

January 1993

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Recommended Citation

Sarah Rumage, *The Return of Article 42: Enemy of the Good for Collective Security*, 5 Pace Int'l L. Rev. 211 (1993)

Available at: <http://digitalcommons.pace.edu/pilr/vol5/iss1/7>

ARTICLE

THE RETURN OF ARTICLE 42: ENEMY OF THE GOOD FOR COLLECTIVE SECURITY

Sarah Ramage†

“The best is the enemy of the good.”¹

“Human beings do not ever make laws; it is the accidents and catastrophes of all kinds happening in every conceivable way, that make laws for us.”²

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I am deeply grateful to Professor Thomas M. Franck, not only for his helpful comments but for his unparalleled teaching and his many kindnesses to me. I would also like to thank the other “Great Minds” — Anthony D’Amato, Richard Falk, Michael Reisman, Louis Henkin, Eugene Rostow, Al Rubin, Oscar Schachter, and Burns Weston — who made this article possible, all of whom graciously answered my numerous (and often impertinent) questions at various ASIL meetings — a busy time when they had people far more famous than myself to talk to. I will do my best to emulate their wisdom and great generosity of spirit. Special thanks is also owed to Janet Fong, without whom this article would have disappeared into unsaved computer oblivion long ago, as well as to the library staff at the Hague Academy of International Law, all of whom worked very hard to indulge my outrageous book requests.

This article, my first, is dedicated to Professor Myres S. McDougal, my first professor of international law and the most immortal of all the great minds. It is also dedicated to all the men and women who fought in the conflicts discussed herein, especially my late grandfather Dr. William T. Ramage (World War I), and his sons Bill (World War II) my uncle, and Joe (Korea) my father. May all who serve, serve as well, and in causes in which they can believe. Finally, this article is also dedicated to my mother, Nancy S. Ramage, and her late parents, the Most Rev. and Mrs. William A. Simms, who first told me the story of the League of Nations, and of their precious dream for a warless world.

1. VOLTAIRE, *Dramatic Arts*, in *PHILOSOPHICAL DICTIONARY* (H.I. Woolf trans., 1945).
2. Plato, *Laws* IV 709.

INTRODUCTION

Should the Persian Gulf Crisis of 1990-91 (hereafter Second Gulf Crisis)³ be characterized as a United Nations Security Council "international enforcement action" under Articles 42 through 50, or as an Article 51 "collective self-defense action" subsequently sanctioned by the Security Council? The founding fathers of modern international law, preoccupied with the "justness" of war, would not have been unduly concerned with the answer.⁴ However, in our age, the name of the rule has assumed a fundamental importance, for at least some of its perceived au-

3. Although some scholars refer to it as a "war," it is called a "crisis" here to differentiate it from traditional, pre-Charter warfare concepts. The word "crisis" also helps to distinguish it from the recent Iran-Iraq War, which was a formally declared war not conducted under Security Council auspices or under the recognized parameters of self-defense. The "First Gulf Crisis" refers to the 1987-88 involvement of the United States in vessel escort operations in the Persian Gulf during the Iran-Iraq War, including the September 21, 1987 attack on an Iranian Navy ship laying mines.

4. See Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 AM. J. INT'L L. 110 (1991); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986). Kennedy explains this issue differentiation:

Traditional scholars begin with the sovereign act, assess its status as public or private, and come to some conclusion about the legal sphere which it structures. They might suggest, for example, that all wars publicly declared by a sovereign are just. In contrast, the primitive scholars begin with an idea of justice, grounded in a moral/legal order which defined sovereignty and the capacities of sovereigns. Justice entrusts sovereigns with certain prerogatives, among them the capacity to engage in wars. Private wars, not expressive of sovereign capacity, are unjust.

Id. at 9.

However, the "primitives" would have had a more critical interest in the issue than nineteenth century jurists, for whom war was "value-neutral and ultimately power-based." Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 281 (1985). See HIDEKI SUGANAMI, *THE DOMESTIC ANALOGY AND WORLD ORDER PROPOSALS* (1989). In the nineteenth century, "states were free to employ force and go to war for any reason or no reason." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 200 (June 27) (dissenting opinion of Judge Schwebel). A decision to use force was regarded as simply a method of conducting international relations—one choice among many, and it "enjoyed close to a full measure of legitimacy under international law." Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271 (1985).

Even into World War I, war was not only "legal", but had the effect of suspending the operation of law. Philip Marshall Brown, *War and Law*, 12 AM. J. INT'L L. 162, 163 (1918). ("Once war has arrived, however, the maxim *inter arma silent leges* must prevail. War is the abandonment of litigation and argument. It is the negation of law.") It was "[o]nly when the universal liberty to go to war was eliminated," that issues of self-defense and collective security could emerge and gain claimants right-holders' status. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 166 (1988).

thority lies in its lineage.⁵ Even the most fondly treasured maxims can lose their legitimacy once their dubious parentage is laid bare.⁶

Moreover, the choice of characterizing the Second Gulf Crisis and its definitive work product, Security Council Resolution 678,⁷ inevitably gives rise to other issues. Rejecting an Article 42 interpretation, and forcing the Second Gulf Crisis into the classification of an Article 51 action, effectively steers away from any pretense of Security Council oversight, never mind control. Article 51 proponents will tolerate some Security Council meddling but arduously insist that Article 51 is little more than a license to wage a war of self-defense without *de facto* Security Council authorization; anything less would be an impermissible surrender of sovereignty.⁸

5. "To be sure, the source of every rule—its pedigree. . . is one determinant of how strong its pull to compliance is likely to be. Pedigree, however, is far from being the only indicator of how seriously the rule will be taken, particularly if the rule conflicts with a state's perceived self-interest." Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988). For a more comprehensive and provocative exploration of the roles of authority and legitimacy in international law, see THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

6. See A. Vaughn Lowe, *Do General Rules of International Law Exist?* 9 REV. INT'L STUD. 207, 211 (1983), which questions the legitimacy of, if not "the logical necessity" for, the most basic international norms, such as *pacta sunt servanda*. See also N. Czaplinski & G. Danilenko, *Conflicts of Norms in International Law*, 21 NETHERLANDS Y.B. OF INT'L L. 1, 7 (1990). For an able defense of general rules of international law as encompassed in *pacta sunt servanda* (and a persuasive argument for their existence), see Hidemi Suganami, *A Normative Enquiry in International Relations: The Case of "Pacta Sunt Servanda"*, 9 REV. INT'L STUD. 35 (1983), as well as Suganami's thoughtful criticisms of Professor Lowe's position, Hidemi Suganami, *A.V. Lowe on General Rules of International Law*, 10 REV. INT'L STUD. 175 (1984); but see A. Vaughn Lowe, *A Reply*, 10 REV. INT'L STUD. 183 (1984), for what surely looks like, but cannot be, the last word.

7. See *infra* notes 194-203 and accompanying text.

8. Thomas M. Franck & Faiza Patel, *U.N. Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 63-70 (1991). But Schachter's view balances these concerns:

There are some who challenge the basic idea that the security of a state—its self-preservation—can and should be subjected to international law. . . . The relationship of national security and international law is inevitably complicated and fluid. . . but I have accepted a basic premise—namely, that the right of self-defense, 'inherent' though it may be, can not be autonomous. To consider it as above or outside the law renders it more probable that force will be used unilaterally and abusively.

Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 259 and 277 (1989).

Some of America's most preeminent constitutional law scholars⁹ and at least fifty-four United States Congressmen¹⁰ have gone through great intellectual pain to take an even more distant stance. This group contends that the U.S., although still the most prominent military power in the world, is simply powerless to act militarily, even under the aegis of the Security Council, absent a formal Congressional declaration of war.¹¹ This scenario, in effect, subjects all U.N. Chapter VII actions "to the same constitutional strictures as the old system's unilateral acts of war — acts that the Charter, with very limited exceptions, has prohibited."¹² Indeed, both groups seem to miss fundamental points. The Charter's first and foremost aim is "to save succeeding generations from the scourge of war."¹³ It is a simple but impressive goal that requires nothing less than the maintenance of "international peace and security."¹⁴

Furthermore, Article 2(4) of the Charter effectively outlaws

9. This group includes, but is not limited to: Michael Glennon, *infra* note 11; Louis Henkin, *infra* note 11; Harold Hongju Koh, author of *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); and Professor Raven-Hansen of George Washington University Law School.

10. See *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990). Compare with *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (a similar case brought by 110 U.S. Congressmen as plaintiffs).

11. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 160 (1972): "[N]o treaty has ever been designed to put the United States into a state of war without a declaration of Congress." See also Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 80 (1991); *The Gulf War and the Constitution*, FOREIGN AFF. 84, 92 (Spring, 1991). Self-defense is the most important exception to this view of strict constitutional constructionism. Its strong historical roots help explain its persistent entrenchment in the modern mind as well as within significant scholarship, despite the fact that the UN Charter clearly dispenses with individual Member State declarations of war. This is particularly evident in the case of the United States. See, e.g., DANIEL G. LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC* 155 (1985).

12. Franck & Patel, *supra* note 8, at 64.

13. U.N. CHARTER, Preamble. Such aims are noble but these affirmations are contradicted by the actual conduct of Member States who engage in large-scale wars, invade countries and then freely use armed forces "to topple governments, to seize territory, to avenge past injustice, or to impose settlements. Threats of force, open or implicit, pervade the relations of states." Oscar Schachter, *International Law: The Right of States To Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984).

For a review of the role of codification in creating international law, see Oscar Schachter, *The Nature and Process of Legal Development in International Society*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 773 (R. MacDonald & D. Johnston eds., 1983).

14. U.N. CHARTER, art. 1.

“war” as a traditional pursuit of “diplomacy by other means.”¹⁵ Seeking to emphasize this change by omission, Article 2(4) does not even use the word “war”.¹⁶ War is no longer a viable option for any U.N. Member State, with three very narrow exceptions: 1) Article 2(7) belligerencies “which are essentially within the domestic jurisdiction of any state;”¹⁷ 2) the enforcement actions of Articles 42 through 50,¹⁸ and 3) the self-defense actions of Article 51.¹⁹

15. “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER, art. 2, para. 4.

Given the recurrent frequency of armed aggression between states since adoption of the U.N. Charter, some scholars question whether Article 2(4) even approaches normative status. See Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT’L L. 1, 45 (1990), describing Article 2(4) as “simply no longer authoritative and controlling.” Even generally optimistic scholars with a great appreciation of the utility of international organizations have vented their frustrations with the paradox of Article 2(4)’s repeated affirmation, but non-application, by Member States in their international affairs. See Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT’L L. 809, 809 (1970), cf. Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT’L L. 544 (1971).

As Oscar Schachter points out: “We know that the principle [of Article 2(4)] was intended to outlaw war in its classic sense, that is, the use of military force to acquire territory or other benefits from another state.” Schachter, *supra* note 13, at 1624.

16. Schachter, *supra* note 13, at 1624. The word *war* is not even used in Article 2(4) which was a departure from the League of Nations Covenant and the Kellogg-Briand Pact of 1928. According to Schachter, “[t]he term ‘force’ was thus a more factual and wider word to embrace military action.” *Id.*

17. “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” U.N. CHARTER art. 2, para. 7. Yet this policy is clearly changing in cases where internal conflict “produces sustained domestic violence and intense international concern.” Richard A. Falk & Saul H. Mendlovitz, *Towards a Warless World: One Legal Formula to Achieve Transition*, 73 YALE L.J. 399, 412-413 (1964).

In fact, Falk and Mendlovitz observe that “U.N. practice discloses a willingness to disregard the constraints of 2(7) whenever an ardent consensus can be mobilized in the General Assembly.” *Id.* at 413.

18. Articles 42 through 50 essentially encompass what are known as “Chapter VII actions” considered apart from art. 51, discussed *supra*, note 17. Article 51 preserves the concept of traditional war, but limits it as a response to an illegal use of force and further narrows it as an “inherent right of self-defense.” Article 51, although physically located in Chapter VII of the Charter, is really an *exception* to it.

