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David R. Penna

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DAVID R. PENNA*

The emergent era of superpower cooperation promises much for international law. The institutional and legal frameworks set in place after the close of the Second World War were premised upon an assumption of superpower cooperation. When that cooperation was absent, it was certain that international law would play a minimal role in constraining superpower conflict; since superpowers perceived that their interests were broad in an era of competition, it was rare for both superpowers to attempt to simultaneously utilize the U.N. framework to resolve "security" issues.[1] With the coming of superpower cooperation and the ability of the U.N. to act in the Iraq-Kuwait crisis, there is a certain optimism that things have changed.[2] This article explores the grounds for (and the limits of) that optimism in the context of the most important international legal principle in the security area: the right to self-defense.

Since claims of self-defense have been used to justify almost every recent use of force,[3] one can claim that the exception at times seems to swallow the general rule against the use of force. Therefore, any attempt to regulate the use of force in the post-Cold War era must first come to terms with defining this exception and evolving a means to enforce this definition in specific circumstances. The prospects for the evolution and institutionalization of this ideal is the main focus of this article. First, the status of the self-defense exception to the prohibition of the use of armed force is briefly reviewed up to the end of the Cold War period. Next, alternative systems of self-defense are presented and discussed, specifying the normative and institutional requirements for each system. Then, the major event of the post-Cold War era thus far, the Kuwait conflict, is analyzed. In the final section of this article, the implications of the functioning of a new post-Cold War system of self-defense are explored.

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* Director of Publications, Center on Rights Development; B.A./M.A., 1982, Duquesne University; J.D., 1985, University of Denver, College of Law; Ph.D. Candidate, University of Denver Graduate School of International Studies.

1. A discussion of the failed Charter institutions with respect to security issues is given in Anthony C. Arend, *International Law and the Recourse to Force: A Shift in Paradigms* 27 STAN. J. INT'L L. 1, 6-10 (1990).

2. This optimism has been endangered by attempts to remove President Gorbachev and roll back his reforms in the Soviet Union.

3. Claims of self defense were made by Iraq in Kuwait, the Soviet Union in Afghanistan, the U.S. in Panama and Nicaragua, Vietnam in Cambodia, and Tanzania in Uganda, to list just a few recent examples.

I. THE EVOLUTION OF THE PRINCIPLE OF SELF-DEFENSE

Today self-defense is the major exception to the prohibition on the use of force by states;[4] however, at one time such a general prohibition did not exist. War was an acceptable legal relationship between states as long as it was properly declared and waged and was for a "just" cause. Self-defense was only one of several just causes for war or the use of force.[5]

As war came to be seen as destructive, attempts were made to abolish or limit recourse to war as a means of settling disputes. The Covenant of the League of Nations contained mutual assurances regarding recourse to war: war could not be resorted to if the dispute was under consideration by the League, an arbiter or a court;[6] nor could there be recourse to war if a state complied with the judgment of one of these bodies.[7] In any case, there could be no recourse to war until at least three months after any of these bodies rendered a decision.[8] The exception, of course, was self-defense.

Self-defense also remained an important implied exception to the Pact of Paris, which sought to abolish war as an instrument of national policy. While the treaty makes no explicit reference to self-defense, the parties understood that such a right was preserved. The issue was not covered in the Pact due to the insistence of the United States, which claimed that to define a right of self-defense would lead to the abuse of this right by states who would seek to mold their actions to fit the language of the exception.[9]

The U.N. Charter, much as the League of Nations Covenant, seeks to limit the recourse to war. It does so through article 2(4), which prohibits the use of force against the political independence or territorial integrity of states.[10] This principle is to be enforced by the Security Council which has the power to act to maintain or restore international peace and security through the implementation of a range of collective measures up to

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4. Arend, *supra* note 1, at 29.

5. During the time of Hugo Grotius (the 17th century), a war was regarded as just if it was in response to a "wrong received." Grotius, *quoted in* AHMED M. RIFAAT, INTERNATIONAL AGGRESSION 12 (1979).

6. League of Nations Covenant, June 28, 1919, art. 12, ¶ 1, T.S. No. 4.

7. *Id.* art. 13, ¶ 4.

8. *Id.* art. 12, ¶ 1.

