as ineffectual, the Council must take some enforcement action—be it diplomatic, economic, or military—to restore the peace.¹³³

Those who wrote the Charter provided for great freedom on the part of the Security Council in determining what action to take.¹³⁴ If confronted with a flagrant violation of the principles of the Charter as specified by Article 2(4),¹³⁵ the Council was expected to take without delay, and to the degree dictated by the situation, actions as provided by Articles 41 and 42, in order to restore international peace and security.¹³⁶ Moreover, the wording of Article 39, taken together with subsequent articles, indicates that once a determination has been reached by the Security Council, and recommended measures have failed to alleviate the situation, the Council has a responsibility to take some action to restore international peace.¹³⁷

3. Article 40 - Provisional Measures

Article 40 provides that the Security Council, subsequent to making the formal determination under Article 39, but prior to deciding upon what measures shall be taken, may order provisional measures in

sumption that a comprehensive definition would remain elusive and therefore the preferred course of action was to permit the Security Council unrestricted latitude in determining whether any of the three situations had been triggered. N. BENTWICH & A. MARTIN, *supra* note 116, at 88. The General Assembly has taken steps to define the term, although merely in the form of a recommendation and therefore not binding upon the Security Council. G.A. Res. 3314, 29 GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

¹³⁰ L. GOODRICH & A. SIMONS, *supra* note 107, at 346. The mere declaration by the Council that it might move towards a determination under Article 39 during the crisis in Palestine in 1948 was an important factor in convincing the parties to institute a cease fire. *Id.*

¹³¹ N. BENTWICH & A. MARTIN, *supra* note 116, at 89.

¹³² *Id.*

¹³³ *Id.* at 94.

¹³⁴ *Report of Rapporteur, SELECTED DOCUMENTS, supra* note 113, at 763.

¹³⁵ *See supra* note 105 and accompanying text.

¹³⁶ L. GOODRICH & A. SIMONS, *supra* note 107, at 393.

¹³⁷ N. BENTWICH & A. MARTIN, *supra* note 116, at 94.

order to prevent an aggravation of the situation.¹³⁸ Provisional measures are actions taken by the party or parties causing the threat to the peace, breach of the peace, or act of aggression.¹³⁹

The decision of what measures are necessary to prevent an aggravation is left to the discretion of the Council and can range from a call for one party to demobilize a potential invasion force to an order for cease-fire and withdrawal.¹⁴⁰ The primary intent of Article 40 was to provide the Council with the means of preventing a mere threat to the peace from developing into an actual breach of the peace.¹⁴¹ While the Security Council has rarely invoked the letter of Article 40, its spirit has been frequently applied.¹⁴²

4. Article 41 - Sanctions Short of Force

Article 41 authorizes the Security Council to call on members of the United Nations to apply non-violent sanctions against offenders.¹⁴³ While this article details an array of economic sanctions available to the Security Council, it is not considered a demarcation of every potential response.¹⁴⁴

¹³⁸ The text of the article provides:

ARTICLE 40 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 position of the parties concerned. The Security Council shall duly take account of the failure to comply with such provisional measures.

U.N. CHARTER art. 40.

¹³⁹ N. BENTWICH & A. MARTIN, *supra* note 116, at 92.

¹⁴⁰ *Id.*

¹⁴¹ L. GOODRICH, E. HAMBRO, & A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 303 (3rd rev. ed. 1969) [hereinafter L. GOODRICH, COMMENTARY].

¹⁴² *Id.*

¹⁴³ The text of the article provides:

ARTICLE 41 The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication and the severance of diplomatic relations.

U.N. CHARTER art. 41.

¹⁴⁴ Note, *supra* note 92, at 294. See also L. GOODRICH, COMMENTARY, *supra* note 141, at 311-12 (noting that although the United States and the United Kingdom initially feared the article would have a limiting effect on the Council, "the text is . . . phrased in permissive terms and cannot be considered as limiting the Council's powers.").

The concept of employing collective sanctions against a state to induce it to uphold its international obligations was pioneered by the League of Nations.¹⁴⁵ Article 16 of the League's Covenant placed the members under a direct and automatic duty to immediately apply sanctions not involving the use of force upon an individual determination by each member that an act of aggression had been committed.¹⁴⁶ League members were not entitled to wait for action by the League Council, nor bound by a decision contrary to their individual assessment of the situation.¹⁴⁷

The drafters of the United Nations Charter, however, sought to avoid this procedural flaw by centralizing the decision-making power within the Security Council.¹⁴⁸ No member of the United Nations is required, nor entitled, to apply enforcement measures absent a Security Council command to do so.¹⁴⁹ From the earliest days of the Charter, however, it was understood that decisions of the Security Council made under Chapter VII were legally binding on all member states.¹⁵⁰ Thus, any nation refusing to comply with sanctions imposed by the Council, would itself be in violation of the Charter and subject to disciplinary action.¹⁵¹

5. Article 42 - Collective Force

Article 42 provides the Security Council unrestricted discretion in deciding when a situation requires the application of collective force.¹⁵²

¹⁴⁵ See *supra* note 88 and accompanying text.

¹⁴⁶ N. BENTWICH & A. MARTIN, *supra* note 116, at 93. See also *supra* text accompanying notes 92 & 93 (highlighting the fatal flaw of the Covenant in leaving the actual decision making process up to the individual members which led to uneven enforcement.)

¹⁴⁷ N. BENTWICH & A. MARTIN, *supra* note 116, at 93.

¹⁴⁸ See L. GOODRICH, COMMENTARY, *supra* note 141, at 311.

¹⁴⁹ N. BENTWICH & A. MARTIN, *supra* note 116, at 93.

¹⁵⁰ The position of the United States on the matter can be found in REPORT TO THE PRESIDENT, *supra* note 111, at 78-79.

¹⁵¹ See *supra* notes 115-116 and accompanying text. An additional article that is relevant to the current discussion states:

ARTICLE 2(5) All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

U.N. CHARTER art. 2, para. 5. The penalty prescribed by the Charter for violations of its principles is expulsion; the pertinent article provides:

ARTICLE 6 A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

U.N. CHARTER art. 6.

¹⁵² The text of the article reads:

Like the previous article, Article 42 contains an enumeration of possible measures but is not meant to be inclusive.¹⁵³

While members of the League of Nations were under an automatic obligation to apply certain non-military sanctions, at no time were they required to apply military measures, even at the request of the League Council.¹⁵⁴

Under the Charter, however, not only are members bound to contribute to military measures when so requested by the Council,¹⁵⁵ but once the Security Council has authorized military sanctions, no member may remain neutral.¹⁵⁶ While this provision ensures that ample resources will be at the Security Council's disposal during a crisis, it by no means obliges all members to participate in military actions.¹⁵⁷

The Council may resort to force when measures previously taken have proved inadequate to accomplish the Council's aims. Additionally, if the Council considers that previous measures would be inadequate,¹⁵⁸ it need not wait for empirical evidence to justify the use of force.¹⁵⁹ Moreover, while there is no requirement that all available economic and diplomatic sanctions be applied before resorting to force,¹⁶⁰ neither is there a requirement that, if measures short of force should fail, the Council must take military action.¹⁶¹ So long as the

ARTICLE 42 Should the Security Council consider the measures provided for in Article 41 would be inadequate, or have proved to be inadequate, it may take such actions by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

U.N. CHARTER art. 42.