19. U.N. Charter Article 51 states:

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

Clearly, a U.S. congressional declaration of war no longer means what it did prior to the signing of the Charter. In fact, it is quite a fair question to ask whether such a congressional declaration means anything at all anymore, for it cannot make any war, conflict, or use of armed force "legal" unless it is actually legal under the Charter.²⁰ Conversely, Congressional withholding of a declaration of war cannot make the United States role in an armed conflict illegal if the action is sanctioned by the Security Council.²¹

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.

As Joyner notes, "[t]he strict test under international law legally sanctioning such a military response is the presence of some real and immediate imperilment to a state." Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 133 (1984).

Even military interference "by invitation" to uphold a friendly regime may be wrongful and violate the Charter where the use of force is excessive, or violates "the territorial integrity or political independence of any state." U.N. CHARTER, art. 2, para. 4. Apart from being simply wrongful, such extra-Charter military excursions have been characterized as "irrational overreactions" which often result in "the initiation of violence without anticipation of the scope and dire nature of such action." See ROBERT MANDEL, *IRRATIONALITY IN INTERNATIONAL CONFRONTATION* 73-81 (1987).

20. See Thomas M. Franck, *Declare War? Congress Can't*, N.Y. TIMES, Dec. 11, 1990, at A27. (opining that Congress' power to declare war is superfluous where the U.N. has authorized military force). But see John M. Hillebrecht, *In U.S., Constitution Supersedes U.N. Charter*, N.Y. TIMES, Dec. 29, 1990, at A22 (letter to the editor), (arguing that the United States Constitution supersedes the power of the U.N. Charter).

21. Declarations of traditional war made outside the Charter's exceptions of self-defense and authorized police enforcement actions are simply not legal under international law. This is not to say that wars, in the traditional sense, have ceased to occur. In fact, very detailed sets of rules regulating war remain in force, despite war's general prohibition by the Charter and the express agreement of all Member States not to engage in it. These include various sets of rules popularly known as the Geneva and Hague Conventions. See, e.g., Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention (II) For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 135; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 157 B.F.S.P. 284; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. The 1949 Geneva Conventions were augmented by the 1977 Protocols I and II, reprinted in 16 I.L.M. 139 (1977). See also Hague Convention of 1899 Respecting the Laws and Customs of War on Land; Regulations Respecting the Laws

The issue of constitutional war powers in conflict with the U.N. Charter seems to portray a uniquely American dilemma. This conflict has had enormous ramifications for all Member States, since its decipherment will determine the ultimate worth of all future Security Council votes. What is the value of a Security Council resolution, when it can be effectively nullified by a U.S. Congressional refusal to participate, or be subject to a U.S. court's judgment that the resolution was unconstitutional? The obvious absurdity of such a result belies a mischievous isolationism and anti-internationalism that has long characterized the U.S.' ambivalent behavior at the U.N.²² Why should any Member state comply with its Article 25 obligations²³ or render

and Customs of War on Land, annexed to the Hague Convention (IV) of 1907; American Rules of Land Warfare (1940); and the British Manual of Military Law (1929). An excellent treatise on these rules is EDWARD K. KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT* (1992).

22. See THOMAS M. FRANCK, *NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT* (1985). See also Flora Lewis, *The Value of the U.N.*, N.Y. TIMES, May 23, 1982, at A23; Burton Y. Pines, *The U.S. and the U.N.: Time for Reappraisal*, THE HERITAGE FOUNDATION BACKGROUNDER, Sept. 29, 1983. Perhaps Calvin Coolidge said it best in 1923, when he blithely informed Congress: "The League [of Nations] exists as a foreign agency. We hope it will be helpful. But the United States sees no reason to limit its own freedom and independence of action by joining it." See also JAMES M. BURNS, *ROOSEVELT: THE LION AND THE FOX* 248 (1956):

Outside Washington were the millions of voters who held the destinies of foreign policy makers in their hands. And here was the most unstable foundation of all on which to build a consistent program of foreign relations. Great numbers of these voters were colossally ignorant of foreign affairs beyond the three-mile limit; as the old story went, they were more concerned about a dogfight on Main Street than a flare-up in distant Ruritania. Others were rigidly bound by loyalties absorbed in the countries of their natural origin. Still others were prisoners of ancient fears and shibboleths: that wily foreign diplomats always played Uncle Sam for a sucker, that America had never lost a war and never won a peace conference, that salvation lay in keeping free of entangling alliances.

But see JOHN MUELLER, *RETREAT FROM DOOMSDAY: THE OBSOLESCENCE OF MAJOR WAR* 98, 108 (1988):

Most Americans, however, felt a sense of guilt about the war [World War II], concluding that irresponsible American isolationism was exactly what had brought it about, giving aggressors the illusion that they could strike without having to take on the American colossus. Furthermore, since the United States was now by far the strongest nation on the globe, it should grow up and take its rightful place in international politics. As the perceived Soviet threat began to loom over war-torn Europe, it also became clear to most that the United States was the only country capable of leading an effective opposition.

23. Also known as the "duty" article, U.N. CHARTER art. 25 states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in

Article 2(5) assistance²⁴ when the U.S. can excuse its own failure to perform by invoking the various and sundry declarations of its domestic political bodies? A U.S. Congressional declaration of war, although politically desirable, was not legally necessary for the United States' engagement of its forces in the Second Gulf Crisis. This hardly means that Congress would have no role to play; Congress still has the ultimate war-making power—the power of the purse (exercisable at its peril, but exercisable nonetheless). However, it does mean that Congress's role changed greatly after the signing of the Charter in 1945, and lacks the prominence in international conflicts that it would have in the case of a purely domestic civil war involving no other state.

This article seeks to prove the return of Article 42 as a viable Charter provision. Part I sets forth some of the most prominent legal theories today on the issue of whether the Second Gulf Crisis constituted an Article 42 or Article 51 U.N. action. Part II historically depicts the United States' actions in the Korean Conflict as a clear example of Article 42 in use. Part III examines the constitutional strength of Article 42 and demonstrates that it is indeed the law of the Charter as well as the "law of the land," and can exist—even thrive—without Article 43 agreements. Part IV appraises the Security Council Resolutions during the Second Gulf Crisis, in particular the ambiguities of Resolution 678. This article concludes that the handling of the Second Gulf Crisis more closely constitutes an international enforcement action based on Article 42, rather than an Article 51 self-defense action.

I. WHAT DO THE GREAT MINDS SAY? ARTICLE 42 OR 51?

The most cursory perusal of recent scholarship shows a spirited divergence of opinion on the issues presented above, proving that great minds do not always think alike.²⁵

accordance with the present Charter."

24. U.N. CHARTER art. 2, para. 5 provides more generally for rendering assistance to the Security Council: "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."

25. The 'great minds' refers to: Professor Thomas Franck, Faiza Patel, *supra* note 8; Eugene V. Rostow, *infra* note 29; Burns H. Weston, *infra* note 33; Oscar Schachter,

A. *Thomas Franck and Faiza Patel: The Article 42 Argument*

Professor Thomas Franck and Faiza Patel contend that the handling of the Second Gulf Crisis was an Article 42 global “collective police action.” They describe Article 42 as “a new alternative to traditional wars of self-defense” under Article 51.²⁶ Furthermore, Franck and Patel assert that, while an Article 51 action remains an “inherent” right, the “old [Article 51] way is licensed only until the new [Article 42, for global action, or Article 53, for regional action] way begins to work: ‘Until,’ in the words of Article 51, ‘the Security Council has taken the necessary measures to maintain international peace and security.’”²⁷

Anticipating some academic outcry, Franck and Patel blame any Article 42 reliance problems on its desuetude. They forcefully maintain “[t]hat this new system has rarely worked as intended . . . [with] the Cold War at an end, the system now has a chance to demonstrate whether it works—to call itself into being and with it the new world order intended in 1945.”²⁸

B. *Eugene Rostow: The Article 51 Argument*

Conversely, Eugene Rostow asserts that the Second Gulf Crisis was strictly an Article 51 collective self-defense action.²⁹

supra note 8. This list is by no means exclusive, and we cautiously pause before the flashing light of Quintilian’s dictum urging modesty and circumspection in judging great minds, “since there is always the risk of falling into the common fault of condemning what one does not understand.” INSTITUTIO ORATIA X, i, at 26 (H.E. Butler trans.).

26. Franck & Patel, *supra* note 8, at 63.

Regardless of whether the Second Gulf Crisis is determined to be based on Article 42 or Article 51, there is no doubt that, because the Security Council was able to respond effectively, the traditionally broad invocation of Article 51 has been implicitly curtailed.

27. *Id.* at 63. This view goes beyond a choice of articles. It would act as a brake upon the power of Member States to resort to traditional uses of force. Rostow, *infra* note 29, at 511, rejects this view.

28. Franck & Patel, *supra* note 8, at 63. See ALF ROSS, *THE UNITED NATIONS: PEACE AND PROGRESS* 38, 40 (1966):

The system of the Charter for the maintenance of international peace and security is the expression of a new and bold construction of a more realistic type than that of the League of Nations. . . .

It would be incorrect to say that this security system has failed. It has simply never been realized or tested.

29. Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense*, 85 AM. J. INT’L L. 506, 506 (1991). See also RICHARD CONNAUGHTON, *MILITARY INTERVENTION IN THE 1990S: A NEW LOGIC OF WAR* 5-9 (1992).

Furthermore, he warns that to conclude otherwise would "eviscerate Article 51,"³⁰ undermine the Security Council's veto power, unleash global chaos, and "[i]t could even destroy the United Nations."³¹

C. Professor Burns Weston: Article 42 Perhaps?

Professor Burns Weston has characterized the Second Gulf Crisis as an illegitimate, unilateral "military campaign"³² full of hidden terrors and moral dilemmas. He laments that the Security Council did not wait to authorize the use of force until all hope of persuading Iraq to relinquish Kuwait through economic

30. *Id.* at 506.

31. *Id.* For a similar conclusion, see RONALD STEEL, *IMPERIALISTS AND OTHER HEROES: A CHRONICLE OF THE AMERICAN EMPIRE* 166 (1971). "The UN Charter is flexible, to be sure, but it cannot be stretched too far without endangering the existence of the organization itself." *Id.* But see ROSS, *supra* note 28, at 29-53, 162-184 for the contention that the UN will not survive unless the great powers are able to implement their foreign policies through its institutions.

Although forecasting the end of the UN has often been the subject of journalistic squabbling and something of a graduate student's parlor game, Cassandra-like wailings from distinguished international jurists are relatively rare. In fact, writers from the school of negative international organizational jurisprudence are far more likely to make bloodthirsty, snarling sounds. See SHIRLEY HAZARD, *DEFEAT OF AN IDEAL: A STUDY OF THE SELF-DESTRUCTION OF THE UNITED NATIONS* (1973). See HILLEL SEIDMAN, *UNITED NATIONS: PERFIDY AND PERVERSION* (1982). See also DANIEL MOYNIHAN, *A DANGEROUS PLACE* (1973); JEANE J. KIRKPATRICK, *1 LEGITIMACY AND FORCE* 20 (1988).

32. Weston states the U.S., ever the international ringmaster made the U.N. "stand on its head and turned Secretary-General Perez de Cuellar into the Bush Administration's 'file clerk and messenger boy.'" Weston, *infra* note 33, at 526. Why Professor Weston did not simply say "toady" and be done with it remains a mystery, but it clearly was not from any compulsion of self-restraint. In a conversation with this author at the ASIL's 1992 Annual meeting, not only was Professor Weston wholly unrepentant, but he voiced his regret that life afforded so few opportunities for similarly honest expression.