9. See Kellog, Note to French Ambassador, *infra*, at 37.

10. Arend claims there were only two exceptions to the use of force prohibition in Article 2(4) under the "Charter paradigm": the Security Council power to restore international peace and security, and self defense under article 51, Arend, *supra* note 1, at 1-2. Others would contend that there may exist another basis for the use of force: humanitarian intervention. *See generally*, FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed. 1973); Ved P. Nanda, *Multilateral Sanctions Against South Africa, in* EFFECTIVE SANCTIONS ON SOUTH AFRICA: THE CUTTING EDGE OF ECONOMIC INTERVENTION 15-16, (George W. Shepherd, ed. 1991).

and including the use of force.

This, at least, was how the structure of the U.N. was intended to work, although, in fact, difficulties arose due to the inability of the permanent members to agree in most situations. Some would contend that the current rapprochement between the superpowers will act to revitalize this system;[11] it is also possible, however, that it is too late to resurrect the system as originally intended. It may also be that the post-Cold War changes in international politics will enable the U.N. system to be utilized in ways the Charter framers had not intended.

Article 51 of the U.N. Charter preserves the "inherent" right of individual and collective self-defense. That is, in a document that otherwise limits the use of force, the Charter claims not to affect the right of self-defense, supposedly preserving it as it existed under customary international law.[12] However, the provision does limit the duration to act under this right to periods prior to the Security Council action to restore international peace and security.[13]

II. SYSTEMS OF SELF-DEFENSE

The interplay of the norms discussed above and the means of their enforcement create a system. The same norms interpreted and enforced through differing institutions are likely to create differing patterns of behavior.

At this point, it may be useful to conceptualize four possible systems of protection against aggression.[14] The first is a system of each state for itself: if a state is attacked, it is entitled to defend itself by using force. This can be labelled a system of individual defense.[15] It has a major weakness: the stronger states can attack the weaker without much risk, since the weak states are unlikely to be capable of inflicting much damage on stronger states when acting individually. Therefore, each state must maintain adequate military means "for the dangers it anticipates."[16]

A second system is one in which an attacked state has the right to call upon other states to assist it in repelling an attack. Other states may

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11. Thomas M. Franck, Comment, *Soviet Initiatives: U.S. Responses — New Opportunities for Reviving the United Nations System*, 83 AM. J. INT'L L. 531 (1989); John Quigley, Comment, *Perestroika and International Law*, 82 AM. J. INT'L L. 788, 794-97 (1988).

12. *See* Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 259-63 (1989).

13. *See* Mary E. O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response To Iraq's Invasion Of Kuwait*, 15 S. ILL. U. L.J. 453, 476-79 (1991).

14. I do not mean to suggest that all of these systems existed at actual periods of history; even those that did exist did not ever control all aspects of self defense in all regions. These are just theoretic possibilities, and ideal types at that.

15. While the system described is clearly a system of individual defense, Stromberg notes that collective security has been used in several contexts, ROLAND N. STROMBERG, COLLECTIVE SECURITY AND AMERICAN FOREIGN POLICY 191-92 (1963).

16. W. Michael Reisman, Comment, *Some Lessons From Iraq: International Law and Democratic Politics*, 16 YALE J. INT'L L. 203 (1991).

or may not respond, according to individual treaty commitments or political considerations. The weakness of this system is that weaker states remain vulnerable since they may be unable to gain guarantees from allies. A state is not totally reliant upon its own military capability, hence the weaker the military capability, the stronger the diplomatic capability must be to gain allies.

A third system is slightly different: it would *require* all other states to respond to aggression. In this system, the aggression is viewed as a violation of the rights of each state in the community rather than the rights of merely the victim state. The weakness here is that some important states may prefer to ignore violations of community norms if they do not believe that their interests are sufficiently imperilled.

A fourth system is further institutionalized. It envisions an independent actor as enforcer of the community norms. Individual actors would have only very limited recourse to force, since this institutional actor, a world government, would be viewed as having a near monopoly on the legitimate use of force. This institution would have a duty to respond to violations of community norms, but would not necessarily have to react through the use of identical force;[17] it would merely have to preserve the community norms.