¹⁵³ L. GOODRICH, COMMENTARY, *supra* note 141, at 315. See also *supra* note 136 and accompanying text (Article 41 sanctions are not limited to those listed in the Article).

¹⁵⁴ N. BENTWICH & A. MARTIN, *supra* note 116, at 95.

¹⁵⁵ See *supra* notes 115 & 143 and accompanying text.

¹⁵⁶ N. BENTWICH & A. MARTIN, *supra* note 116, at 95. See also *supra* note 121 and accompanying text (regarding effect on the customary law of neutrality.)

¹⁵⁷ It is for the Council to make such requests. Obviously a nation with no navy could not substantively contribute to a naval blockade, but other assistance from such a nation, e.g., financial or medical, may be requested. See generally L. GOODRICH & A. SIMONS, *supra* note 107, at 433-39.

¹⁵⁸ N. BENTWICH & A. MARTIN, *supra* note 116, at 96.

¹⁵⁹ L. GOODRICH, COMMENTARY, *supra* note 141, at 314. The San Francisco Conference unanimously agreed that "in the case of a flagrant aggression imperiling the existence of a member of the Organization, enforcement measures should be taken without delay, and to the full extent required by the circumstances." *Id.* at 314 n.96 (citing 12 U.N.C.I.O. Doc. 507 (1945)).

¹⁶⁰ N. BENTWICH & A. MARTIN, *supra* note 116, at 96.

¹⁶¹ *Id.*

Council has taken some action, its obligations for the maintenance of world peace have been met.¹⁶²

6. *Article 43 - Military Contribution of Members*

Unlike the collective security arrangement of the League of Nations, which provided for sanctions to be enforced independently by the individual action of its members, the system of the Charter rests on military sanctions to be applied by the Security Council itself.¹⁶³ In order to ensure the Security Council sufficient means to apply a military option, Article 43 allows members to make available various methods of military assistance.¹⁶⁴ The drafters of the Charter envisaged an enforcement system of national contingents provided by the members, but only in accordance with agreements negotiated in advance.¹⁶⁵ The focus of the agreements was to be on the number and type of forces, the degree of readiness, the general location of forces, and the nature of military facilities and assistance.¹⁶⁶ No agreements as described in Article 43 have been concluded, and as there are no

¹⁶² *Id.* See also *supra* note 137 and accompanying text.

¹⁶³ See N. BENTWICH & A. MARTIN, *supra* note 116, at 98.

¹⁶⁴ Article 43 reads:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purposes of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general locations, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory States in accordance with their respective constitutional processes.

U.N. CHARTER, art. 43.

¹⁶⁵ L. GOODRICH, COMMENTARY, *supra* note 141, at 318. The architects of the Charter considered two alternatives to the system developed in Article 43. The first and most radical was to establish an international force which would be maintained by the United Nations. This idea was rejected as too great a violation of national sovereignty. The second option was to delegate enforcement of Council actions to a temporary coalition convened anew with each passing crisis. As this was the basic scheme of the League of Nations, prior experience had already proved it ineffective. *Id.* at 317-18.

¹⁶⁶ U.N. CHARTER, art. 38, para. 2; N. BENTWICH & A. MARTIN, *supra* note 116, at 98-99.

alternative methods of mobilizing military commitments from members, the scheme has proved to be a major weakness in the Charter.¹⁶⁷

7. *Article 44 - Representation of Non-Council Members*

Article 44 provides those members who are not sitting on the Security Council at the time of a decision to use force an opportunity to present their views before they are called upon to commit forces.¹⁶⁸ If the Council does not explicitly call upon the military forces of a member, the member has no right to invoke Article 44.¹⁶⁹ Since the special agreements of Article 43 have not been concluded, the provisions of Article 44 have yet to be applied.¹⁷⁰

8. *Article 45 - Air Force Contingents*

Article 45 recognizes the benefits of maintaining air force contingents immediately available for urgent military action.¹⁷¹ The ability of air forces to provide "immediate striking power over long distances" warranted a specific provision and was not meant to exclude the use of other branches of service.¹⁷² Rather than creating an international force, the drafters provided for national air force contingents to be available for joint enforcement action.¹⁷³ As this Article

¹⁶⁷ N. BENTWICH & A. MARTIN, *supra* note 116, at 98-99.

¹⁶⁸ The text reads as follows:

ARTICLE 44 When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of the Member's armed forces.

U.N. CHARTER art. 44.

¹⁶⁹ N. BENTWICH & A. MARTIN, *supra* note 116, at 100; L. GOODRICH, COMMENTARY, *supra* note 141, at 327; REPORT TO THE PRESIDENT, *supra* note 111, at 94.

¹⁷⁰ L. GOODRICH, COMMENTARY, *supra* note 141, at 327.

¹⁷¹ The text of the article reads:

ARTICLE 45 In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air force contingents for combined international enforcement action. The strength and readiness of these contingents and plans for their combined actions shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

U.N. CHARTER art. 45.

¹⁷² REPORT TO THE PRESIDENT, *supra* note 111, at 97.

¹⁷³ L. GOODRICH, COMMENTARY, *supra* note 141, at 328.

is also framed within the limits of Article 43, the value of Article 45 will depend on the contents of the special agreement or agreements yet to be negotiated.¹⁷⁴

9. Articles 46 & 47 - The Military Staff Committee

The Military Staff Committee was intended to serve as a general staff for the Security Council and is responsible for assisting the Council with strategic planning on United Nations military matters.¹⁷⁵ The Committee has no authority other than what is delegated to it and is fully subordinate to the Security Council.¹⁷⁶ Due to the foreseeability of rotating membership on the Council reducing the efficiency of its operations, Article 47¹⁷⁷ established fixed membership: consisting of the Chiefs of Staff, or their designated representatives, from each of the permanent members.¹⁷⁸ Subordinate to the Security

¹⁷⁴ N. BENTWICH & A. MARTIN, *supra* note 116 at 101. The notion of a United Nations air force reemerged during the debate on how best to enforce resolution 660 (1990). See Wright, *Forget Kuwait: A Kinder, Gentler Gulf Strategy; Punitive Bombing with U.N. Sanction*, 203 NEW REPUBLIC 19, at 19 (Dec. 3, 1990).

¹⁷⁵ L. GOODRICH, COMMENTARY, *supra* note 141, at 329. The text of Article 46 reads:

ARTICLE 46 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.

¹⁷⁶ N. BENTWICH & A. MARTIN, *supra* note 116, at 101.

¹⁷⁷ Article 47 reads:

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 subcommittees.

U.N. CHARTER art. 47.

¹⁷⁸ N. BENTWICH & A. MARTIN, *supra* note 116, at 102. This restriction was highly offensive to many of the non-permanent members. L. GOODRICH, COMMENTARY, *supra* note 141, at 330.