While Professor Weston gets points for honesty, it is worth remembering that the Secretary-General's role is a difficult one; his tasks are frequently thankless, and his office is always an easy target. In the Korean Conflict, then-Secretary-General Trygve Lie was similarly pilloried by the Soviets as a "coward," a "right-wing Socialist," a "stooge of Wall Street," and an "abettor of American aggression who is helping to wreck the United Nations." *Russians Vilify Lie as Tool of the West*, N.Y. TIMES, July 9, 1950, at A1. The Organization itself was branded "a lap dog which Truman can lead on a leash," and the six voting Security Council delegates were labeled "bloody fools"—the U.S. delegate a "talking fool, Sir Terence Shone of Britain "an old fool of the old diplomatic school," the French delegate Jean Chauvel "a fool with the rank of ambassador;" Arne Sunde of Norway "a fool by virtue of necessity," the Ecuadorian "a fool with pretensions of philosophic knowledge," and the Cuban a "marionette fool, who jerks up his hand every time the Americans pull his string." *Id.*

sanctions had been definitively extinguished.³³ He blasts the ambiguity of Resolution 678,³⁴ preferring to view it “as a license to use force only as a last resort, [whereas] President [Bush] chose to construe it as an unconditional warrant to go to war come January 15.”³⁵ Weston, if he had his way, would re-number Resolution 678 as a Bondian 007 directive, “a virtual unrestricted license to kill and destroy.”³⁶ Weston also decries the coalition’s inadequate “[T]hird World representation”³⁷ and pouts that nobody in the coalition wore a blue helmet.³⁸

It is a pity that Weston founders so long on the shoals of ethical determinism, because his eventual exploration of legal issues leads him to an Article 42 justification. Initially, Weston rejects an Article 42 characterization because of the Article’s “dependent relationship with Article 43.”³⁹ Yet, “[a]n Article 51 justification, too, seems elusive.”⁴⁰ Nor is he comfortable with

33. Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT’L L. 516, 530 (1991). The theory of economic sanctions is that by causing populations to suffer varying degrees of economic discomfort and even harm, their (often totalitarian) leadership will change its moral character and bow to the international will. This is a peculiarly liberalist concept. Like many pedagogical notions, economic sanctions sometimes work after a very long time (e.g. South Africa), and sometimes they have a more perverse incentive (Cuba)—even though they plunge the poor into even deeper misery. What Weston fails to consider is the problems of application of prolonged economic sanctions. Enforcing sanctions through blockade and embargo can be extremely volatile, giving rise to serious “incidents” which may well result in the application of deadly force, especially in a case where a country is heavily armed, as Iraq was at the time of the Second Gulf Crisis. Economic sanctions which, to be meaningful, may involve the arrest of cargo and the boarding of ships at sea, the forcing down of aircraft, and creation of roadblock inspections, rarely remain peaceful for any length of time.

34. See *infra* notes 199-263 and accompanying text.

35. Weston, *supra* note 33, at 530.

36. *Id.* at 532-33.

37. *Id.* at 527.

38. *Id.* at 521-22. Certainly, the U.N. flag, flown in conjunction with other standards of participating Member States (as in the Korean Conflict), would have been entirely appropriate, and would have “underline[d] the United Nations character of all the forces under [U.S. command].” Walter H. Waggoner, *U.S. Pushes Tie-In to U.N. on Korea*, N.Y. TIMES, July 5, 1950, at A1. The blue helmet, however, may have acquired a connotation making it less suitable for use in actual combat. Affectionately called a “blueberry”, its use by U.N. peacekeeping troops has come to represent that the forces are working under the U.N. authority in a peace-seeking manner, non-aggressively. See *gen.* MICHAEL HARBOTTLE, *THE BLUE BERETS* (1971).

39. Weston, *supra* note 33, at 519.

40. *Id.* at 520.

Article 39, although this was the Security Council's Article of choice for the Korean Conflict of 1950. The use of military force in Korea, sniffs Weston, "was scarcely the kind of recommendation the Charter drafters had in mind when they adopted Article 39."⁴¹ Unfortunately, Weston sheds little light on what he thinks the framers of Resolution 678 did have in mind—perhaps more *economic* sanctions? However, in taking another look at Article 42, he comes perilously close to Franck's view:

[O]ne is left to conclude that the Security Council created an entirely new precedent, seemingly on the basis of some assumed penumbra of powers available to the Council under chapter VII—an 'Article 42 ½' authorization, as some UN watchers have called it. Not that there is anything inherently wrong about such a development. It is analogous to the judicially developed penumbra of powers available to the President of the United States in the conduct of foreign relations under the U.S. Constitution.⁴²

41. *Id.* at 521. Weston's rejection of an Article 39 basis is somewhat convoluted, and the Charter basis of the Korean conflict deserves an analysis which, because of time constraints, is simply beyond the scope of this paper. It is sufficient to say here that Weston's remark about Article 39 is specious—how can anyone determine, without at least some doubt, what was in another's mind, especially in the past? Constitutions are drafted to have more staying power than simple statutes; their creators are not expected to have included in them every conceivable application for every exigency. Constitutions, expressive of the people's collective will, are supposed to last. The fact is that only five years had elapsed between the Charter's adoption and the Korean invasion; nobody was shocked that Article 39 was used—it obviously solved the Article 43 dilemma, and the Member States were in a hurry because the North Korean Army had destroyed the South Korean Army and seized the southern capitol in less than four days. See, e.g., Walter H. Waggoner, *State Dept. Seeks Way to Form Unified U.N. Force*, N.Y. TIMES, July 2, 1950, at A1. The situation was "desperate and rapidly deteriorating;" scores of people were being killed, and the Communists were in *de facto* possession of the country. See U.S. State Dept. doc., U.S. Embassy, Tokyo, *Telegram No. 688*, June 30, 1950. 1p., TOP SECRET, declass. Nov. 17, 1975. TRUMAN LIBRARY, GEORGE M. ELSEY PAPERS. Moreover, prominent international law jurists have long recognized that Articles 39 and 42 are "closely connected." See *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 274-5 (Advisory Opinion of July 20, Dissenting Opinion of Judge Koretsky).

42. Weston, *supra* note 33, at 522. Franck also supports the idea of Charter "penumbras", and applies it to substantiate a police power to enforce democratic entitlement: "The World Court observed in the Bernadotte case that established rights and duties implicitly validate a penumbra of unenunciated, yet legitimate, means necessary to give them effect. If the 'end' of global peace demands the 'means' of global democracy, a Charter-based system established to ensure peace must also be presumed to be authorized to ensure universal adherence to democratic political rights." Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 89 (1992), footnotes omitted. The penumbra language, of course, comes from Justice White's concur-

D. Oscar Schachter: *Leaning more towards Article 51*

Oscar Schachter is much less troubled than Weston by the coalition's structure and leadership. Likewise, he is not offended by the speediness with which the Security Council acted to authorize the use of military force in Kuwait. In 1991 Schachter wrote "[w]hether a longer period would have been effective remains conjectural, but there is no doubt that the council had the legal right to decide on the need for military action."⁴³ Neither does Schachter find the Security Council's failure to declare the inadequacy of the economic sanctions, prior to authorizing the use of force, especially relevant, since there is nothing in the Charter specifically requiring it and "the debates indicate that several members believed that the sanctions would prove to be inadequate to bring about a withdrawal by Iraq."⁴⁴

rence in *Griswold v. Connecticut*, 381 U.S. 479, 381-486 (1965): Some rights which emanate from the Constitution "have penumbras, formed by emanations from these guarantees that help give them life and substance." *Id.* at 484.

43. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 463 (1991). Moreover, three months is not an insignificant period of time, given the circumstances and objectives. *But see* United Nations Security Council, Provisional Verbatim Record [hereafter S/PV. 2932 et seq.], S/PV. 2963, Nov. 29, 1990. 1 THE KUWAIT CRISIS: BASIC DOCUMENTS 163 (Lauterpacht et al, eds. 1991) [Mr. Al-Ashtal of Yemen]:

It is a little surprising that those who used to lecture us on the need to be patient for sanctions to work when they had to do with Rhodesia or South Africa are today in such a hurry to declare that those comprehensive and enforceable sanctions imposed on Iraq are simply not working. For sanctions to work and force Iraq to implement resolutions of the Security Council we need patience. That is the alternative to a catastrophic and unpredictable military confrontation in an inflammable region of the world. But it looks like patience is a rare commodity these days.

44. Schachter, *supra* note 43 at 462. Schachter notes that only Cuba and Yemen opposed Resolution 678; their contention was that force could not be used because no determination had been made that Article 41 sanctions were inadequate. "In their view, that determination was required when force was authorized under the terms of Article 42." *Id.* at 455-6. Therefore, Schachter reasons, either Article 42 was not in fact the basis or, "even if Article 42 was applied, the Council discussion showed that members considered that the economic sanctions would not be adequate to achieve the withdrawal of Iraq." *Id.* at 456.

Schachter's rationalization gives this thesis too much credit. Cuba's and Yemen's protestations about Article 42 often bordered on the incoherent and, because of their blatantly political content, do not carry a high indicia of reliability (although this has nothing to do with those states' right to vote). In particular, Cuba's aversion to Resolution 665's proposal "to halt all inward and outward maritime shipping" (see Resolution 665 (1990), para. 1, reprinted in THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 117-8), with its implicit reference to Article 42's measures of "blockade and other opera-

Professor Schachter does express surprise that the Security Council "did not condemn the invasion as a violation of Article 2(4) and an act of aggression. Clearly, it was both."⁴⁵ However, he "would not attribute any legal significance to the omission," since the diplomats' statements made during the conferences and debates leave no doubt that Iraq's actions went well beyond the pale of any conceivable bounds of legitimacy.⁴⁶ Moreover,

tions by air, sea, or land forces," is easily interpreted by looking at its recent history. See, e.g., S/PV.2937, Aug. 18, 1990, *id.* at 112-13; S/PV.2938, August 25, 1990, *id.* at 117-18.

45. Schachter, *supra* note 43, at 453. Resolution 660 (1990) does generally "condemn the Iraqi invasion of Kuwait," but its specific reference to Article 39 gives rise to Chapter VII, which is titled: *Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*.

Such reticence is an established feature of United Nations diplomacy, recognized even by the International Court of Justice. In the *Certain Expenses* case, Judge Koretsky noted of the Congo matter: "If the Security Council in its resolutions did not call the activity of the Belgian troops an aggression, then this was only for tactical reasons. 'We have refrained,' said the representative of Tunisia. . . from using the word 'aggression' or even 'aggressive acts' in resolutions, since we are most anxious not to exacerbate the feelings of the Belgian people. . . ." But this cannot change the essence of the matter." *Certain Expenses*, 1962 I.C.J. at 276 (diss. op. Koretsky).

Korea is "the one case where the Council has *declared* the existence of a breach to the peace" pursuant to Article 39. LELAND M. GOODRICH, EDVARD HAMBRO & ANNE P. SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 297 (1969), emphasis added. The Council came short of calling it "aggression," instead "noting with grave concern the armed attack upon the Republic of Korea by forces from North Korea." S.C. Res. 82, June 25, 1950. Some commentators reason that, "in this case it was felt that an attempt to label the 'attack' as an act of aggression might cause undue delay, in view of the greater seriousness of such a charge." L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* at 297-8.

46. Schachter, *supra* note 43, at 453. Canada's delegate stated in no uncertain terms that "the brutal Iraqi aggression against Kuwait is totally unacceptable and represents a flagrant violation of international law"; Finland expressed "shock and dismay. . . . This act of aggression is a gross violation of the United Nations Charter;" the United Kingdom called it "an unquestionable act of aggression"; and even the Soviet delegation expressed "its profound concern and alarm," and urged the Security Council to "act immediately to eliminate this violation of international peace and security." S/PV. 2932, Aug. 2, 1990, *reprinted in THE KUWAIT CRISIS: BASIC DOCUMENTS*, *supra* note 43, at 99-102.

Schachter also observes: "In view of the persistence of irredentist claims, the Council's unequivocal rejection of Iraq's claim is likely to be recalled in the future. It affirms that armed force may not be used to change the existing boundary of a state even if that boundary was established unjustly or by conquest." Schachter, *supra* note 43, at 454. This is an important legal development, especially in light of the pending claims of Libya to a healthy chunk of Chadian territory.