While the differences between these systems may seem slight, they do have some important implications. While realizing the limits of analogy, it will be instructive to illustrate some of the differences by reference to the domestic legal system.

The international right to self-defense is often analogized to the domestic right of individuals to use force in self-defense.[18] Take, for instance, the example of an individual encountering a criminal who is a threat to the life of the innocent individual.[19] The first system is illustrated by the somewhat outmoded concept of the "fair fight." While force is ordinarily not permissible in interpersonal relations, it may be employed if an individual is himself threatened with violence.[20] Others, however, may not use violence, even against the aggressor since this would result in an "unfair" fight and threaten the escalation of violence.[21]

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17. An analogy can be made here to the domestic system where a murderer need not be killed, nor even be met with force, if lesser measures can be successful.

18. *See e.g.*, Hans Kelsen, *Collective Security, in* 49 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 1 (1954).

19. In a domestic context, Robinson notes that an individual who is the victim of aggression may justifiably cause a "greater harm" in order to protect himself. He cites the case of a victim killing three thugs in order to save his own life. This is justified because "society highly values the protection of innocents and deplores unjustified aggression." PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 131a, at 70 (1984).

20. FREDRIC S. BAUM & JOAN BAUM, LAW OF SELF DEFENSE 6 (1970). Baum and Baum note that Blackstone distinguished between justifiable homicide and excusable homicide, with the former still carrying some degree of guilt. Self-defense was excusable homicide rather than justifiable homicide and therefore had a degree of culpability.

21. This aspect has no analogy in modern law, which does allow for limited defensive

The second system permits the wronged party to call for help, but does not obligate others to give it.[22] It still recognizes the wrong committed as essentially a private wrong and allows redress only through self-enforcement.[23]

The third system is quite different: it requires a response not only to provide protection to weaker individuals, but also because the initial use of force can be viewed as a wrong against each individual in the community. The individuals act together to vindicate this wrong, but do not delegate the responsibility to some institutional actor, which is seen as either unresponsive or incapable of achieving the vindication of the norms infringed.[24] In the fourth system, any use of force is viewed as primarily against the community and, in particular, against the institutional actor or government of the community.[25] In human systems, some vestige of rights of self-defense would remain since the destruction of an individual life cannot be reconstituted after the fact. In a state system, however, this is not the case. Either states are kept legally intact after their territory has been over-run, or the state can be reconstituted after the aggression has been repelled by the institutional actor's forces. Therefore, in such a state-system, if a reliable institutional actor is created, it could be contended that a right of self-defense would not only be unnecessary but counterproductive.[26]

While identifying actual manifestations of each of these ideal systems is difficult and likely to be imperfect, some possible historical examples may better illustrate the workings of these systems. The first system is illustrated in the policies of United States isolationism. For example, neutrality acts,[27] which prohibited the provision of assistance to either side in an armed conflict were based upon several perceptions. First, the conflict

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intervention for the protection of others; it may be illustrated, however, by rules in sport which punish severely intervention by third persons in a brawl that has already been started. It is common for players to be fined and suspended for being the "third man in," or "first man off the bench" in sport. The rationale is that it is an attempt to limit violence so that officials can control the initial outbreak. The analogy is imperfect, however, since sport presupposes the presence of officials who will act to limit the outbreak of violence.

22. In domestic law there exists no duty to give aid to another. There are limitations on the use of force to assist another. *See* ROBINSON, *supra* note 19, § 133.

23. This is analogous to Norman law in early England where "homicide was considered a matter of private vengeance." BAUM & BAUM, *supra* note 20, at 3. It is also analogous to some conceptions of traditional African law; *see*, JOHN CAMPBELL, 2 TRAVELS IN SOUTH AFRICA 210-11 (1822).

24. In some respects, this is the same reasoning that underlies the justification of vigilante action. *See* CAMPBELL, *supra* note 23, at 49-52.

25. Some would argue that the international system ultimately protects the lives of individuals, Kelsen, *supra* note 18, at 1, but one must be careful not to assume an identity of individual and state interests.