Council, the Committee is to prepare plans for the application of Article 43. Considering the difficulty in identifying long-range threats to international peace and security, planning by the Committee must necessarily be limited to that of the most general kind.¹⁷⁹

10. *Article 48 - Participation in Sanctions*

Article 48 restates and amplifies the obligation of members to carry out resolutions of the Security Council for the maintenance of international peace and security.¹⁸⁰ The drafters recognized the distinction between the world-wide obligations of the permanent members and the more restricted scope of the lesser powers, whose military effectiveness is likely to be negligible in areas outside their home territories.¹⁸¹ Thus, while no member can claim a right of exemption from participation in sanctions, neither can the Security Council be obligated to devise sanctions that affect every member equally.¹⁸²

Paragraph one grants the Council full discretion to determine whether participation is necessary from an individual member and to choose which members shall actually take part in a particular action.¹⁸³ Additionally, recognizing the importance of international agencies such as the International Monetary Fund and the World Bank in the implementation of economic sanctions, paragraph two directs members to exercise their responsibilities to such organizations in furtherance of Security Council objectives.¹⁸⁴

11. *Articles 49 & 50 - Sharing the Burden of Sanctions*

Article 49 recognizes that the obligation of all members to provide enforcement of Security Council actions in the preservation of peace is, to a large extent, dependent on the corresponding obligation of individual members to afford each other mutual assistance in order

¹⁷⁹ L. GOODRICH, COMMENTARY, *supra* note 141, at 329.

¹⁸⁰ *Id.* at 334. Article 48 provides:

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

U.N. CHARTER art. 48.

¹⁸¹ REPORT TO THE PRESIDENT, *supra* note 111, at 98.

¹⁸² N. BENTWICH & A. MARTIN, *supra* note 116, at 104.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

to alleviate any hardships created by the directives of the Council.¹⁸⁵ Since a member may need military or financial assistance in order to fully implement measures required of them, the Charter provides that no other member may refuse to provide such assistance when requested.¹⁸⁶ If a member or non-member discovers that they are confronted with special economic difficulties as a result of action decided upon by the Security Council, the Charter provides for recourse in Article 50.¹⁸⁷

While Article 50 avoids specifics, the drafters recognized that collective economic measures create substantial costs for those employing them¹⁸⁸ and identified the need for some machinery to distribute equitably the economic burden.¹⁸⁹ It is clear, however, that the remedies of Articles 49 and 50 are not available to the state against which sanctions are directed.¹⁹⁰

12. Article 51

A perfect system of collective security would prohibit any use of force, except by the organization appointed guardian of the peace;¹⁹¹ to give individual states *any* discretionary authority to rationalize a resort to arms invites abuse.¹⁹² Nevertheless, Article 51 provides for the right of individual or collective self-defense¹⁹³ as a safeguard to

¹⁸⁵ The text of the Article reads:

ARTICLE 49 The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

U.N. CHARTER art. 49.

¹⁸⁶ N. BENTWICH & A. MARTIN, *supra* note 116, at 105.

¹⁸⁷ The Charter states:

ARTICLE 50 If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

U.N. CHARTER art. 50.

¹⁸⁸ L. GOODRICH, COMMENTARY, *supra* note 141, at 341.

¹⁸⁹ N. BENTWICH & A. MARTIN, *supra* note 116, at 105.

¹⁹⁰ L. GOODRICH, COMMENTARY, *supra* note 141, at 341 n.177.

¹⁹¹ N. BENTWICH & A. MARTIN, *supra* note 116, at 106.

¹⁹² Modern history is crowded with aggressions justified as self-defense: the German invasion of Poland in 1939; the Soviet invasions of Hungary in 1956, Czechoslovakia in 1968, and Afghanistan in 1979; and the American invasions of Grenada in 1983 and Panama in 1989.

¹⁹³ In order to assuage the insecurities of the world powers at the time of its inception, the U.N. Charter requires that the five permanent members concur on all non-procedural questions. U.N. CHARTER art. 27, para. 3. See also *supra* note 125 and accompanying text.

the potential inability of the Security Council to act efficiently in the face of an international crisis,¹⁹⁴ a reality that paralyzed the Council throughout the Cold War.¹⁹⁵

While the provision is couched in temporary terms, *viz.*, self-defense is permitted "until the Security Council has taken measures necessary to maintain international peace and security,"¹⁹⁶ varying interpretations may arise when determining precisely what actions by the Security Council would be sufficient to discontinue the right to individual or collective self-defense.¹⁹⁷

IV. CHAPTER VII AND THE INVASION OF KUWAIT

When the United Nations Charter was ratified, it was generally held to have outlawed aggressive war.¹⁹⁸ On paper, the plans for maintaining peace and security—as embodied in Chapter VII of the

¹⁹⁴ It has been observed:

To many of the architects of the Charter, Article 51 seemed necessary to provide the basis for measures of self-defense in case the Security Council was unable to discharge its responsibilities because of disagreements among major powers. It has been the fact of such disagreements, particularly between the Soviet Union and the Western powers, that has seemed to justify the extensive resort to the right which Article 51 recognizes.

L. GOODRICH, COMMENTARY, *supra* note 141, at 352. See also Bernstein, *The United Nations Security Council Seems Bent on Irresolution*, N.Y. Times, April 8, 1984, § 4, at 5, col. 1 (noting that "[t]hroughout its history . . . the Security Council has been hampered by the difficulty of getting the Soviet Union and the United States to agree to common programs.").

¹⁹⁵ The text reads:

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

U.N. CHARTER art. 51.

¹⁹⁶ U.N. CHARTER art. 51.

¹⁹⁷ L. GOODRICH, COMMENTARY, *supra* note 141, at 352-53. Distinctions must be drawn between *positive action*, which would mean an affirmative step towards resolving the dispute; *no action*, which would signify those situations which have not yet been addressed by the Council; and *negative action*, which would refer to an actual vote taken by the Council with the result that nothing is done to help resolve the situation. J. CASTANEDA, *supra* note 21, at 210 n.25.

¹⁹⁸ Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH L. REV. 1620, 1620 (1984).

Charter—were quite an improvement over what had been attempted before.¹⁹⁹ Unfortunately, what is down on paper is not necessarily what is done in practice.²⁰⁰ The system of security envisaged by the drafters was restricted by the veto, and thereby hinged upon the continued cooperation of the permanent members of the Security Council.²⁰¹ This interaction, however, was not forthcoming, as Chapter VII became one of the first casualties of the Cold War.²⁰²

Forty-five years later, on the heels of the superpower reconciliation, comes the compelling case of Kuwait and the long-awaited opportunity to move another step closer to the end of aggressive war. Perhaps paradoxically, the collective use of force is essential to the maintenance of international law under the Charter; at times it is necessary to wage war in order to preserve peace.

On two occasions during the debate over Iraq and Kuwait, the Security Council ordered the collective use of force in the name of international law and as authorized by Chapter VII.²⁰³ Prerequisite to the exercise of this authority is the obligatory determination by the Council that one of the three situations described by Article 39 exists.²⁰⁴ Following such a conclusion, Article 40 allows provisional measures to be imposed at the option of the Council.²⁰⁵ In the current crisis, resolution 660 (1990)²⁰⁶ fulfilled both functions. Framed in the

¹⁹⁹ R. HISCOCKS, *THE SECURITY COUNCIL: A STUDY IN ADOLESCENCE* 66-67 (1973).

²⁰⁰ D. ZIEGLER, *supra* note 74 at 304.

²⁰¹ R. HISCOCKS, *supra* note 199, at 67.