The fact is that Iraq's border dispute with Kuwait is very old. For a discussion of this matter during the age of the British Empire, see *The Historic Background*, in *THE KUWAIT CRISIS: BASIC DOCUMENTS*, *supra* note 43, at 3-72.

that the Security Council did not point a Dreyfusian finger at Tariq Aziz and shriek "J'accuse!" was almost certainly a laudable exercise in hopeful, voluntary self-restraint, premised on the theory that Iraq would be more easily cajoled into peaceful negotiation "if it were not expressly condemned for the 'supreme crime' of aggression."⁴⁷ The omission may also have made it easier for Iraq's "brother Arab" nations to agree on the resolutions' language and to vote for their passage.⁴⁸

According to Schachter, "Resolution 678 may be read as consistent with both Article 51 and Article 42,"⁴⁹ although he leans more toward Article 51.⁵⁰ Like Weston, Schachter feels it is significant that the coalition's military forces neither wore the traditional blue helmets nor carried the U.N. flag.⁵¹ Schachter

47. Schachter, *supra* note 43, at 453. Such finger-pointing and vociferous condemnations are usually reserved for Israel (also known as "the Zionist Entity") in the meetings of the Special Political Committee.

The "Dreyfusian finger" belonged to Major Henry, who had falsely accused Captain Dreyfus of espionage. During his testimony at Dreyfus's trial, Henry theatrically pointed his finger at the defendant and identified him, shrieking "that traitor is sitting there." DAVID L. LEWIS, *PRISONERS OF HONOR: THE DREYFUS AFFAIR* 51 (1973).

The bellicose phrase "J'Accuse" derives from the title of the famous essay by the popular novelist and intellectual Emile Zola, written in response to the acquittal of Esterhazy, who was likely the true spy. Zola charged that the acquittal was "a supreme slap at all truth, all justice!" and then concluded by listing, by name, various government officials involved in the conspiracy, prefaced with the words "J'Accuse."

48. Schachter, *supra* note 43, at 453. In his initial address to the Security Council on August 2, 1990, the Kuwaiti delegate referred to Iraq as "a sisterly country with which we had previously always enjoyed close links; we have always been linked by our pure Arab blood, and we have always defended sacred rights and dedicated ourselves to them." S/PV.2932, Aug. 2, 1990, *reprinted in* THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 99. The Iraqi delegate also invoked Arab consanguinity (in this case, referring to Saudi Arabia): "The allegations that Iraq is acting against a brotherly Arab country are without foundation whatsoever." S/PV.2934, Aug. 9, 1990, *id.* at 108.

49. Schachter, *supra* note 43, at 462.

50. *Id.* at 457.

51. *Id.* at 459-60. The use of the blue flag during the Korean Conflict was provided for in U.N. Security Council Resolution 1588, at paragraph 5, concurrently with the flags of the various nations participating. See *supra* note 38, and accompanying text. Early in the Conflict, the U.N. (with considerable ceremony) presented a flag to the U.S. delegate to be given to General MacArthur, and to be returned to U.N. Headquarters "when no longer needed for the purpose for which it was sent." U.S. State Dept. doc., U.S. Mission to the U.N., *Telegram No. 33*, July 7, 1950, 1p., UNCLASSIFIED, rel. Dec. 3, 1974. Neither Schachter nor Weston mentions that, during the Korean Conflict, the General Assembly took the extraordinary step of awarding ribbons and medals to participating personnel. WALTER L. WILLIAMS, JR., *INTERNATIONAL MILITARY FORCES AND WORLD PUBLIC ORDER* 96 (1971).

contends that the lack of baby blue regalia and a formal U.N. command center "is further evidence that the Security Council intended to leave the choice of means, timing, command and control to the participating states."⁵²

Although Schachter does not openly so conclude, his analysis shows that the difference between Resolutions 661 and 678 is that in 678, the Security Council intended to broaden its options for the use of force beyond Article 51. By including the whole of Chapter VII, the Security Council implicitly recognized that Article 42 enforcement actions were not only possible without Article 43 agreements, but necessary.

Schachter asks rhetorically why Resolution 678 was required when the Council had already affirmed, in Resolution 661, the right of collective self-defense.⁵³ Schachter also questions why, if the use of force was under Article 51, the Security Council decided that Resolution 678 was necessary in the first place. This reasoning would put the cart before the horse—Article 51 plainly states that one should defend one's self first, and then report "the exercise of this right of self defense immediately. . .to the Security Council."⁵⁴ As Schachter himself notes, "collective self-defense action did not require Council approval or authorization; member states were free anyway to use force against the aggressor within the limits of self-defense."⁵⁵ His observation that Resolution 678 "served the political purpose of underlining the general support of the United Nations for the military measures [and] clarified the objectives of the collective defense action"⁵⁶ does not provide a satisfactory answer. Resolution 678 is much more than a mere highlight.

52. Schachter, *supra* note 43, at 459-60. Maybe so, but the fact that a "command" is set up independent of the Security Council hardly means that the action automatically becomes one of self-defense. Schachter himself points out that, in Article 42 enforcement actions, the word "action" does not have to mean that those armed forces are under the control or command of the Council. That such command and control was contemplated under other articles of Chapter VII should not be read into Article 42." *Id.* at 462.

53. *Id.* at 460. See Resolution 661 (1990) ("*Affirming* the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter"). Cf. Resolution 678 (1990) ("*Acting* under Chapter VII of the Charter of the United Nations").

54. U.N. CHARTER, art. 51.

55. Schachter, *supra* note 43, at 460.

56. *Id.*

Despite his clear penchant for Article 51, Professor Schachter inadvertently makes his Article 42 argument more forcefully than he realizes:

Article 42 is the only provision in the Charter that expressly empowers a UN organ 'to take action by air, sea, or land forces' as may be necessary to maintain or restore international peace and security. Moreover, Article 39, the 'basic' provision of Chapter VII, authorizes the Council to 'decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.' A reasonable inference is that if the Council decides on measures, they should be under either Article 41 (i.e., not involving force) or Article 42 (if military action is taken).⁵⁷

It therefore follows that "if Resolution 678 is a 'measure decided on' by the Council involving armed force, Article 42 would necessarily apply."⁵⁸ It seems so simple and forthright. Yet, Schachter persistently contends, "[t]he argument is not entirely compelling."⁵⁹

To weaken the strength of Article 42's application, Schachter raises the specter of the *Certain Expenses* case.⁶⁰ Schachter interprets that decision by the I.C.J. as stating that the Security Council could employ armed force pursuant to Charter provisions other than Article 42.⁶¹ Specifically, Schachter suggests "that the Council could act on a liberal construction of its authority. . .to maintain and restore international peace and security."⁶² While it is true that the Charter is

57. *Id.* at 461.

58. *Id.*

59. *Id.*

60. *Certain Expenses of the United Nations*, 1962 I.C.J. at 254 (Advisory Opinion of July 20, Dissenting Opinion of Judge Koretsky). Even Judge Koretsky feared the opinion would be "used as an instrument of political struggle" and essentially involved "a political question" outside the authority of the Court. *Id.*

Certain Expenses has been criticized by at least one writer as "wallowing in politics and giving it the name of law." Stanley Hoffman, *A World Divided and a World Court Confused: The World Court's Advisory Opinion on U.N. Financing*, in *THE PROCESS OF INTERNATIONAL ORGANIZATION* 137, 150 (Robert S. Wood ed., 1971).

61. Ian Brownlie describes *Certain Expenses* as an application of the "doctrine of implied powers." IAN BROWNLIE, *PUBLIC INTERNATIONAL LAW* 690 (1990). This is analogous to Weston's principle of "penumbra of powers. . .under Chapter VII." See note 42, *supra* text.

62. Schachter, *supra* note 43, at 461.

replete with such references, and nobody will deny that *Certain Expenses* is hardly a model of clarity,⁶³ Schachter is evading the fact that the Court's opinion is focused on the practical limitations of applying Article 43. The conclusive language is not about Article 42 at all, nor does it provide a forum for Article 51 proponents.

E. *The U.N. and the I.C.J.*

As Schachter avers, the I.C.J. announced from the start that "the operations known as UNEF and ONUC were not enforcement actions within the compass of Chapter VII" and therefore Article 43 does not apply.⁶⁴ However, the opinion is about procuring financing for peacekeeping operations, which in the Congo matter became very confused and very expensive as United Nations' involvement deepened. It offers no definition of an "enforcement" action or how it differs in application from self-defense, nor does it conclusively characterize the United Nations' military operations there.

Despite its preempting caveats, the I.C.J. uses language which bolsters the argument for Article 42 enforcement actions as not only *existing* outside of Article 43 agreements, but being *financed* ad hoc. The I.C.J. noted that even if one assumes the existence of Article 43 agreements, such agreements would not always apply in every Article 42 action:

The economic problems [of implementing Chapter VII actions and measures] could not have been covered in advance by a negotiated agreement since they would be unknown until after the event and in the case of non-Member States, which are also included in Article 50, *no agreement at all* would have been negotiated under Article 43.⁶⁵

63. See Donald W. McNemar, *The Postindependence War in the Congo*, in *INTERNATIONAL LAW OF CIVIL WAR* 244-302 (Richard A. Falk ed., 1971).

64. *Certain Expenses of the United Nations*, 1962 I.C.J. at 166 (Advisory Opinion of July 20, Dissenting Opinion of Judge Koretsky). *UNEF* stands for *United Nations Emergency Force*, deployed on peacekeeping activities in the 1956 Suez crisis; *ONUC* is the acronym for *Operation des Nations Unies au Congo*, deployed from 1960-64 on an initially peacekeeping mission that became increasingly war-like. See CONNAUGHTON, *supra* note 29, at 9-10, 51-2.

65. *Certain Expenses of the United Nations*, 1962 I.C.J. at 166-7 (Advisory Opinion of July 20, Dissenting Opinion of Judge Koretsky). Moreover, Article 2, paragraph 6 provides: "The Organization shall ensure that States which are not Members of the United

This is a powerful statement that neither the existence nor non-existence of Article 43 agreements is grounds for hampering "measures taken for the maintenance of international peace and security."⁶⁶ The full quote supporting this contention (only partially acknowledged by Schachter) states "it cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded."⁶⁷

Thus, *Certain Expenses* sets forth three premises: first, that even if Article 43 agreements exist, they are not required to encompass everything, since certain facts will not be determined until after the event; second, Article 43 agreements need not exist for the Security Council to be able to authorize the use of force since, if applied stringently to every situation, this would necessarily exclude non-Member States⁶⁸ and this is clearly contrary to the Charter's intention; third, "in an emergency situation," the Security Council can do its job even though "agreements under Article 43 have not been concluded."

The biggest problem with *Certain Expenses* is that it mischaracterizes the Congo matter and therefore makes it difficult to define the scope of Article 42 enforcement actions strictly in terms of the law of the case. As Judge Koretsky in his dissenting opinion states, there is little question as to what the United Nations Force was doing in the Congo: "The United Nations Force was sent there, not to persuade or to parade, but to carry out military operations. And they did so."⁶⁹

The finding of implied powers not expressly set forth in the

Nations act in accordance with the Principles so far as may be necessary for the maintenance of international peace and security." Article 50 gives non-Member States the right "to consult the Security Council" in the event its measures cause them economic harm. See also note 68, *infra* text.

66. *Certain Expenses of the United Nations*, 1962 I.C.J. at 166-7. Moreover, the lack of actual Article 43 agreements did not inhibit the U.N. Military Staff Committee from musing on the overall strength of the armed forces to be made available to the Security Council. See, e.g., U.N. YEARBOOK 495 (1947-8).

67. *Certain Expenses of the United Nations*, 1962 I.C.J. at 167.

68. In some circumstances, Articles 31 and 32 of the Charter and Rules 37 and 39 of the Provisional Rules of Procedure provide invitations to non-Members of the Security Council to participate in the debates, without vote. See DAVIDSON NICOL, *THE UNITED NATIONS SECURITY COUNCIL: TOWARDS GREATER EFFECTIVENESS* 89 (1982).

69. *Certain Expenses of the United Nations*, 1962 I.C.J. at 276 (Advisory Opinion of July 20, Dissenting Opinion of Judge Koretsky).

Charter is not a novel exercise for the Court. In the *Reparation* case,⁷⁰ the I.C.J. observed that “the rights and duties of an entity such as the Organization [U.N.] must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice.”⁷¹ Thus, practice is clearly an important element, and it can be properly asserted that Article 42 actions could develop from practice and necessity—that the doctrine is in fact evolutionary.