26. Kelsen, *supra* note 18, at 27.

27. Neutrality acts generally only banned assistance that did not have executive approval. *See* FRANCIS DEAK & PHILLIP C. JESSUP, 2 A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 1079-1115 (1974) (a collection of U.S. neutrality acts).

did not involve United States interests, and therefore, the United States should not become involved. Second, the participation of United States citizens could endanger United States relations with the warring states. A less substantial concern was to limit the conflict to the original combatants and not engulf the region in war.

The second system is illustrated in the French draft of the Pact of Paris[28] and implicitly in the final draft of that pact. There, states renounced the use of force as an instrument of national policy.[29] However, if a state breached its promise by employing force, all other parties were to be released from their obligation toward the breaching party.[30] While states were not obligated to come to the defense of the victim state, many states were obligated to do so by bilateral treaties.[31]

The third system is illustrated by the European system in the Cold War era. While the U.N. Charter permissively authorized collective self-defense in Article 51, other agreements assured the use of force in retaliation to an armed attack.[32] The examples here include the NATO[33] and Warsaw Pact treaties.[34] Formerly, the League of Nations Covenant attempted a similar, but more limited obligation, declaring, "Should any Member of the League resort to war in disregard of its covenants. . . it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League. . . ."[35] The members were to "immedi-

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28. French Draft Of Treaty For The Condemnation And Renunciation Of War As An Instrument Of National Policy, *translated in* 133 FOREIGN REL. LAW OF THE U.S. 32-34 (1928, vol. 1) [hereinafter French Draft].

29. *Id.* at art. I. The renunciation was "without intention to infringe upon the exercise of their rights of legitimate self-defense within the framework of existing treaties . . . ."

30. *Id.* at art. III.

31. While the final draft of the pact, Treaty Between the United States and Other Powers, August 27, 1928, 46 Stat. 2343, *reprinted in* 133 FOREIGN REL. LAW OF THE U.S. 153-56 (1928), contained no explicit recognition of the right to self defense, the Kellog criticism of the earlier French draft claimed "[t]here is nothing in the American draft . . . which restricts or impairs in any way the right of self defense. That right is inherent in every sovereign and implicit in every treaty." Kellog, Telegram from the Secretary of State to the Ambassador in France (April 23, 1928), *reprinted in* 133 FOREIGN REL. LAW OF THE U.S. 34, 36 (1928). Kellog also noted that the Covenant of the League of Nations did not contain a positive obligation to go to war, even against aggressors, although such an obligation did exist in the treaties of Locarno, *id.* at 37. Kellog also contended that any state violating the Pact of Paris "would automatically release the other parties from their obligations to the treaty-breaking state. Any express recognition of this principle of law is wholly unnecessary." *Id.* at 38.

32. The decision to pursue collective security outside of the U.N. was due to not only the superpower rivalry, but the perceived failures of the U.N. to preserve the peace in areas where superpower interest was not yet considered to be unreconcilable, such as Palestine, STROMBERG, *supra* note 15, at 191-92.

33. *See* North Atlantic Treaty, April 4, 1949, arts. 5-6, 63 Stat. 2241, *reprinted in* 4 FOREIGN REL. OF THE U.S. 281-85 (1949). An attack against one member of the alliance is considered an attack against all.

34. Treaty of Friendship, Cooperation and Mutual Assistance, May 14, 1955, 219 U.N.T.S. 3, *reprinted in* 49 AM. J. INT'L L. SUPP. 194 (1955).

35. LEAGUE OF NATIONS COVENANT, *supra* note 6, at art. 16, ¶ 1.

ately" impose sanctions on the aggressor state, but members were only to take military action under the direction of the Council, "to protect the covenants of the League."[36]

The fourth system is illustrated both by the League of Nations scheme and the U.N. framework.[37] Here a supranational body is charged with maintaining international peace and security and is empowered to take various steps against aggression.[38] Aggression in both instances is defined as an international crime and treated as a wrong against the international community.[39]

From the examples given above, it is obvious that these systems coexist. But the coexistence is tenuous; there are ideological underpinnings of the two systems that are inconsistent and will ultimately make one system prevail over the other.[40] This is because the animating legal principles are different. The principle underlying system three is that the use of force is wrong because it threatens the existence or welfare of a state; the state is viewed as the basic unit of the international system. The goal of this system is, therefore, the preservation of states.