²⁰² Daniel Patrick Moynihan, a Former United States Ambassador to the United Nations, describes the dynamic of the Cold War Security Council: "The Communist powers had clients, we had clients; what our client wanted we wanted, the more so if 'their' clients . . . wanted otherwise." D. MOYNIHAN, *supra* note 71, at 3. Indeed, the sole prior attempt to use the collective security arrangements of Chapter VII was in response to what was in essence a Cold War conflict. *See generally* L. HENKIN *supra* note 69, at 776-781.

²⁰³ The first instance, resolution 665 (1990), involved enforcement of resolution 661 (1990) through limited naval interdiction of shipping. *See supra*, note 42. The second occasion, resolution 678 (1990), authorized member states to employ all "necessary means" to reverse the Iraqi aggression into Kuwait. *See supra* note 63. A third occasion, the approval of resolution 670 (1990), which involved the application of resolution 661 (1990) to all means of transportation, including aircraft, was not as much an authorization of force, but a clarification of the scope of the prior resolution. *See supra* note 53.

²⁰⁴ Article 39 states, *inter alia*, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . ." U.N. CHARTER art. 39. *See also* text accompanying notes 128-137.

²⁰⁵ *See supra* text accompanying notes 138-142.

²⁰⁶ *Supra* note 14. *See infra* Appendix A for the full text of the resolution.

language of the Charter, the second preambular paragraph concluded "that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait."²⁰⁷

In addition, the operative paragraphs of the resolution contained two provisional measures: one that demanded Iraq initiate an immediate withdrawal of forces, and another that called upon Iraq and Kuwait to begin negotiations to resolve the dispute peaceably.²⁰⁸ At this stage in the crisis, the Council was addressing only the parties involved,²⁰⁹ attempting to prevent an escalation of the hostilities.

Upon the annexation of Kuwait by Iraq,²¹⁰ the Council decided that additional action would be necessary and approved resolution 661 (1990); the vehicle for the application of the non-military sanctions permitted by Article 41 against Iraq.²¹¹ The language of the resolution was direct: a total severance of economic relations between Iraq and the rest of the world would be maintained until operative paragraph 2 of resolution 660 (1990) was implemented.

Despite the clarity of the Security Council's resolve to take non-military action, one paragraph created confusion about the authority of members to employ military force in the enforcement of the non-military sanctions. The United States used the paragraph in question²¹² to support its position that unilateral enforcement action was in fact self-defense²¹³ under Article 51.²¹⁴

²⁰⁷ S.C. Res. 660, *supra* note 14, preambular para. 2.

²⁰⁸ S.C. Res. 660, *supra* note 14, operative paras. 2 & 3.

²⁰⁹ See *supra* text accompanying note 139.

²¹⁰ Declared by the Council to be without basis in international law. See *supra* note 24.

²¹¹ See *infra* Appendix B. At this point the Council could have bypassed economic sanctions and proceeded to exercise a military option under Article 42. See *supra* text accompanying note 159. In 1950 at the beginning of the Korean War, the only other collective security effort by the Council, economic sanctions were passed over as military measures were decided within two days of the North Korean invasion. L. HENKIN, *supra* note 69, at 777.

²¹² The resolution affirmed the "inherent right of individual or collective self-defence . . . in accordance with Article 51 of the Charter. S.C. Res. 660, *supra* note 14, preambular para. 6.

²¹³ Both individual and collective self-defense are addressed in Article 51. The right of collective self-defense can be conceived of in two ways. First, states can collectively exercise their individual right to self-defense based on some shared interest, i.e., a common border or common enemy. An additional conceptualization of collective self-defense exists in the right of one state to come to the assistance of another state that is exercising its individual right to self-defense, on a general interest of international peace and security rather than any specific shared interest. From both the discussions in San Francisco in 1945 and in subsequent practice by U.N.

The controversy was reduced to an academic argument when the Council authorized the use of maritime force to halt trade with Iraq.²¹⁵ Although Article 42 is not explicitly cited as the basis for such action, the wording of the resolution²¹⁶ certainly indicates the Council was continuing to abide by the process of the Charter.²¹⁷

The final authorization for the collective use of force came in resolution 678 (1990).²¹⁸ Again the text of the resolution bears no mention of any particular Article under which enforcement action was based, rather the Council makes reference to Chapter VII in general.²¹⁹ One paragraph in particular, however, points to the Article 42 for authority to use force. Despite the discretion allowed the

Members, it is clear that the latter is the more accurate interpretation of Article 51. L. GOODRICH, COMMENTARY, *supra* note 141, at 348.

²¹⁴ Regular State Department Briefing from Margaret Tutwiler, (Aug. 14, 1990) (transcript available from Federal News Service, LEXIS, NEXIS library, Fednew file) ("While U.N. resolution 661 on sanctions against Iraq does not provide legal basis for interdiction, the request for such action by the exiled Emir of Kuwait to implement the resolution does provide such a basis under Article 51 of the Charter.").

In a newspaper commentary, it was suggested that the inclusion of this paragraph, though "innocuous at first sight," was the result of a "brilliant legal stratagem" on the part of the United States. For several decades the interpretation of Article 51 had been that the right of self-defense was thought to be suspended when the Security Council took appropriate action. *See supra* note 194 and accompanying text. The inclusion of a reaffirmation of Article 51, however, would theoretically allow one to argue that the right was again recognized, despite the Security Council's actions, and provided the United States with a concrete, albeit technical, argument in favor of unilateral action. Wells, *Kuwait Request Brings a New Word into International Law*, *The Independent*, Aug. 14, 1990, Foreign News §, at 9. *See also*, Regular State Department Briefing from Richard Boucher, (Aug. 17, 1990) (transcript available from the Federal News Service, LEXIS, NEXIS library, Fednew file) (expressly citing the reaffirmation of Article 51 as consistent with international law).

²¹⁵ S.C. Res. 665, *supra* note 42, operative para. 1. The full text of this resolution is contained in Appendix E.

²¹⁶ For example, both Article 42 and resolution 665 use the language of proportionality. The Charter provides that the Council may take such an action "*as may be necessary* to maintain or restore international peace . . ." (emphasis added) U.N. CHARTER, art. 42. Similarly, resolution 665 (1990) calls upon members to "use such measures commensurate to the specific circumstances *as may be necessary* . . ." S.C. Res 665, *supra* note 42, operative para. 1 (emphasis added).

²¹⁷ In addition to the implication of Article 42, two other references to the Charter were made by resolution 665 (1990): Article 49 and the requirement of mutual assistance appeared in the third operative paragraph, as well as a request in the fourth operative paragraph that members exercising military measures under the authority of the Security Council coordinate their actions through the Military Staff Committee.

²¹⁸ *See supra* note 63. Appendix L contains the full text of this resolution.

²¹⁹ S.C. Res. 678, *supra* note 63, preambular para. 5.

Security Council in determining if and when military measures are to be applied,²²⁰ the second operative paragraph appears to be a statement that the Council considered non-military measures to have proved inadequate.²²¹

Regardless of the source of authority within Chapter VII, resolution 678 (1990) provides members with what appears to be an unrestricted mandate for the eviction of Iraq from Kuwait,²²² the only express qualification being that any operations under the resolution be delayed until 15 January 1991.²²³ Using the same language of proportionality as the Charter,²²⁴ the Council provides a broad mandate for the application of military measures in the name of the community of nations.