Recent history indicates that Article 42 is evolving into a doctrine of emergency. If one examines how force was used in both the Korean Crisis and the Second Gulf Crisis, the element of emergency clearly predominates. “Emergency” concepts are traditionally applied to special situations, where one would have neither the time nor the luxury of making a request to the Security Council. However, the word does not fall exclusively within the realm of Article 51 self-defense actions. This emergency doctrine can clearly apply to Article 42, and other Chapter VII provisions as well. Here, “emergency” means a threat to the peace and security where the immediate situation is such that the Council can meet, deliberate, and make determinations, but even with the passage of time, the situation remains dire.

The key point is that the I.C.J. recognizes the need for flexibility now, and is willing to give the Organization a free hand in taking actions on an emergency basis—not only where there are no Article 43 agreements, but even in the case where such an existing agreement would prove inadequate or inapplicable. The Court will not restrain the Security Council from actions that it *must* undertake in order to maintain international peace and security. Law is a mighty thing, the I.C.J. averred, and necessity is

70. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Advisory Opinion of Apr. 11). Rostow observes: “The actions of the Secretary-General and his ‘private army’ in that case became highly controversial, and in the end the Soviet Union and France refused for a long time to pay their shares of the costs of the operation as a protest.” Rostow, *supra* note 29, at 508. However, the Advisory Opinions of the International Court of Justice make their duties in this regard clear. Rostow neglected to say that these Member States also refused to pay their share of the upkeep of the United Nations Memorial Cemetery in Korea. See Elisabeth Zoller, *The “Corporate Will” of the United Nations and the Rights of the Minority*, 81 AM. J. INT’L L. 610, 620 (1987).

71. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. at 176.

even mightier. This, the *Reparation* court held, is not just good advice, but a matter of international law. "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in its Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."⁷² In the case of Article 42, all the powers needed are in fact set forth in the Charter.

F. Michael Glennon: Resolution 678

Although he does not specifically tackle the issue of Resolution 678's Charter basis, Michael Glennon takes something of a giant step and calls the whole of Chapter VII "a dead letter."⁷³ Taking a firm anti-internationalist stance, Glennon hurls a pox at both articles, insisting that no matter what the basis of Resolution 678's is, the President of the U.S. had no right to introduce U.S. armed forces into the Second Gulf Crisis without Congressional authorization.⁷⁴

A strict constructionist, Glennon's fixation on the "permissive" and "nonobligatory" character of Resolution 678 inexorably leads him to conclude that, "[u]nder the Charter, a permissive Security Council decision imposes no obligation on a member state to 'carry out' a decision under Article 25 or Article 48."⁷⁵

II. THE LEGALITY OF A MAJORITY OF ONE⁷⁶

Much attention has been focused on the fact that the majority of the U.N. coalition's forces in the Second Gulf Crisis were American, and that the coalition itself was formed, prodded, and led into battle predominantly by the United States.⁷⁷ However,

72. *Id.* at 178.

73. Glennon, *supra* note 11, at 87, n.71 (1991). See Weston, *supra* note 33, at 519: "Article 42 had become, it is widely agreed, a dead letter".

74. Glennon, *supra* note 11, at 88, n.75.

75. *Id.* at 75.

76. "Any man more right than his neighbors constitutes a majority of one." HENRY DAVID THOREAU, *CIVIL DISOBEDIENCE* (1849).

77. That the Soviet Union (such as it still existed at the time) did not contribute any military forces to the coalition should surprise no one: "[T]he combination of incipient civil war at home and popular revulsion against eight years of war in Afghanistan imposed severe restraints on Gorbachev." Alvin Z. Rubinstein, *New World Order or*

American leadership coming to the forefront in international conflicts is nothing new.

North Americans played a prominent military role in international conflicts from the late seventeenth century onwards. At least four European wars were partially fought in continental North America by various colonial powers before American independence: War of the League of Augsburg, 1689-97; War of the Spanish Succession, 1702-13; War of the Austrian Succession, 1740-48; and the Seven Years War (known as "the French and Indian War"), 1756-63. By the eighteenth century, Americans had ample experience with the employment of military force as a valuable tool in imperial expansion, which they soon used to pursue American manifest destiny in their own spheres of influence.⁷⁸ These conflicts, however, did not reflect the "rescue operation" philosophy that eventually became the predominant feature of American military involvement in foreign affairs.⁷⁹

History shows that real multinational coalitions are hard to come by. Neither World War I nor World War II presented a true model of either coordination or cooperation on the part of Allied forces. In both World Wars, the U.S. initially held back from entering offshore hostilities until matters reached a crisis,

Hollow Victory? 70, 4 FOREIGN AFF. 53, 57 (Fall, 1991).

78. "We consider the interests of Cuba, Mexico and ours as the same," Jefferson wrote to William C. C. Claiborne in 1808, "and that the object of both must be to exclude all European influence from this hemisphere." Robert W. Tucker & David C. Hendrickson, *Thomas Jefferson and American Foreign Policy*, 62, 2 FOREIGN AFF. 135 (Spring, 1990).

Although Jefferson aspired to accomplish this without resort to force, other Presidents were not so reticent—especially Teddy Roosevelt: "I have been hoping and working ardently," Roosevelt admitted, "to bring about our interference in Cuba." WILLIAM A. WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* 34 (1962).

79. Americans, writes Spanier, are used to fighting not on the basis of a set of "abstemious rules," but prefer to engage in conflicts that "can be converted into moral crusades for righteous causes." JOHN W. SPANIER, *THE TRUMAN-MACARTHUR CONTROVERSY AND THE KOREAN WAR* 4 (1965). Basically, Spanier contends, Americans view power as "sinful" and believe that international conflicts stem from the actions of "undemocratic political systems," "wicked (i.e. undemocratic) statesmen", and "totalitarian tyrants." *Id.* at 4-5. The United States justifies using force because it claims it has been "provoked into violence by despots." *Id.* at 5. It rationalizes its acts in terms of "universal" principles. This "crusade" consciousness rocked America's foreign policy pendulum between extremes of "total war or total isolation. What it did *not* allow was a practical and consistent participation in world politics." JOHN STOESSINGER, *CRUSADERS AND PRAGMATISTS: MOVERS OF THE MODERN AMERICAN FOREIGN POLICY* 7 (1985).

and other belligerent nations had fought themselves literally into a state of exhaustion and decimation.⁸⁰ In World War I, the Allies did not even begin to cooperate with one another until the U.S. finally entered the hostilities in 1917.⁸¹ Up to that time, each state had waged a separate war against a common enemy towards a common end, and each was being crushed seriatim.⁸² Before entry by the United States, whatever actual coordination of military forces there was between the Allies had only resulted in entrenched stalemates, if not outright failure. Of the million combatants in the last great battle of World War I, 896,000 were Americans.⁸³

Although World War II eventually came to be conducted with unique cooperation and combined strategy, the idea of a unified command was more illusion than actual fact. In 1941, after a long flirtation with neutrality,⁸⁴ Congress finally declared

80. Ironically, President Wilson won the Democrats' renomination in 1916 under the slogan, "He kept us out of the war," all the while beefing up the army and reserve forces in preparation to join the Allied war effort. The Democrats' official campaign platform, "Peace and Prosperity," was only slightly less incongruous. ROBERT H. FERRELL, *WOODROW WILSON & WORLD WAR I, 1917-1921*, 1 (1985). Although Wilson lacked a popular mandate, the election made clear that most Americans wanted to stay out of the war. Nevertheless, five months later, Wilson declared that "the right is more precious than peace" when it meant fighting "for democracy," and Congress declared war on Germany. *Id.* at 2-3. See also JAMES G. HARBORD, *THE AMERICAN ARMY IN FRANCE, 1917-1919*, 17-32 (1936).

81. The first U.S. troops reached France on January 26, 1917. "Lafayette," said U.S. Army Colonel Charles E. Stanton, during a July 4th ceremony at the patriot's tomb, "we are here." See DONALD SMYTHE, *PERSHING: GENERAL OF THE ARMIES*, 33-4 (1986). Some historians have erroneously credited General Pershing with coining this profundity. See Robert M. McAllister, *Pershing Didn't Say It*, N.Y. TIMES, Dec. 26, 1988, at A30.

82. On September 5, 1914, Russia, France and Great Britain had concluded the Treaty of London, in which each pledged not to make a separate peace with the Central Powers. Following the Russian Revolution, the Bolsheviks abrogated their treaty obligations and made a separate peace with Germany in March, 1918. HARBORD, *supra* note 80, at 242-62.

83. FERRELL, *supra* note 80, at 81.

84. Exhausted by World War I, most Americans were in no hurry to jump back across the pond. "As long as Europe plans for war," Walter Lippman wrote in 1934, "America must plan for neutrality." Even so, the United States eventually moved from the 1935 Neutrality Act and a steadfast policy of noninterventionism through 1938, to a declaration of "limited national emergency" in 1939. In 1940, President Roosevelt announced a policy shift from neutrality to "non-belligerency." After winning reelection to an unprecedented third term, Roosevelt, chatting by his fireside, told his radio audience that the United States would serve as the allies' "arsenal of democracy." Speech of Dec. 29, 1940, printed in FRANKLIN DELANOR ROOSEVELT, *MY FRIENDS—TWENTY-EIGHT HIS-*

war on Japan after that nation bombed the U.S. naval base at Pearl Harbor.⁸⁵ Once the U.S. was in the war, attempts were made to set up a unified central command in the Southwest Pacific, coordinating American, British, Dutch and Australian forces to oppose the Japanese offensive advance into the Netherlands, East Indies and Malaysia.⁸⁶ Although several unified World War II Allied Commands were set up in Europe, the Mediterranean, the Pacific, and South-East Asia, Americans consistently played a dominant and often singular role.

A. *The Korean Conflict*

The mere mention of the U.N. Command in the Korean Conflict, as an example of an international coalition force, makes many scholars blush with embarrassment.⁸⁷ Although eventually

TORY-MAKING SPEECHES (Edward H. Kavinsky & Julian Park eds., 1945), 67-75 at 75.

Like Wilson before him, however, Roosevelt was gearing up the United States to enter the war. Hence, his disparagement of negotiating "a dictator's peace": "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." Message to Congress of Jan. 6, 1941, *id.* at 76-83, 78. Nevertheless, Hitler was "convinced that North America would never again take part in a European war. Undoubtedly, isolationism contributed to this delusion." DESMOND SEWARD, NAPOLEON AND HITLER: A COMPARATIVE BIOGRAPHY 144 (1988). Saddam Hussein's certainty that America could not accept high battle casualties—"10,000 dead in an afternoon," as Iraq had suffered in its war with Iran—has a strikingly similar ring. *Excerpts From Iraqi Document on Meeting With U.S. Envoy*, N.Y. TIMES, Sept. 23, 1990, at A19. See also H.D.S. Greenway, *It was Bush's Call*, BOSTON GLOBE, May 10, 1991, at 17.

85. December 7, 1941, "a day which will live in infamy," was an especially busy day for the Japanese, who simultaneously bombed Guam, Wake Island, Midway Island, the Philippines, Hong Kong and Singapore, as well as Pearl Harbor, all within a twenty-four hour period, inflicting serious casualties and military hardware losses, as well as a crippling loss of American confidence. Although historians debate whether Roosevelt "knew" that the Japanese would attack Pearl Harbor, and intended to use this as grounds to enter the war, there is no doubt that the American military and the Executive Branch were surprised and horrified by the devastation, and astonished by Japan's ability to strike from such a distance. See generally MICHAEL SLACKMAN, TARGET: PEARL HARBOR (1990), see also JOHN TOLAND, INFAMY: PEARL HARBOR AND ITS AFTERMATH (1982).

Hoping to unravel the mysteries of the Japanese war machine, the U.S. government enlisted the aid of anthropologists such as Ruth Benedict, author of THE CHRYSANTHEMUM AND THE SWORD (1946), to explain Japan's Samurai warrior tradition of military obligation, obeisance, and complete sacrifice.

86. This did not reflect American concern for upholding democratic institutions and values; it served to protect established colonial presences against Japan's efforts to further its own manifest destiny. See JOHN COSTELLO, THE PACIFIC WAR 180-97, 202-210 (1981).