The fourth system, however, is focused upon the principle that the use of force is wrong because it represents a disruption of the global order. Generally, the global order will require the preservation of states, but in some instances, the global order may require the dismantling of states if so required by the authoritative decision-maker. Further, any use of force represents at least a theoretical diminution of the power of the institutional actor which is supposed to hold a monopoly on the use of force or at least have the sole power to authorize its use.

It is possible to argue that the more institutionalized system should be preferred for several reasons. First, it appeals to the notion that fairness should triumph over mere brute strength, since a properly constituted institution can be viewed as employing its power after fair consideration of competing claims, and thereby acting justly. Secondly, the institutionalization of legitimate recourse to the use of force would have the effect of lesser recourse to force. If the institution is properly constituted, its threat of force would be so overwhelming that criminal conduct would be deterred and individual state use of legitimate force would be

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36. *Id.* at art. 16, ¶¶ 1-2.

37. Arend claims that the U.N. system only promised a very limited type of collective security due to the probability of the veto: there could be no collective security through U.N. machinery against any of the permanent members of the Security Council. Arend, *supra* note 1, at 9 n.40.

38. LEAGUE OF NATIONS COVENANT, *supra* note 6, at art. 10; U.N. CHARTER arts. 41-42.

39. *See* Protocol for the Pacific Settlement of International Disputes, Oct. 2, 1924, art. 2, L.N.O.J., Spec. Supp., No. 23, p. 498, *reprinted in* RIFAAT, *supra* note 5, at 54-55.

40. The U.S. claimed that NATO would only be a countermeasure to immediate aggression until the Security Council was able to act, STROMBERG, *supra* note 15, at 194; North Atlantic Treaty, *supra* note 33, arts. 5-7. The contention that the U.N. is the primary framework is weak since it was apparent to all at the time that either the U.S. or U.S.S.R. would utilize a veto to prevent effective Security Council action in most cases.

unnecessary since such claims would be vindicated by institutional threat of force.

The remainder of this article documents the trends toward the likely forms of institutionalization, while examining the changes the post-cold war system is likely to make in the system of self-defense prevalent in the international community.

III. ANALYSIS OF U.N. ACTION IN KUWAIT CRISIS

When Iraq invaded Kuwait, Kuwait clearly had a right to defend itself. Kuwait was an independent state, and a member of the United Nations, and therefore had rights under article 51 of the Charter. The right to self-defense was acknowledged in a Security Council resolution during the crisis.[41] Therefore, Kuwaiti defensive efforts, including the efforts of the Kuwaiti resistance after Iraq's attempted annexation, (which the U.N. declared illegal), had a firm basis in international law.

There are, however, some specific provisions of article 51 that merit brief but careful examination. Article 51 requires that a state report actions taken in self-defense to the Security Council.[42] This has been interpreted by the International Court of Justice as a requirement of a state declaring itself the victim of an armed attack, rather than a requirement of detailing specific defensive measures taken.[43] Kuwait clearly did this.

Another provision of Article 51 indicates that states are free to act in self-defense "until the Security Council has taken measures necessary to maintain international peace and security."[44] The precise meaning of this phrase is difficult to determine. Does it mean that states must stop acting even if Security Council actions are ineffective? That states must not act unless the Security Council approves of its actions? That states merely cannot take steps that would be inconsistent with Security Council actions? In the case of Kuwait, this raises an ambiguity. Was the action taken by the Security Council merely an approval of Kuwait's measures of collective self-defense or was it a U.N. action? Which principle was being vindicated by the U.N. action: preservation of states or maintenance of global order? Analysis of both the language of the U.N. resolutions and the actions taken by the Kuwaiti alliance is necessary for a proper examination of these questions.

The language of the Security Council resolutions is ambiguous. The Council recognized Kuwait's right to respond with individual or collective self-defense in an August resolution. The resolution, which imposed sanc-

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41. S.C. Res. 661, U.N. SCOR, 2933rd meeting (6 Aug. 1990), *reprinted in* 29 I.L.M. 1325 (1990).

42. *See* D.W. Grieg, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 INT'L & COMP. L. Q. 366, 367-69 (1991).

43. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.) 1986 I.C.J. 1.