The scope of such language, however, lends itself to both a broad and narrow interpretation. On one hand, the command to implement the twelve relevant resolutions seems to pivot on Iraqi withdrawal from Kuwaiti territory. Conversely, the reference to peace and security in the region may support an argument that maintains a militarized Iraq is a *de facto* threat to regional stability.²²⁵

Other questions raised by resolution 678 (1990) center around implications of the Charter's provisions for the Military Staff Committee and national contingents of troops under United Nations' command. Notwithstanding the Council's request that military action be coor-

²²⁰ See *supra* text accompanying notes 158-162.

²²¹ Article 42 provides for military action should the Council "consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate" U.N. CHARTER art. 42.

²²² The second operative paragraph of the resolution authorizes members to "use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." S.C. Res. 678, *supra* note 63, operative para. 2.

²²³ See *supra* text accompanying note 63.

²²⁴ Compare U.N. CHARTER art. 42 (which permits the Council to take such action "as may be necessary to maintain or restore international peace and security.") with S.C. Res. 678, *supra* note 63, operative para. 2 (authorizing members to "use all necessary means to [compel Iraq to withdraw from Kuwait] and to restore international peace and security in the area.").

²²⁵ Just such a debate arose shortly after the United Nations' coalition began the bombardment of Iraq and Kuwait. Some argued that massive strikes against Baghdad and other cities exceeded the authorization to drive the Iraqi army from Kuwait, further insisting that invasion by coalition forces should necessarily stop at the Kuwaiti border with Iraq. Others maintained that the mandate to restore peace and security to the area equally necessitated the coalition insure the Iraqi army was incapable of mounting another aggressive action, even if this meant pursuit into Iraq. *Legitimate Aims of the Allies*, The Independent, Jan. 23, 1991, at 18.

dinated with the Military Staff Committee,²²⁶ control of military operations in the Persian Gulf remained entirely in the hands of the nations taking part in the enforcement action.²²⁷ As the Articles that create the Military Staff Committee also establish its subordination to the Security Council,²²⁸ there is little basis for the position that the Military Staff Committee *must* direct military operations conducted in the name of the Security Council. Arguably, it is necessary for the Security Council to maintain some semblance of control over collective security measures; conceivably, this will be a lesson learned by experience and applied to future crises. Similarly, a unified armed force under Security Council command is not necessary to the exercise of the military measure contained in Article 42.²²⁹ The purpose of these provisions was to ensure the availability of sufficient military resources to permit the Security Council to enforce any of its decisions, a problem not faced in the current crisis.²³⁰

It is important to keep in mind that the Charter is a flexible document. Far from being a rigid set of rules to be adhered to blindly, the Charter gives the Security Council the freedom and discretion to apply Chapter VII in a manner deemed appropriate to a given situation.

V. IMPLICATIONS FOR THE FUTURE

The Council's actions in addressing the Iraqi invasion of Kuwait are highly significant. After nearly fifty-years of ineffectiveness, the world has witnessed the Charter's distinction between force used aggressively and force used collectively. Well within the legal boundaries of the Security Council's power to authorize military action for

²²⁶ S.C. Res. 665 (1990), *supra* note 42, operative para. 4.

²²⁷ See, e.g., Hayes-Holgate, *U.N. Must reclaim Role in the Gulf*, Christian Sci. Monitor, Feb. 12, 1991, at 19.

²²⁸ See *supra* notes 175 & 177 and accompanying text.

²²⁹ Scheffer, *United Nations and International Law are Flying High, But Real Test is to Come*, L.A. Times, Sept. 2, 1990, part M, at 2, col. 3.

²³⁰ On the day before the United Nations deadline expired, there were between 615,000 and 660,000 troops available from 28 nations to enforce the Security Council resolutions. The 28 nations that had sent ships, aircraft, or personnel to the region were: Argentina, Australia, Bangladesh, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Great Britain, Greece, the Gulf Cooperation Council (consisting of troops from Bahrain, Kuwait, Oman, Qatar, and the United Arab Emirates), Honduras, Italy, Morocco, the Netherlands, New Zealand, Niger, Norway, Pakistan, Portugal, Senegal, Saudi Arabia, the Soviet Union, Spain, Syria, Turkey, and the United States. *Facing Off*, Wash. Post, Jan. 15, 1990, at A15.

the preservation of international peace and security, the resolutions that addressed Iraq's invasion of Kuwait have advanced the capability of international law, as embodied by the Charter of the United Nations, to confront aggression. Now that the war between Iraq and the Allied coalition is over, numerous opportunities exist for an expanded role for the United Nations.²³¹ With continued cooperation between the members of the international community, its ability to prevent aggression will be advanced as well.

Christopher John Sabec

²³¹ See, e.g., Scheffer, *Roles for the United Nations After the Gulf War*, U.N. ASS'N OF THE U.S.A., OCCASIONAL PAPER NO. 3 (1991).

APPENDIX A

RESOLUTION 660 (1990)

*Adopted by the Security Council at its 2932nd meeting
on 2 August 1990*

The Security Council,

Alarmed by the invasion of Kuwait on 2 August 1990 by the military forces of Iraq,

Determining that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait,

Acting under Articles 39 and 40 of the Charter of the United Nations,

1. *Condemns* the Iraqi invasion of Kuwait;
2. *Demands* that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990;
3. *Calls upon* Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences and supports all efforts in this regard, and especially those of the Arab League States;
4. *Decides* to meet again as necessary to consider further steps to ensure compliance with the present resolution.

S.C. Res. 660, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX B

RESOLUTION 661 (1990)

*Adopted by the Security Council at its 2933rd meeting on
6 August 1990*

The Security Council,

Reaffirming its resolution 660 (1990) of 2 August 1990,

Deeply Concerned that the resolution has not been implemented and that the invasion by Iraq of Kuwait continues with further loss of human life and material destruction,

Determined to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence, and territorial integrity of Kuwait,

Noting that the legitimate Government of Kuwait has expressed its readiness to comply with resolution 660 (1990),

Mindful of its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,

Affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter,

Acting under Chapter VII of the Charter of the United Nations,

1. *Determines* that Iraq so far has failed to comply with paragraph 2 of resolution 660 (1990) and has usurped the authority of the legitimate Government of Kuwait;

2. *Decides*, as a consequence, to take the following measures to secure compliance of Iraq with paragraph 2 of resolution 660 (1990) and to restore the authority of the legitimate Government of Kuwait;

3. *Decides* that all States shall prevent:

(a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;

(b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or transshipment of any commodities or products from Iraq or Kuwait; and any dealing by their nationals or their flag vessels or in their territories in any commodities or products originating in Iraq or Kuwait and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Iraq or Kuwait for the purpose of such activities or dealings;

(c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for

medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purpose of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products;

4. *Decides* that all states shall not make available to the Government of Iraq or any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs;

5. *Calls upon* all States, including states non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or license granted before the date of the present resolution;

6. *Decides* to establish, in accordance with rule 28 of the provisional rules of procedure of the Security Council, a Committee of the Security Council consisting of all the members of the Council, to undertake the following tasks and to report of its work to the Council with its observations and recommendations;

(a) To examine the reports on the progress of the implementation of the present resolution which will be submitted by the Secretary-General;

(b) To seek from all States further information regarding the action taken by them concerning the effective implementation of the provisions laid down in the present resolution;

7. *Calls upon* all States to co-operate fully with the Committee in the fulfillment of its task, including supplying such information as may be sought by the Committee in pursuance of the present resolution;

8. *Requests* the Secretary-General to provide all necessary assistance to the Committee and to make the necessary arrangements in the Secretariat for the purpose;

9. *Decides* that, notwithstanding paragraphs 4 through 8 above, nothing in the present resolution shall prohibit assistance to the legitimate Government of Kuwait, and *calls upon* all States;

(a) To take appropriate measures to protect assets of the legitimate Government of Kuwait and its agencies;

(b) Not to recognize any régime set up by the occupying Power;

10. *Requests* the Secretary-General to report to the Council on the progress of the implementation of the present resolution, the first report to be submitted within thirty days;

11. *Decides* to keep this item on its agenda and to continue its efforts to put an early end to the invasion by Iraq.