87. Of course, everybody knows that the Korean Conflict was fought mostly by

forces from sixteen Member States fought alongside each other, most of the troops were Americans. They were led by an American, General Douglas MacArthur, who was later relieved of his command not by the Security Council, but by U.S. President Harry Truman.⁸⁸ Furthermore, all the support staff was American and virtually all military strategy was decided by the United States.⁸⁹ The United States paid for practically the entire operation, including subsidizing the coalition forces with munitions and supplies. All this was accomplished pursuant to valid Security Council and General Assembly resolutions, proposed, drafted, and promoted largely by the United States. Nevertheless, it was officially considered a U.N. operation, and was conducted under Security Council supervision; the coalition troops flew the U.N. flag and wore its insignia. The Security Council received reports from the U.N. Command outlining the progress of the military operation, and even issued medals to combatants.⁹⁰

Although the circumstantial evidence is daunting, it is too easy to conclude that the Korean Conflict is just another example of the U.S. unilaterally throwing its weight around.⁹¹ President Truman felt that if the United States "had not persuaded the U.N. to back up the free Republic of Korea, Western Europe would have gone into the hands of the Communists."⁹² Never-

Americans, because one never sees forces of any other nationality on M*A*S*H*.

88. "I fired him because he wouldn't respect the authority of the President. That's the answer to that," said Truman. "I didn't fire him because he was a dumb son of a bitch, although he was, but that's not against the law for generals. If it was, half to three-quarters of them would be in jail." Harry S. Truman, *quoted in MERLE MILLER, PLAIN SPEAKING* 287 (1974). See also BURTON I. KAUFMAN, *The Recall and the MacArthur Hearings, in THE KOREAN WAR: CHALLENGES IN CRISIS, CREDIBILITY, AND COMMAND* 144-82 (1986).

89. See JAMES BARROS, *TRYGVE LIE AND THE COLD WAR: THE UN SECRETARY GENERAL PURSUES PEACE, 1946-1953* 278-311 (1989).

90. *Id.* at 280. See also note 51, *supra*. Scholars have noted the "striking" unanimity of the Truman administration and the U.S. State Department, as summarized by then-Ambassador Philip C. Jessup: "We've got to do something, and whatever we do, we've got to do it through the United Nations." STOESSINGER, *supra* note 79, at 72 (footnote omitted).

91. *But see* I.F. STONE, *THE HIDDEN HISTORY OF THE KOREAN WAR 1950-1951* (1952) (suggesting that the Korean Conflict was the product of a pre-Cold War intervention conspiracy).

92. HARRY S. TRUMAN, *THE AUTOBIOGRAPHY OF HARRY S. TRUMAN* (1980). For Truman, the President who let the atomic genie out of the bottle, there was no turning away

theless, the truth is that the Korean Conflict comes very close to representing a Chapter VII enforcement action of a multinational nature. Given the extreme bipolarity of global politics in 1950, it probably comes closer than anything that could have been imagined then. Certainly, Truman had no doubts about the nature of the action he undertook. Truman stated, "[t]his was a police action, a limited war, whatever you want to call it to stop aggression and to prevent a big war. And that's all it ever was."⁹³ However, one must look at the whole picture, and not simply at the structure of the command, to see how truly international the Korean Conflict was.

from North Korean aggression: "I wasn't going to let this attack on the Republic of Korea . . . go forward. Because if it wasn't stopped, it would lead to a third world war, and I wasn't going to let that happen. Not while I was President." Harry S. Truman, *quoted in* MILLER, *supra* note 88, at 274; *cf.*, *CIA Report*, Oct. 12, 1950, 4 p., TOP SECRET, declass. May 7, 1979, TRUMAN LIBRARY, PRESIDENT'S SECRETARY'S FILE, KOREAN WAR FILE. This intelligence report, issued early in the Conflict, concluded that there were "no convincing indications" of overt Chinese intervention and, barring a Soviet decision to engage in "global war," no outside intervention was expected in 1950. *Id.* This changed dramatically in less than a month, when a National Security Council report warned that the United States "should make its preparations on the basis that the risk of global war is increased." N.S.C. doc., *A Report to the President by the National Security Council, NSC 81/1*, Sept. 9, 1950, 9 p., TOP SECRET, declass. Apr. 24, 1975.

Others contend that Truman's quick response was to counter charges of earlier "malfeasance in the Far East"—specifically, the fall of Nationalist China. Thomas F. Roeser, *Harry Truman: Man v. Myth*, CHIC. TRIB., Oct. 9, 1992, at C23. *See also* Dept. of Defense doc., CAPT. WILBER W. HOARE, JR. USAR, IV THE KOREAN CONFLICT: II THE WEEK OF DECISION, 25 JUNE-30 JUNE 1950 (Jan. 1953), at Sec. VI; 17 p., TOP SECRET, declass. Mar. 4, 1977.

93. MILLER, *supra* note 88, at 274. By "a big war," Truman meant "a third World War between Communist and non-Communist states." STOESSINGER, *supra* note 79, at 73. Rostow disputes this, calling the Korean Conflict "a mission of collective self-defense under American direction." Rostow, *supra* note 29, at 508. However, it is difficult to reconcile Rostow's self-defense contentions with the movements of the United Nations field forces, which were on the offensive for the most part and chased the North Koreans back, beyond the 38th Parallel and eventually to the Yalu River. Even when the action first commenced, it was not a defensive action; the North Koreans had not merely invaded the south, they had destroyed its army and set up shop in its capital. This being America, Rostow is free to say what he likes, but the facts do not bear him out. Part of the confusion over the nature of the Korean Conflict may arise from Truman's early disclaimer that the U.S. was "not at war," but involved in "a police action" that was also a "combat operation." Anthony Leviero, *U.S. "Not at War," President Asserts; Calls Operation Police Action for U.N. on "Bandits,"* N.Y. TIMES, June 30, 1950, at A1. Of course, technically under the U.N. Charter, Truman was correct, since the Charter effectively outlaws "war" in the classical sense. *See supra* text notes 16-21, and accompanying text.

1. *The Division*

Historians differ on interpreting the 1943 division of Korea, but it is likely that the U.S.' strategy was merely to halt the Soviets' southern advance.⁹⁴ Immediately after the bombing of Hiroshima and Nagasaki, Stalin declared war on Japan; Soviet troops fanned out across Manchuria and landed on the northern tip of Korea.⁹⁵ Following Japan's official surrender, the U.S. drafted General Order No. 1, setting forth the terms of Japan's surrender in Korea.⁹⁶ In effect, this Order divided Korea at the 38th Parallel;⁹⁷ Japanese forces to the north surrendered to the Soviet Union, and those to the south surrendered to the United States.⁹⁸ Stalin raised no objections, but just as Berlin was divided, he ordered the 38th Parallel sealed off.

In September of 1946, the U.S. brought the issue of Korean reunification before the U.N. General Assembly, which adopted a U.S.-drafted resolution. The resolution called for general elections to be held under the observation of a U.N. Temporary Commission on Korea.⁹⁹ Those Koreans elected would thereby form a National Assembly, establish a government, and make arrangements with both military powers for the withdrawal of foreign troops.¹⁰⁰

Whereas the South held U.N.-supervised elections and its U.S. military government came to an end, the Soviets refused to allow the Temporary Commission into North Korea.¹⁰¹ Instead, the Soviets set up a Communist puppet regime, and on October 12, 1948 the Soviet Union recognized the (Northern) Democratic People's Republic of Korea as the only lawful government. Con-

94. RICHARD WHELAN, *DRAWING THE LINE: THE KOREAN WAR, 1950-1953*, 31-2 (1990).

95. *Id.* at 24-35. See also, ERIK VAN REE, *SOCIALISM IN ONE ZONE: STALIN'S POLICY IN KOREA, 1945-1947*, 58-69 (1989).

96. WHELAN, *supra* note 94, at 30, citing U.S. Dept. of State, VI *Foreign Relations of the United States: Diplomatic Papers* 659 (1945).

97. BRUCE CUMMINGS, *THE ORIGINS OF THE KOREAN WAR: LIBERATION AND THE EMERGENCE OF SEPARATE REGIMES, 1945-1947* 120-2 (1981).

98. See WHELAN, *supra* note 94, at 29. See also BARROS, *supra* note 89, at 273; Richard J.H. Johnston, *Division of Korea Started in 1945 as Part of a War Plan to Beat Japan*, N.Y. TIMES, June 26, 1950, at A8.

99. LEON GORDENKER, *THE UNITED NATIONS AND THE PEACEFUL UNIFICATION OF KOREA: THE POLITICS OF FIELD OPERATION, 1947-1950* 13-48 (1959).

100. *Id.*

101. See BARROS, *supra* note 89, at 273-4.

versely, exactly two months later, the U.N. General Assembly solemnly declared that the (Southern) Republic of Korea was the only lawful government.¹⁰²

When the North Koreans attacked on June 25, 1950, at 4:00 A.M. Korean time, both South Korea and the U.S. were caught completely unprepared.¹⁰³ The U.S. had considered an attack from the northern regime to be so unlikely that it did not even have an emergency alert system in place. The Truman Administration first heard of the attack "not from the military personnel or foreign service officers in Korea, but from the U.S. press news service."¹⁰⁴ Relying more on a faulty vision of a "total" war¹⁰⁵ with the Soviet Union, the U.S. had decided that "in the event of war American troops stationed in Korea would constitute a military liability, since they could not be maintained on the peninsula without substantial reinforcements prior to the attack."¹⁰⁶ Moreover, the Truman Administration had deliberately

102. U.S. DEPT. OF STATE PUBLICATION 5609, *THE KOREAN PROBLEM AT THE GENEVA CONFERENCE, APRIL 26 — JUNE 15, 1954*, at 2.

103. DAVID REES, *KOREA: THE LIMITED WAR* 3-7, 13 (1964); Robert F. Whitney, *Capitol in Dispute on Korean Attack: Washington Arguing Whether Administration was Taken by Surprise by Blow*, N.Y. TIMES, June 26, 1950, at A3. *But see* Hanson W. Baldwin, *Blocking the Red Conquest Program: U.S. Decision to Aid South Korea With Armed Forces May Have Curbed Pattern Set For the Summer Months*, N.Y. TIMES, June 28, 1950, at A12. Hanson reported that, in early June, C.I.A. reports (circulated to Truman and others) detailed "a marked build-up by the North Korean People's Army along the Thirty-Eighth Parallel" and "noticeable" deployment of tanks, field guns, and other heavy equipment along the "bloody border." *Id.* Ironically, only the day before, U.N. field observers had returned from a fact-finding mission to the 38th Parallel, and had issued a report denoting that the South Korean forces were wholly defensive and "in no condition to carry out a large-scale attack against North Korean forces." SPANIER, *supra* note 79, at 15. The U.S. State Department speedily confirmed that South Korea faced an "all-out offensive" invasion from the North (U.S. State Dept. doc., U.S. Embassy, Seoul, *Telegram No. 925*, June 25, 1950, 1p., CONFIDENTIAL, declass. June 7, 1974), and that North Korea not only had "complete air superiority," but was strafing the capitol. U.S. State Dept. doc., U.S. Embassy, Seoul, *Telegram No. 935*, June 25, 1950, 1 p., Secret, declass. June 7, 1974.

Perversely, the Soviets claimed that South Korea had initiated the hostilities. *See Tass Has Reverse News; Says South Invaded North*, N.Y. TIMES, June 26, 1950, at A3.

104. SPANIER, *supra* note 79, at 21.

105. "The objective of total war is the complete destruction or surrender of the enemy's military forces and the overthrow of his government—the enemy's unconditional surrender." *Id.* at 4.