44. U.N. CHARTER art. 51.

tions on Iraq, read in part: "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 . . . ."[45] In the same resolution, "acting under Chapter VII of the Charter," the Council calls upon all states to impose sanctions on Iraq for a dual purpose: to secure compliance with an earlier Security Council resolution[46] and "to restore the authority of the legitimate government of Kuwait."[47]

In a later resolution, the Security Council called upon

> 1) . . . 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 ensure strict implementation of the provisions related to . . . shipping laid down in resolution 661 (1990). . . .
> 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.[48]

The resolution also requested the states so acting to coordinate their efforts through the Military Staff Committee.[49]

Both of these resolutions indicate some uncertainty regarding the basis for action. In the former resolution, sanctions were imposed to both secure compliance with Security Council decisions and to assist in the defense of Kuwait's sovereignty. The difference between the two purposes may be considered by some to be excessively legalistic since the decision to be complied with was one that was designed to restore the sovereignty of Kuwait.[50]

Some of the implications, however, are clearer in the latter resolution. There, the states that are acting independently under the right to self-defense are authorized to act under the authority of the Security Council to enforce the sanctions.[51] Further, paragraph 3 of that resolution is painfully unclear. It does not specify for what purpose such assistance should be given: should it be given merely to assist those states in enforcing sanctions, or should it be given to assist those states acting under Article 51 rights of collective self-defense? At the time, the type of assistance was of crucial importance since the Security Council had not yet explicitly authorized any use of force under U.N. auspices to liberate Ku-

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45. S.C. Res. 661, *supra* note 41.

46. S.C. Res. 660, U.N. SCOR, 2932nd mtg. (2 August 1990), *reprinted in* 29 I.L.M. 1325 (1990) (calling for immediate Iraqi withdrawal from Kuwait).

47. S.C. Res. 661, *supra* note 41, at ¶ 2.

48. S.C. Res. 665, U.N. SCOR, 2938th mtg. (25 August 1990), ¶¶ 1-2, *reprinted in* 29 I.L.M. 1329-30 (1990) (emphasis added).

49. *Id.* at ¶ 4.

50. *See* S.C. Res. 660, *supra* note 46; *see also* S/Res/661 *supra* note 41, at ¶ 2.

51. Some states, such as Britain, interpreted this resolution as providing for the use of force. *See Current Development: The Invasion of Kuwait By Iraq*, 40 INT'L & COMP. L. Q. 482, 485 (1991).

wait directly, although it had recognized the right of Kuwait to act under Article 51.

The resolution that seemingly authorized the use of force was resolution 678, which permitted "Member States co-operating with the Government of Kuwait" to implement the previous resolutions by using "all necessary means" if Iraq failed to fully comply before January 15, 1991.[52] Further, it authorized the same states "to restore international peace and security in the area."[53] Such a broad delegation of power seems an attempt to make the alliance an organ of the United Nations. Certainly, restoration of international peace and security, if interpreted more broadly than expelling Iraq from Kuwait, is beyond the scope of the traditional right to self-defense. Too broad an interpretation would have likely endangered the alliance as well as elicited strong dissent and a possible veto in the Security Council.

Several of the governments involved in Operation Desert Storm viewed their actions as totally justified by the principle of collective self-defense even without Security Council authorization. Several British officials, before the November resolution, claimed that "authorization from the Security Council was not a legal necessity for the use of force"[54] or that the choice should not be put "wholly and entirely with the machinery of the U.N.."[55] However, they did recognize the political expediency of gaining U.N. authorization.

The U.S. position was complex, if not confused. Near the end of the Desert Storm offensive, President Bush stated the goals of the alliance: "Our goal remains what it's been all along — Iraq's complete and unconditional compliance with all relevant United Nations resolutions and its implementation of all the requirements to be found in Security Council Resolution 686 . . . ."[56]

Earlier, on January 5, 1991, he had emphasized the U.N. role in citing "the condemnation of the world in the form of no less than 12 resolutions of the U.N. Security Council,"[57] but later in the same address noted other more fundamental considerations: "We have seen too often in this century how quickly any threat to one becomes a threat to all. At this critical moment in history, at a time the Cold War is fading into the past, we cannot fail. At stake is the kind of world we will inhabit."[58]

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52. S.C. Res. 678, U.N. SCOR, 2963rd mtg. (29 Nov. 1990), ¶ 2, *reprinted in* 29 I.L.M. 1565 (1990).