S.C. Res. 661, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX C

RESOLUTION 662

*Adopted by the Security Council at its 2934th meeting
on 9 August 1990*

The Security Council,

Recalling its resolutions 660 (1990) and 661 (1990),

Gravely alarmed by the declaration by Iraq of a "comprehensive and eternal merger" with Kuwait,

Demanding, once again, that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990,

Determined to bring the occupation of Kuwait by Iraq to an end and restore the sovereignty, independence and territorial integrity of Kuwait,

Determined also to restore the authority of the legitimate Government of Kuwait,

1. *Decides* that the annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void;

2. *Calls upon* all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation;

3. *Further demands* that Iraq rescind its actions purporting to annex Kuwait;

4. *Decides* to keep this item on its agenda and to continue its efforts to put an early end to the occupation.

S.C. Res. 662, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX D

RESOLUTION 664

*Adopted by the Security Council at its 2934th meeting
on 9 August 1990*

The Security Council,

Recalling the Iraqi invasion and purported annexation of Kuwait and resolutions 660, 661 and 662,

Deeply concerned for the safety and well being of third state nationals in Iraq and Kuwait,

Recalling the obligations of Iraq in this manner under international law,

Welcoming the efforts of the Secretary-General to pursue urgent consultations with the Government of Iraq following the concern and anxiety expressed by the members of the Council on 17 August 1990,

Acting under Chapter VII of the United Nations Charter:

1. *Demands* that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries and grant immediate and continuing access of consular officials to such nationals;

2. *Further demands* that Iraq take no action to jeopardize the safety, security or health of such nationals;

3. *Reaffirms* its decision in resolution 662 (1990) that annexation of Kuwait by Iraq is null and void, and therefore demands that the government of Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel, and refrain from any such actions in the future;

4. *Requests* the Secretary-General to report to the Council on compliance with this resolution at the earliest possible time.

S.C. Res. 664, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX E

RESOLUTION 665

*Adopted by the Security Council at its 2938th meeting
on 25 August 1990*

The Security Council,

Recalling its resolutions 660 (1990), 661 (1990), 662 (1990) and 664 (1990) and demanding their full and immediate implementation,

Having decided in resolution 661 (1990) to impose economic sanctions under Chapter VII of the Charter of the United Nations,

Determined to bring an end to the occupation of Kuwait by Iraq which imperils the existence of a Member State and to restore the legitimate authority, and the sovereignty, independence and territorial integrity of Kuwait which requires the speedy implementation of the above resolutions,

Deploring the loss of innocent life stemming from the Iraqi invasion of Kuwait and determined to prevent further such losses,

Gravely alarmed that Iraq continues to refuse to comply with resolutions 660 (1990), 661 (1990), 662 (199) and 664 (1990) and in particular at the conduct of the Government of Iraq in using Iraqi flag vessels to export oil,

1. *Calls upon* those Member States co-operating with the Government of Kuwait which are deploying maritime forces in 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 ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990);

2. *Invites* Member States accordingly to co-operate as may be necessary to ensure compliance with the provisions of resolution 661 (1990) with maximum use of political and diplomatic measures, in accordance with paragraph 1 above;

3. *Requests* all States to provide in accordance with the Charter such assistance as may be required by the States referred to in paragraph 1 of this resolution;

4. *Further requests* the States concerned to co-ordinate their actions in pursuit of the above paragraphs of this resolution using as appropriate mechanisms of the Military Staff Committee and after consultations with the Secretary-General to submit reports to the Security Council and its Committee established under resolution 661

(1990) to facilitate the monitoring of the implementation of this resolution;

5. *Decides* to remain actively seized of the matter.

S.C. Res. 665, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX F

RESOLUTION 666

*Adopted by the Security Council at its 2939th meeting
on 13 September 1990*

The Security Council,

Recalling its resolution 661 (1990), paragraphs 3 (c) and 4 of which apply, except in humanitarian circumstances, to foodstuffs,

Recognizing that circumstances may arise in which it will be necessary for foodstuffs to be supplied to the civilian population of Kuwait in order to relieve human suffering,

Noting that in this respect the Committee established under paragraph 6 of that resolution has received communications from several Member States,

Emphasizing that it is for the Security Council, alone or acting through the Committee, to determine whether humanitarian circumstances have arisen,

Deeply concerned that Iraq has failed to comply with its obligations under the Security Council resolution 664 (1990) in respect of the safety and well-being of third state nationals, and reaffirming that Iraq retains full responsibility in this regard under international humanitarian law including, where applicable, the Fourth Geneva Convention,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that in order to make the necessary determination whether or not for the purposes of paragraph 3 (c) and paragraph 4 of resolution 661 (1990) humanitarian circumstances have arisen, the Committee shall keep the situation regarding foodstuffs in Iraq and Kuwait under constant review;

2. *Expects* Iraq to comply with its obligations under Security Council resolution 664 (1990) in respect to third State nationals and reaffirms that Iraq remains fully responsible for their safety and well-being in accordance with international humanitarian law including, where applicable, the Fourth Geneva Convention;

3. *Requests*, for the purposes of paragraphs 1 and 2 of this resolution, that the Secretary-General seek urgently, and on a continuing basis, information from relevant United Nations and other appropriate humanitarian agencies and all other sources on the availability of food in Iraq and Kuwait, such information to be communicated by the Secretary-General to the Committee regularly;

4. *Requests further* that in seeking and supplying such information particular attention will be paid to such categories of persons who might suffer specially, such as children under 15 years of age, ex-

pectant mothers, maternity cases, the sick and the elderly;

5. *Decides* that if the Committee, after receiving the reports from the Secretary-General, determines that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq or Kuwait in order to relieve human suffering, it will report promptly to the Council its decision as to how such need should be met;

6. *Directs* the Committee that in formulating its decisions it should bear in mind that foodstuffs should be provided by the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries;

7. *Requests* the Secretary-General to use his good offices to facilitate the delivery and distribution of foodstuffs to Kuwait and Iraq in accordance with the provisions of this and other relevant resolutions;

8. *Recalls* that resolution 661 (1990) does not apply to supplies intended strictly for medical purposes, but in this connection recommends that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies.