106. SPANIER, *supra* note 79, at 16. *See also White House Memo*, Dec. 30, 1952, 2 p., TOP SECRET, declass. Jan. 16, 1987 [part. illeg.]. This memo notes that in June 1949, the U.S. had 8,000 troops stationed in Korea "as the living guarantee that if the North

withheld most heavy weapons from South Korea, on the grounds that it would only encourage them to carry out their frequent threats to forcibly reunify the country.¹⁰⁷

On June 26, 1950 the U.N. Security Council, abetted by the U.S. and in the absence of the Soviet delegate, adopted Resolution 82.¹⁰⁸ Similar in content to Resolution 660 of the Second

Koreans invaded they would be automatically at war with the United States." *Id.* These troops were withdrawn, pursuant to Secretary of State Dean Acheson's statement that South Korea lay "outside the 'American defense perimeter.'" *Id.* According to the White House memo, the rationale for the withdrawal was based on a flawed understanding of a report by Gen. MacArthur, who had actually recommended that U.S. forces be kept in place in South Korea. *Id.*

107. See REES, *supra* note 103, at 16; Walter Sullivan, *Soviet, U.S. Models for Korean Armies*, N.Y. TIMES, June 26, 1950, at A3. Truman's "less is more" policy led to scathing criticism from the Senate's more colorful members: "American boys are dying in Korea" because "a group of untouchables in the State Department sabotaged" the aid program that Congress had voted for Korea, claimed Senator Joseph R. McCarthy. *McCarthy Assails Acheson on Korea, Says State Dept. Group "Sabotaged" Program of Aid Enacted by Congress*, N.Y. TIMES, July 3, 1950, at A2. McCarthy complained that all the South Koreans had received from the money Congress had voted them for arms was "about \$52,000 worth of baling wire." *Id.* Although McCarthy was a notorious extremist and demagogue, his remarks about "American boys" dying abroad struck a chord with the American public, coming the same day that the first list of U.S. casualties in Korea was released by the U.S. Army. *First Casualties in Korea*, N.Y. TIMES, July 3, 1950, at A2.

108. Unanimity on the final vote was marred by only one abstention—Yugoslavia. A.M. Rosenthal, *Security Council Acts Swiftly at U.S. Call to End Hostilities: Vote 9-0, Russia Absent*, N.Y. TIMES, June 26, 1950, at A1. See also STOESSINGER, *supra* note 79, at 74. Throughout the Korean Conflict, Yugoslavia successfully bartered its votes between the U.S. and U.S.S.R. delegations. See C.L. Sulzberger, *Tito Due to get Marshall Plan Flour in Emergency Step Against Famine*, N.Y. TIMES, Nov. 10, 1950, at A1; C.L. Sulzberger, *Tito Says He'll Back U.N. Decision in Event of Conflict With Red China*, N.Y. TIMES, Nov. 7, 1950, at A1. But the United States resisted being completely mercenary. India, which had bitterly resisted branding China as an "aggressor" when that country attacked U.N. forces, received \$180,000,000 in U.S. aid "to demonstrate. . . the humanitarian nature of American foreign policy." W.H. Lawrence, *Truman Will Urge Grain Gift to India; Plans 2,000,000-Ton Request to Congress to Avert Famine—No Strings Attached*, N.Y. TIMES, Feb. 2, 1951, at A1. U.S. Secretary of State James Baker would have done well to remember Truman's lesson of largess during the Second Gulf Crisis. See *infra* note 145, and accompanying text.

Stoessinger claims that some delegates "actually risked their political futures by deciding to vote in the absence of instructions from their governments." Stoessinger, *supra* note 79, at 74. But few diplomats took North Korea's attack on South Korea more personally than Then-Secretary-General Trygve Lie, who called it "an affront to the United Nations more than to anyone else, since the United Nations had been . . . largely responsible for the formation of the Republic." TRYGVE LIE, *IN THE CAUSE OF PEACE* 329 (1954).

On the absence of the Soviet delegate, see BARROS, *supra* note 89, at 276. The Soviet

Gulf Crisis, Resolution 82 declared the invasion of South Korea to be "a breach of the peace," and called for North Korea's immediate withdrawal.¹⁰⁹ This resolution was predictably ignored. The same day, President Truman ordered the U.S. Navy and Air Force to render assistance to the South Koreans.¹¹⁰ Catching up with Truman on June 27, the Security Council adopted Resolution 83. Framed and proposed by the United States, Resolution 83 "recommend[ed]" that Member States furnish to South Korea such assistance as necessary "to repel the armed attack and restore internal peace and security in the area."¹¹¹ This enabled Truman to bring in U.S. troops under U.N. auspices.¹¹²

Had Truman simply acted on his own, and not immediately raised the matter with the Security Council, he could still have invoked Article 51 to justify his initial actions. Although the U.S. had no defense treaty or pact with South Korea, that nation was indeed a U.S. "friend" with practically *de facto* status as a protectorate. However, the decisive defeat of the South Korean Army and capture of the capital by the North Koreans not only changed the character of any possible response, but indi-

Union subsequently challenged the Security Council's action on two grounds—lack of concurring votes of all permanent members pursuant to U.N. Charter Article 27, and failure to seat a "Chinese Communist Government" delegation. *Soviet Criticism of U.N. Action is Rejected; U.S. Cites Precedents for Korea Decision*, N.Y. TIMES, July 1, 1950, at A2. The U.S. State Department rejected these contentions, averring that "prior to the Soviet allegations, every member of the United Nations, including the U.S.S.R., accepted as legal and binding decisions of the Security Council made without the concurrence, as expressed through an affirmative vote, of all permanent members." *Id.*

109. U.N. SCOR, 5th Sess., 473 mtg., at 7, 13-4 U.N. Doc. 8/1501 (1950). Text printed in N.Y. TIMES, June 26, 1950, at A4. See also text of U.S. Statement by U.S. delegate Ernest A. Gross, printed in N.Y. TIMES, June 26, 1950, at A4.

110. Austin Stevens, *U.S. Rushing Arms to South Koreans: Quantities to "Shift Balance" Being Sent by MacArthur Under Air, Naval Escort*, N.Y. TIMES, June 26, 1950, at A1. Congress also acted swiftly, approving "the prompt submission of the dispute by the United States to the United Nations Security Council" and "applaud[ing] Truman's "arms aid." Clayton Knowles, *Congressmen Back Moves Made by U.S.*, N.Y. TIMES, June 26, 1950, at A1. See also U.S. Embassy, Moscow, *Telegram no. 1726, Pass USUN*, June 25, 1950, 2 p., TOP SECRET, declass. Nov. 11, 1975, TRUMAN LIBRARY, GEORGE M. ELSEY PAPERS.

111. U.N. SCOR, 5th Sess., 474 mtg., at 4, U.N. Doc. 8/1511 (1950).

112. *Letter from John D. Hickerson, for the Secy. of State, to Warren A. Austin, U.S. Rep. to the U.N.*, June 30, 1950, 2 p., UNCLASSIFIED, released Dec. 3, 1974. For a detailed account of the conflict between Trygve Lie and the U.S. Government on the role of the Organization in "the actual use and control of assistance," see BARROS, *supra* note 89, at 278-88.

cated to all that a concerted military effort would be required to dislodge the captors. Moreover, the U.N. had been effectively overseeing the Korean political situation since the Japanese surrender, and already had established its role; the very survival of the U.N. depended upon a military response.¹¹³ Also, President Truman himself wanted to frame the U.S. response in the nature of an enforcement action. When he announced that he was sending U.S. forces to Korea, he was careful to note *why*: "A return to the rule of force in international affairs would have far-reaching effects. The United States will continue to uphold the rule of law."¹¹⁴ Implicit in Truman's promise to "uphold the rule of law" was the reciprocal promise to be bound by it.

Matters took a quick and dangerous turn when, on June 28, the North Koreans captured Seoul, the southern capital.¹¹⁵ Truman immediately ordered U.S. ground forces into Korea, where they first saw battle on July 4.¹¹⁶ A third Resolution, this time passed by the General Assembly, recommended "that all members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the

113. BARROS, *supra* note 89, at 274. From the start, the U.N. insisted "that the fighting there was assuming the character of full-scale war and might endanger international peace and security." *U.N. Unit in Korea Warns on Fighting: Message to Lie Says Outbreak May Endanger "International Peace and Security,"* N.Y. TIMES, June 26, 1950, at A5. See also texts of U.N. Commission in Korea Communique and Radio Statement, both printed in N.Y. TIMES, June 26, 1950, at A5. The journalistic record points unequivocally to Article 42, rather than Article 51. As General Omar Bradley realized, the invasion was "the test of all the talk of the last five years of collective security." Quoted in STOEISSINGER, *supra* note 79, at 75.

114. *Statement by the President on the Situation in Korea*, June 27, 1950, 1950 PUB. PAPERS: HARRY S. TRUMAN 492, cited in Franck & Patel, *supra* note 8, at 70; text printed in N.Y. TIMES, June 28, 1950, at A1. See Anthony Leviero, *Truman Orders U.S. Air, Navy Units to Fight in Aid of Korea; U.N. Council Supports Him*, N.Y. TIMES, June 28, 1950, at A1. See also REES, *supra* note 103, at 24.

115. See JOHN W. RILEY, JR. & WILBUR SCHRAMM, *THE REDS TAKE A CITY: THE COMMUNIST OCCUPATION OF SEOUL* (Hugh Heung-wu Cynn trans., 1951); *M'Arthur Flies to Base in Korea as Seoul Falls*, N.Y. TIMES, June 29, 1950, at A1; *North Korean Tanks Enter Seoul; South Moves its Capitol 20 Miles*, N.Y. TIMES, June 27, 1950, at A1.

116. See Lindesay Parrott, *U.S. Troops Check North Koreans in Fierce Battle South of Suwon*, N.Y. TIMES, July 6, 1950, at A1; *U.S. Troops Shell North Koreans; Suwon Captured by the Invaders*, N.Y. TIMES, July 5, 1950, at A1; Harold B. Hinton, *U.S. Troops Land in South Korea, North Bombed on Truman Order; President Authorizes Air Force to Strike North of 38th Parallel*, N.Y. TIMES, July 1, 1950, at A1.

United States."¹¹⁷ Most of the initial troops were supplied by U.S. occupation forces stationed in Japan.¹¹⁸ Although sixteen Member States sent contingents, most of the air units, naval forces, supplies and money for the operation came from the United States.¹¹⁹

117. U.N. GAOR, 5th Sess., Supp. No. 2, at 25, U.N. Doc. A/1361 (1950). See Thomas J. Hamilton, *Most U.N. Delegates Favor Use of Land Force in Korea*, N.Y. TIMES, July 1, 1950, at A1. Other Member States quickly followed suit. A.M. Rosenthal, *33 Countries Back Security Council; List of Nations Approving U.N. Action on Korea Still Rising—Military Aid Pledged*, N.Y. TIMES, July 1, 1950, at A3. By July 7, this number had increased to forty-four (out of fifty-nine). Thomas J. Hamilton, *U.N. Charter Cited to Refute Russian Charges Against U.S.*, N.Y. TIMES, July 7, 1950, at A4.

118. *U.S. Troops Moving to Battle Front; Reinforcements Leave Japan by Sea*, N.Y. TIMES, July 2, 1950, at A1; *U.S. Troops Are Alerted*, N.Y. TIMES, June 29, 1950, at A2.

119. REES, *supra* note 103. According to Rees, President Truman was at first reluctant to enter into a military action which held the potential for a confrontation with the Soviet Union. *Id.* at 26. However, a firm U.S. commitment to fight North Korea was immediately made. See Lindesay Parrott, *MacArthur Assures Aid to Korea; Ten Mustangs Transferred to Seoul*, N.Y. TIMES, June 27, 1950, at A1; C.P. Trussell, *War Spurs Senate to Speed up Arms Aid*, N.Y. TIMES, June 27, 1950, at A1. The U.S. also lobbied hard for international support. *U.S. Tells Envoys of Move in Korea; State Dept. Explains Necessity for Action There—Response Enthusiastic*, N.Y. TIMES, June 28, 1950, at A3.