53. *Id.*

54. Prime Minister (Mrs. Thatcher), H.C. Hansard, Vol. 177, col. 738 (6 Sept. 1990), *cited in Current Developments, supra* note 51, at 487.

55. Foreign Secretary (Mr. Hurd), H.C. Hansard, Vol. 177, col. 901 (7 Sept. 1990), *cited in Current Developments, supra* note 51, at 487 n.37.

56. Remarks at a Meeting of Veterans Service Organizations, 27 WKLY. COMP. PRES. Doc. 247 (March 4, 1991).

57. Radio Address, 27 WKLY. COMP. PRES. Doc. 15 (Jan. 5, 1991).

58. *Id.* at 16.

There are several ways of interpreting this passage. Its failure to be grounded in legal considerations, and the rather grand historical analogy, may indicate that what is at stake is U.S. leadership in the post-Cold War era. A second interpretation, which would be more comfortable to the other members of the alliance, would be that the grander principle at stake is the principle of non-aggression and global security. Indeed this is the principle Bush emphasized to the allies a few days later: "[Iraq's] unprovoked invasion was more than an attack on Kuwait, more than the brutal occupation of a tiny nation that posed no threat to its large and powerful neighbor. It was an assault on the very notion of international order."[59]

In any case, it is clear that the U.S. viewed the issues at stake as more than a mere alliance commitment to Kuwait. The issue for analysis here remains as what did the actors perceive as the issue at stake and what was the perceived role of the institutional actor, the U.N.?

The U.S. view of the U.N. role may have unwittingly been stated clearly by presidential spokesman Marlin Fitzwater in the following statement:

> The President spoke with U.N. Secretary-General Perez de Cuellar late this afternoon to discuss the Secretary-General's upcoming visit to Baghdad. The President wished him well and stated that he was pleased that the Secretary-General is undertaking this mission for peace. The President noted that the United Nations has played a key role in building and maintaining the international coalition against the Iraqi aggression.[60]

This instrumental view of the U.N. should be contrasted with the views of other allies. For example, the Prime Minister of Canada was quick to emphasize his country's role as a supporter of the U.N. rather than as an ally of the U.S.: ". . . all possible diplomatic means that might resolve the situation must be examined, and no promising avenue should be overlooked . . . . [I]f Saddam Hussein continues to reject the path of peace, Canada will stand with the United Nations in implementing its resolutions as Canada has always done."[61] The reference to alliance with the United Nations rather than the U.S. is significant since the statement was made at a joint press conference with U.S. Secretary of State James Baker.

The position of other governments should also be briefly considered. Japan, for example, while not taking an active military role in the Gulf, had an interest in shaping the new world order. In February 1991, monthly publication of Japan's ruling Liberal Democratic Party summa-

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59. Message to Allied Nations, 27 WKLY. COMP. PRES. DOC. 16 (Jan. 8, 1991).

60. Statement by Presidential Spokesman Marlin Fitzwater, 27 WKLY. COMP. PRES. DOC. 31 (Jan. 10, 1991).

61. Prime Minister (Mr. Mulroney), January 14, 1991 *quoted in* 2 U.S. DEPT. STATE DISPATCH 42 (Jan. 21, 1991).

rized the government's position, noting, "[Japanese government] officials emphasized that: 1) Japan has a duty to assist the multinational forces, although it must make its own decisions on specific support measures, and 2) when Americans are shedding blood, Japan cannot remain unconcerned."[62]

While Japan's earlier statements emphasized the U.N. role,[63] the language of the February statement seems clearly in the nature of collective self-defense concerns. This is particularly true of the second point, which indicates a concern for the preservation of an alliance.

An Indian statement at approximately the same time places much more emphasis on the U.N. In a February 9, 1991, statement, a Foreign Office spokesman urged a Security Council meeting to "ensure that the conduct of military operations is in strict conformity with U.N. Resolution 678."[64] The statement emphasized that the objective of the resolution was to "liberate Kuwait and not to subdue Iraq or dismantle its technological and physical infrastructure or to cripple its social and economic life. . . ."[65] While all these statements have different emphases, one must ask if the differences are significant. If some of the alliance states claimed to be acting in collective self-defense (although appreciating the U.N. authorization) while others claimed that alliance forces were strictly bound by the U.N. resolutions, was there any difference in the standards imposed in either case?