S.C. Res. 666, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX G
RESOLUTION 667

*Adopted by the Security Council at its 2940th meeting
on 16 September 1990*

The Security Council,

Reaffirming its resolutions 650 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990) and 656 (1990),

Recalling the Vienna Conventions of 18 April 1961 on diplomatic relations and of 24 April 1963 on consular relations, to both of which Iraq is a party,

Considering that the decision of Iraq to order the closure of diplomatic and consular missions in Kuwait and to withdraw the immunity and privileges of these missions and their personnel is contrary to the decisions of the Security

Council, the international Conventions mentioned above and international law,

Deeply concerned that Iraq, notwithstanding the decisions of the Security Council and the provisions of the Conventions mentioned above, has committed acts of violence against diplomatic missions and their personnel in Kuwait,

Outraged at recent violations by Iraq of diplomatic premises in Kuwait and at the abduction of personnel enjoying diplomatic immunity and foreign nationals who were present in these premises,

Considering that the above actions by Iraq constitute aggressive acts and a flagrant violation of its international obligations which strike at the root of the conduct of international relations in accordance with the Charter of the United Nations,

Recalling that Iraq is fully responsible for any use of violence against foreign nationals or against any diplomatic or consular mission in Kuwait or its personnel,

Determined to ensure respect for its decisions and for Article 25 of the Charter of the United Nations,

Further considering that the grave nature of Iraq's actions, which constitute a new escalation of its violations of international law, obliges the Council not only to express its immediate reaction but also to consult urgently to take further concrete measures to ensure Iraq's compliance with the Council's resolutions,

Acting under Chapter VII of the Charter of the United Nations,

1. *Strongly condemns* aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nationals who were present in those premises;

2. *Demands* the immediate release of those foreign nationals as well as all nationals mentioned in resolution 664 (1990);

3. *Further demands* that Iraq immediately and fully comply with its international obligations under resolutions 660 (1990), 662 (1990) and 664 (1990) of the Security Council, the Vienna Conventions on diplomatic and consular relations and international law;

4. *Further demands* that Iraq immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait and in Iraq and take no action to hinder the diplomatic and consular missions in the performance of their functions, including access to their nationals and the protection of their person and interests;

5. *Reminds* all States that they are obliged to observe strictly resolutions 661 (1990), 662 (1990), 664 (1990), 665 (1990) and 666 (1990);

6. *Decides* to consult urgently to take further concrete measures as soon as possible, under Chapter VII of the Charter, in response to Iraq's continued violation of the Charter, of resolutions of the Council and of international law.

S.C. Res. 667, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX H
RESOLUTION 669

*Adopted by the Security Council at its 2942nd meeting
on 24 September 1990*

The Security Council,

Recalling its resolution 661 (1990) of 6 August 1990,

Recalling also Article 50 of the Charter of the United Nations,

Conscious of the fact that an increasing number of requests for assistance have been received under the provisions of Article 50 of the Charter of the United Nations,

Entrusts the Committee established under resolution 661 (1990) concerning the situation between Iraq and Kuwait with the task of examining requests for assistance under the provisions of Article 50 of the Charter of the United Nations and making recommendations to the President of the Security Council for appropriate action.

S.C. Res. 669, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX I
RESOLUTION 670

*Adopted by the Security Council at its 2943rd meeting
on 25 September 1990*

The Security Council,

Reaffirming its resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), and 667 (1990),

Condemning Iraq's continued occupation of Kuwait, its failure to rescind its actions and end its purported annexation and its holding of third State nationals against their will, in flagrant violation of resolutions 660 (1990), 662 (1990), 664 (1990) and 667 (1990) and of international humanitarian law,

Condemning further the treatment by Iraqi forces of Kuwaiti nationals, including measures to force them to leave their own country and mistreatment of persons and property in Kuwait in violation of international law,

Noting with grave concern the persistent attempts to evade the measures laid down in resolution 661 (1990),

Further noting that a number of States have limited the number of Iraqi diplomatic and consular officials in their countries and that others are planning to do so,

Determined to ensure by all necessary means the strict and complete application of the measures laid down in resolution 661 (1990),

Determined to ensure respect for its decisions and the provisions of Articles 25 and 48 of the Charter of the United Nations,

Affirming that any acts of the Government of Iraq which are contrary to the above-mentioned resolutions or to Articles 25 or 48 of the Charter of the United Nations, such as Decree No. 377 of the Revolution Command Council of Iraq of 16 September 1990, are null and void,

Reaffirming its determination to ensure compliance with Security Council resolutions by maximum use of political and diplomatic means,

Welcoming the Secretary-General's use of his good offices to advance a peaceful solution based on the relevant Security Council resolutions and noting with appreciation his continuing efforts to this end,

Underlining to the Government of Iraq that its continued failure to comply with the terms of resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 666 (1990) and 667 (1990) could lead to further serious action by the Council under the Charter of the United Nations, including under Chapter VII,

Recalling the provisions of Article 103 of the Charter of the United Nations,

Acting under Chapter VII of the Charter of the United Nations,

1. *Calls upon* all States to carry out their obligations to ensure strict and complete compliance with resolution 661 (1990) and in particular paragraphs 3, 4 and 5 thereof;

2. *Confirms* that resolution 661 (1990) applies to all means of transport, including aircraft;

3. *Decides* that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the date of the present resolution, shall deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances, subject to authorization by the Council or the Committee established by resolution 661 (1990) and in accordance with resolution 666 (1990), or supplies intended strictly for medical purposes or solely for UNIIMOG;

4. *Decides further* that all States shall deny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly its territory unless:

(a) The aircraft lands at an airfield designated by that State outside Iraq or Kuwait in order to permit its inspection to ensure that there is no cargo on board in violation of resolution 661 (1990) or the present resolution, and for this purpose the aircraft may be detained for as long as necessary; or

(b) The particular flight has been approved by the Committee established by resolution 661 (1990); or

(c) The flight is certified by the United Nations as solely for the purposes of UNIIMOG;

5. *Decides* that each State shall take all necessary measures to ensure that any aircraft registered in its territory or operated by an operator who has his principal place of business or permanent residence in its territory complies with the provisions of resolution 661 (1990) and the present resolution;

6. *Decides further* that all States shall notify in a timely fashion the Committee established by resolution 661 (1990) of any flight between its territory and Iraq or Kuwait to which the requirement to land in paragraph 4 above does not apply, and the purpose for such a flight;

7. *Calls upon* all States to cooperate in taking such measures as may be necessary, consistent with international law, including the

Chicago Convention, to ensure the effective implementation of the provisions of resolution 661 (1990) or the present resolution;

8. *Calls upon* all States to detain any ships of Iraqi registry which enter their ports and which are being or have been used in violation of resolution 661 (1990), or to deny such ships entrance to their ports except in circumstances recognized under international law as necessary to safeguard human life;

9. *Reminds* all States of their obligations under resolution 661 (1990) with regard to the freezing of Iraqi assets, and the protection of the assets of the legitimate Government of Kuwait and its agencies, located within their territory and to report to the Committee established under resolution 661 (1990) regarding those assets;

10. *Calls upon* all States to provide to the Committee established by resolution 661 (1990) information regarding the action taken by them to implement the provisions laid down in the present resolution;

11. *Affirms* that the United Nations Organization, the specialized agencies and other international organizations in the United Nations system are required to take such measures as may be necessary to give effect to the terms of resolution 661 (1990) and this resolution;

12. *Decides* to consider, in the event of evasion of the provisions of resolution 661 (1990) or of the present resolution by a State or its nationals or through its territory, measures directed at the State in question to prevent such evasion;

13. *Reaffirms* that the Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches.