If it is recalled that a right to act in self-defense of others, and even in self-defense of oneself, is only a justification for a limited use of force, one can contend that the standards are equivalent. Self-defense under international law requires consideration of both necessity and proportionality. These are the very concerns the Indian spokesman raises in the context of the harm caused to Iraqi civilians.[66] These concerns would have been relevant if the Security Council had not considered the issue at all and the alliance states were acting purely under Article 51 rights as defined in customary international law.[67] Indeed, most of the debate can be viewed as differences in perceptions of the necessity and proportionality of the force employed. For example, many anti-war protesters in the U.S. and elsewhere contended that the inadequacy of sanctions had not been demonstrated.[68] If this contention is correct, it would mean that the use of force was not necessary.

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62. *Prime Minister Outlines Japan's Response to Gulf*, LIBERAL STAR, Feb. 15, 1991, at 1.

63. *Kaifu Stresses Resolve to Support Gulf Defense*, LIBERAL STAR, Oct. 15, 1990, at 1 ("Mr. Kaifu expressed full support for the international efforts in the Gulf, centering on the U.N. . . . .").

64. *Official Spokesman's Statement*, INDIA NEWS, Feb. 1-15, 1991, at 2.

65. *Id.*

66. *Id.*

67. *See* RESTATEMENT (THIRD) FOREIGN REL. L. § 905(2) and comment g (for examples).

68. *See* Shepherd, *Middle East: A Crisis of Human Rights and World Order*, GLOBAL JUSTICE, Oct.-Nov. 1990, vol. 1, no. 3, at 1.

IV. CONCLUSIONS

From the presentation above, several points become clear. First, in acting in the Kuwait crisis, the Security Council not only authorized the Desert Storm action by the Kuwait alliance, but in doing so fused (or confused) the powers given to states under Article 51 with the power of the Security Council "to maintain international peace and security." This fusion was most evident in Resolution 678 which set the January 15 deadline for Iraq to comply with the earlier resolutions.[69] This fusion has several implications. Initially, it indicates that the Security Council is likely to play a more active role in defining what is proper self-defense, and therefore, in theory at least, indicates that the Security Council will be more likely to limit recourse to the doctrine in the future. Another implication is that the fusion of these powers will give states acting in self-defense under U.N. authorization additional powers beyond that which they could have claimed under customary international law. While it is unlikely that the Security Council could authorize the use of force much beyond the traditional limits of self-defense and still carry the coalition of permanent members needed, it has clearly gone beyond the core rights of self-defense in authorizing the control and supervision over Iraq's chemical and nuclear war capability.

Second, the states participating in Desert Storm, and the global community in general, may have had differing perceptions of what was at stake in Kuwait, and in particular, the role of the United Nations in the conflict. While it is difficult to predict how future leaders will assess the operation, it is certainly clear that there was more than enough rhetoric by all participants and observers regarding the vindication of international legal principles against aggression and the enforcement of U.N. resolutions to suggest that the action in Kuwait may be given that significance in the future. Given the basic agreement on the vindication of some (but not necessarily the same) legal principle by the Kuwait alliance, it is unlikely that the events will be remembered as American or Western imperialism.

Third, the actions of the U.N. and the Kuwait allies does signal an improvement in the system of international security. Where before, in the Cold War system, a very limited type 3 system of collective security existed in Europe through NATO and WTO, the Kuwait crisis signals the globalization of this system. While the United Nations has not developed the kind of independent military capability that would enable it to implement a type 4 system, it appears that through the sanctioning of Article 51 actions by states, and by playing a significant role in mobilizing collective security responses, the system of international security has evolved for the better. While this evolution is incomplete and tentative at this time, and there will certainly be setbacks in the future when permanent

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69. *See* S.C. Res. 678, *supra* note 52; *see also supra* notes 52 and 53, and accompanying text.

members disagree, the new system promises to limit the recourse to force by aggressors, thereby accomplishing one of the major purposes of the United Nations.