S.C. Res. 670, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX J
RESOLUTION 674

*Adopted by the Security Council at its 2951st meeting
on 29 October 1990*

The Security Council,

Recalling its Resolutions 660 (1990), 661 (1990) 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990) and 670 (1990),

Stressing the urgent need for the immediate and unconditional withdrawal of all Iraqi forces from Kuwait, for the restoration of Kuwait's sovereignty, independence and territorial integrity and of the authority of its legitimate Government,

Condemning the actions by the Iraqi authorities and occupying forces to take third-state nationals hostage and to mistreat and oppress Kuwait and third-state nationals, and the other actions reported to the Council such as the destruction of Kuwaiti demographic records, forced departure of Kuwaitis and relocation of population in Kuwait and the unlawful destruction and seizure of public and private property in Kuwait including hospital supplies and equipment, in violation of the decisions of this Council, the Charter of the United Nations, the Fourth Geneva Convention, the Vienna Conventions on Diplomatic and Consular Relations and international law,

Expressing grave alarm over the situation of nationals of third states in Kuwait and Iraq, including the personnel of the diplomatic and consular missions of such states,

Reaffirming that the Fourth Geneva Convention applies to Kuwait and that as a high contracting party to the convention, Iraq is bound to comply fully with all its terms and in particular is liable under the convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches,

Recalling the efforts of the Secretary-General concerning the safety and well-being of third-state nationals in Iraq and Kuwait,

Deeply concerned at the economic cost, and at the loss and suffering caused to individuals in Kuwait and Iraq as a result of the invasion and occupation of Kuwait by Iraq,

Acting under Chapter VII of the United Nations Charter,

Reaffirming the goal of the international community of maintaining international peace and security by seeking to resolve international disputes and conflicts through peaceful means,

Recalling the important role that the United Nations and its Secretary-General have played in the peaceful solution of disputes and

conflicts in conformity with the provisions of the United Nations Charter,

Alarmed by the dangers of the present crisis caused by the Iraqi invasion and occupation of Kuwait, which directly threaten international peace and security, and seeking to avoid any further worsening of the situation,

Calling upon Iraq to comply with the relevant resolutions of the Security Council, in particular Resolutions 660 (1990), 662 (1990) and 664 (1990),

Reaffirming its determination to insure compliance by Iraq with the Security Council resolutions by maximum use of political and diplomatic means,

A.

1. *Demands* that the Iraqi authorities and occupying forces immediately cease and desist from taking third-state nationals hostage, and mistreating and oppressing Kuwaiti and third-state nationals, and from any other actions such as those reported to the Council and described above, violating the decisions of this Council, the Charter of the United Nations, the Fourth Geneva Convention, the Vienna Conventions on Diplomatic and Consular Relations and international law;

2. *Invites* states to collate substantiated information in their possession or submitted to them on the grave breaches by Iraq as per paragraph 1 above and to make this information available to the Council;

3. *Reaffirms* its demand that Iraq immediately fulfill its obligations to third-state nationals in Kuwait and Iraq, including the personnel of diplomatic and consular missions, under the Charter, the Fourth Geneva Convention, the Vienna Conventions on Diplomatic and Consular Relations, general principles of international law and the relevant resolutions of the Council;

4. *Also reaffirms* its demand that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of those third-state nationals, including diplomatic and consular personnel, who wish to leave;

5. *Demands* that Iraq insure the immediate access to food, water and basic services necessary to the protection and well-being of Kuwaiti nationals and of nationals of third states in Kuwait and Iraq, including the personnel of diplomatic and consular missions in Kuwait;

6. *Reaffirms* its demand that Iraq immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait and in Iraq, take no action to hinder these diplomatic and

consular missions in the performance of their functions, including access to their nationals and the protection of their person and interests and rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel;

7. *Requests* the Secretary-General, in the context of the continued exercise of his good offices concerning the safety and well-being of third-state nationals in Iraq and Kuwait, to seek to achieve the objectives of paragraphs 4,5 and 6 and in particular the provision of food, water and basic services to Kuwaiti nationals and to the diplomatic and consular missions in Kuwait and the evacuation of third-state nationals;

8. *Reminds* Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq;

9. *Invited* states to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq with a view to such arrangements as may be established in accordance with international law

10. *Requires* that Iraq comply with the provisions of the present resolution and its previous resolutions, failing which the Council will need to take further measures under the Charter;

11. *Decides* to remain actively and permanently seized of the matter until Kuwait has regained its independence and peace has been restored in conformity with the relevant resolutions of the Security Council.

B.

12. *Reposes* its trust in the Secretary-General to make available his good offices and, as he considers appropriate, to pursue them and undertake diplomatic efforts in order to reach a peaceful solution to the crisis caused by the Iraqi invasion and occupation of Kuwait on the basis of Security Council Resolutions 660 (1990), 662 (1990) and 664 (1990), and calls on all states, both those in the region and others, to pursue on this basis their efforts to this end, in conformity with the Charter, in order to improve the situation and restore peace, security and stability;

13. *Requests* the Secretary-General to report to the Security Council on the results of his good offices and diplomatic efforts.

S.C. Res. 674, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX K
RESOLUTION 677

*Adopted by the Security Council at its 2962nd meeting
on 28 November 1990*

The Security Council,

Recalling its resolutions 660 (1990) of 2 August 1990, 662 (1990) of 9 August 1990 and 674 (1990) of 29 October 1990,

Reiterating it concern for the suffering caused to individuals in Kuwait as a result of the invasion and occupation of Kuwait by Iraq,

Gravely concerned at the ongoing attempt by Iraq to alter the demographic composition of the population of Kuwait and to destroy the civil records maintained by the legitimate Government of Kuwait,

Acting under Chapter VII of the Charter of the United Nations,

1. *Condemns* the attempts by Iraq to alter the demographic composition of the population of Kuwait and to destroy the civil records maintained by the legitimate Government of Kuwait;

2. *Mandates* the Secretary-General to take custody of a copy of the population register of Kuwait the authenticity of which has been certified by the legitimate Government of Kuwait which covers the population registration up to 1 August 1990;

3. *Request* the Secretary-General to establish, in co-operation with the legitimate Government of Kuwait, an Order of Rules and Regulations governing access and use of the said copy of the population register.

S.C. Res. 677, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).

APPENDIX L
RESOLUTION 678

*Adopted by the Security Council at its 2963rd meeting
on 29 November 1990*

The Security Council,

Recalling, and reaffirming its Resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990), 669 (1990), 670 (1990), 674 (1990) and 677 (1990),

Noting that, despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement resolution 660 (1990) and the above subsequent relevant resolutions, in flagrant contempt of the Council,

Mindful of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security,

Determined to secure full compliance with its decisions,

Acting under Chapter VII of the Charter of the United Nations,

1. *Demands* that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;

2. *Authorizes* Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;

3. *Requests* all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of this resolution;

4. *Requests* the States concerned to keep the Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of this resolution

5. *Decides* to remain seized of the matter.

S.C. Res. 678, 45 U.N. SCOR (Resolutions and Decisions of the Security Council) at —, U.N. Doc. S/INF/46 (1990).