As with the Second Gulf Crisis, concurring Member States responded at various levels of participation, and even these levels changed in greater and lesser degree for the duration of the Conflict. See *infra* text at note 154. In the first days of the U.N. decision, Britain literally turned its fleet around and headed to South Korea to assist in the U.N.'s naval blockade. *British Send Fleet to Aid U.S. Forces; Australia and New Zealand Also Place Ships in Area Under M'Arthur Command*, N.Y. TIMES, June 29, 1950, at A1. Portugal and Peru offered "full support." U.S. State Dept. doc., U.S. Embassy, Lisbon, *Telegram No. 7*, July 5, 1950, 1 p., SECRET, declass. Dec. 3, 1974; U.S. State Dept. doc., U.S. Embassy, Lima, *Telegram No. 5*, July 3, 1950, 1 p., CONFIDENTIAL, declass. Nov. 21, 1974. Australia gave naval and air assistance. U.S. State Dept. doc., *Outgoing Telegram No. 1 to U.S. Embassy, Canberra*, July 3, 1950, 1 p., CONFIDENTIAL, declass. Dec. 3, 1974. France sent a naval vessel (although the U.S. had hoped for more from its former ally) [U.S. State Dept. doc., U.S. Embassy, Paris, *Telegram No. 29*, July 3, 1950, 1 p., SECRET, declass. Dec. 3, 1974], as did Canada. U.S. State Dept. doc., U.S. Embassy, Ottawa, *Telegram No. 3*, July 5, 1950, 1 p., SECRET, declass. Dec. 3, 1974. Greece promised to participate in a "trade blockade." U.S. State Dept. doc., U.S. Embassy, Athens, *Telegram No. 73*, July 7, 1950, 1 p., UNCLASSIFIED, rel. Dec. 3, 1974. Nicaragua offered food and "raw material aid," and promised to supply troops "if necessary." U.S. State Dept. doc., U.S. Embassy, Managua, *Dispatch No. 15*, July 5, 1950, 1 p., CONFIDENTIAL, declass. Dec. 3, 1974.

Some responses were rather creative. Bolivia tendered the talents of its best and brightest—"military officers." U.S. State Dept. doc., *Outgoing Telegram No. 4 to U.S. Embassy, La Paz*, July 6, 1950, 1 p., CONFIDENTIAL, declass. Nov. 21, 1974. Chile offered to supply raw materials and, curiously, to "counteract Communist opposition."

At first the U.N. Command forces arriving in Korea were forced to retreat, as the North Koreans continued to advance.¹²⁰ The tide finally turned against the North after MacArthur's brilliant amphibious attack at Inchon, and the North was suddenly "on the run."¹²¹ It is here, in the flush of victory, that the rosy issues of power and authority in Article 42 enforcement actions truly sprout their thorns. On September 27, 1950, the Joint Chiefs of Staff ordered MacArthur to "destroy" the North Korean forces.¹²² Two days later U.S. President Truman, presumably on the basis of his authority as Commander-In-Chief of the U.S. troops (and without so much as a *nod* to the U.N. Military Staff Committee), authorized MacArthur to cross the line into North Korea.¹²³ With all the appearance of being an after-

U.S. State Dept. doc., U.S. Embassy, Santiago, *Telegram No. 1*, July 3, 1950, 1 p., CONFIDENTIAL, declass. Dec. 3, 1974. Haiti gave its "moral support." U.S. State Embassy, Port au Prince, *Telegram No. 5*, July 3, 1950, 1 p., CONFIDENTIAL, declass. Nov. 21, 1974. Even States that did not wish to become directly embroiled made some sort of meaningful gesture. Japan pledged "overt support" within its limitations as an occupied country. U.S. State Dept. doc., U.S. Political Advisor, Japan (Tokyo), *Telegram No. 40*, July 6, 1950, 1 p., SECRET, declass. Dec. 3, 1974. Mexico avoided taking "a formal position" (U.S. State Dept. doc., U.S. Mission to the U.N., *Telegram No. 30*, July 6, 1950, 2 p., SECRET, declass. Dec. 3, 1974), but did not hesitate to informally offer propaganda advice. U.S. State Dept. doc., U.S. Mission to the U.N., *Telegram No. 24*, July 7, 1950, 1 p., SECRET, declass. Dec. 3, 1974. Egypt promised to support the U.S. "in the event of war with the U.S.S.R." U.S. State Dept. doc., U.S. Embassy, Cairo, *Telegram No 19*, July 4, 1950, 1 p., SECRET, declass. May 6, 1974. Indonesia was not asked to do anything, out of fear that its support might cause the U.S.S.R. to veto its application for U.N. membership, which was then pending. U.S. State Dept. doc., *Outgoing Telegram No 13, to U.S. Embassy, Djakarta*, July 5, 1950, 2 p., SECRET, declass. Dec. 3, 1974.

120. *4 Red Korean Columns Drive South; Suwon and its Airfield Outflanked; Situation Worsens*, N.Y. TIMES, July 3, 1950, at A1; Burton Crane, *South Koreans Kill Own Troops by Dynamiting a Bridge Too Soon; Hundreds of Retreating Soldiers in Trucks Blasted at Span South of Seoul*, N.Y. TIMES, June 29, 1950, at A3.

121. REES, *supra* note 103, at 77-97; Hanson W. Baldwin, *The Forces at Inchon*, N.Y. TIMES, Sept. 22, 1950, at A8.

122. "Foe Disintegrated!" screamed the normally circumspect New York Times headline. N.Y. TIMES, Sept. 28, 1950, at A1.

123. REES, *supra* note 103, at 98-104. The first troops to cross the 38th Parallel were South Korean, and penetrated the border in conjunction with MacArthur's call for the North to surrender. Lindsay Parrott, *South Koreans Cross 38th Parallel on 8th Army's Order*, N.Y. TIMES, Oct. 2, 1950, at A1. Their ethnic background was no accident, and was designed to minimize controversy over the aggressive nature of the action. Previously, crossing north of the 38th Parallel had been a matter of considerable debate (see Hanson W. Baldwin, *Invasion Gamble Pays; One of Big Questions is How Far North in Korea U.N. Forces Should Go*, N.Y. TIMES, Sept. 27, 1950, at A6), and some Member States, otherwise supportive of using force to expel the North Korean army from the

thought, on October 7 the U.N. General Assembly passed a resolution permitting the U.N. Command to enter North Korea¹²⁴ and, somewhat prematurely, set up a Commission for the Unification and Rehabilitation of Korea.¹²⁵ U.N. forces then moved across North Korea, through its capital of Pyongyang,¹²⁶ and finally to the Manchurian border at the banks of the Yalu River.¹²⁷

South, contended that the U.N. had no mandate to reunify Korea by force. Nevertheless, the United States was emboldened by its victory, and warned the U.N. "that the North Korean Communists must not be allowed to retire behind the Thirty-Eighth Parallel and pose a new threat to World Peace." A.M. Rosenthal, *M'Arthur Calls for North Korean Surrender; Indicates Crossing of Border to Supervise It*, N.Y. TIMES, Oct. 1, 1950, at A1. U.N. authorization first came in the curious form of a resolution from the General Assembly's "Political and Security Committee." A.M. Rosenthal, *Political Committee Votes 8-Power Korea Resolution; U.N. Body Backs Crossing*, N.Y. TIMES, Oct. 5, 1950, at A1. This same issue was to be raised again in the Second Gulf Crisis, when U.N. forces pursued the fleeing Iraqi army, and some parties suggested that Iraq be occupied.

124. REES, *supra* note 103, at 107-10; A.M. Rosenthal, *Americans Cross Parallel Above Captured Kaison; Assembly Backs Occupation*, N.Y. TIMES, Oct. 8, 1950, at A1. See General Assembly Resolution 376 (V), Oct. 7, 1950. According to GOODRICH and SIMONS: "This resolution, by implication, confirmed the authority of the United Nations Command to undertake the destruction of the North Korean forces by military operations north of the parallel and expressed approval of such a course." LELAND M. GOODRICH & ANNE P. SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 469-70 (1955).

125. Britain had first proposed the creation of the Commission in late September of 1950, when MacArthur's forces "closed the Korean gap," making unification a real possibility. A.M. Rosenthal, *Allied Forces Close Korean Gap; U.N. Gets Plan to Unify the Country*, N.Y. TIMES, Sept. 27, 1950, at A1.

126. See Lindsay Parrott, *U.N. Troops Smash into Pyongyang; Korean Red Government Flees North*, N.Y. TIMES, Oct. 19, 1950, at A1.

127. Lindsay Parrott, *U.N. Troops Race Unopposed Toward Manchurian Border*, N.Y. TIMES, Oct. 23, 1950, at A1. The Conflict had taken on harrowing global dimensions, leading MacArthur to proclaim, "Our first line of defense for Western Europe is not the Elbe, it is not the Rhine—it is the Yalu." REES, *supra* note 103, at 123-52.

Once United Nations forces were actually in combat, MacArthur's flawed notion of the Yalu being the line of demarcation was quickly picked up by South Korean officials. "Where is the 38th parallel?" President Syngman Rhee exclaimed. "It is non-existent. I am going all the way to the Yalu, and the United Nations can't stop me." TRUMBULL HIGGINS, *KOREA AND THE FALL OF MACARTHUR: A PRECIS IN LIMITED WAR* 55 (1960). "To the Yalu" became the rallying cry of the South Korean officers aiding the United Nations forces. See JAMES MCGOVERN, *TO THE YALU: FROM THE CHINESE INVASION OF KOREA TO MACARTHUR'S DISMISSAL* 36 (1972). The Chinese responded with their own call to cross the Yalu, contending that the United States was "an unreasonable man-eating tiger" and that North Koreans deserved to be assisted in their "just war." Henry R. Lieberman, *Red China Whips Up Propaganda for Active Intervention in Korea*, N.Y. TIMES, Nov. 4, 1950, at A3. Less lofty concerns included China's desire to establish a "cordon sanitaire" south of the Yalu, guaranteeing the security of Manchuria's border

China had been closely watching MacArthur's progress since his triumph at Inchon, and had amassed thousands of troops along the Yalu, knowing that what they did not possess in terms of weaponry could be compensated for by their overwhelming numbers.¹²⁸ When the Chinese troops literally poured across the border, U.N. forces beat a hasty and disorderly retreat.¹²⁹ On January 4, 1951, Seoul had to be evacuated a second time.¹³⁰ After the Chinese advance was halted, the General Assembly issued a victor's resolution condemning the People's Republic of China as an "aggressor."¹³¹ After a successful counter-offensive,

and insuring the flow of power from its hydroelectric systems of Manchurian industries. *CIA Memorandum, Walter Bedell Smith, Dir. of Central Intelligence, to the President, Nov. 1, 1950, 2 p., SECRET, declass. Dec. 11, 1979, TRUMAN LIBRARY, PAPERS OF HARRY S. TRUMAN, PSF.* The C.I.A. concluded that the Chinese "genuinely" feared an invasion of Manchuria despite the "clear-cut definition" of U.N. objectives. *Id.*

128. REES, *supra* note 103, at 136. See Hanson W. Baldwin, *War in Korea Broadens; Thousands of Fresh Chinese Red Troops Join Defeated, Disorganized North Koreans*, N.Y. TIMES, Nov. 7, 1950, at A6. The actual numbers were staggering. Lindsey Parrott, *60,000 Chinese Reds in War, More Ready; 500,000 Other Soldiers Massed in Manchuria*, N.Y. TIMES, Nov. 10, 1950, at A1. By the end of 1952, over a million Chinese were fighting with North Korean forces against the United Nations field forces.

129. MacArthur decried China's "intervention, without notice of belligerency" as "one of the most offensive acts of international lawlessness of historic record." Text of MacArthur's Communique *printed in* N.Y. TIMES, Nov. 6, 1950, at A5.

130. This was called "the big bug-out." REES, *supra* note 103, at 171-77.

131. See General Assembly Resolution 498 (V), Feb. 1, 1951, which declared the People's Republic of China guilty of aggression. General Assembly Resolution 498 did not recommend any additional military measures apart from those in place through the Security Council, but it did affirm the U.N.'s "determination . . . to continue its action in Korea to meet the aggression" and called upon "all States and authorities to continue to lend every assistance to the United Nations action in Korea." *Id.* See also Thomas J. Hamilton, *U.N. Assembly Votes Red China Guilty, 9 Countries Abstain on Move that Asks for Study of Sanctions*, N.Y. TIMES, Feb. 2, 1951, at A1. A subsequent resolution [General Assembly Resolution 500 (V), May 18, 1951] recommended the imposition of collective economic sanctions. Clearly, the People's Republic of China felt it was acting in its own defense (despite the fact that it had provided steady covert assistance to North Korea since the invasion), and in defense of its friend and ally. Government slogans popular at the time reflected this popular belief: "Resist America! Aid Korea!" JONATHAN SPENCE, *THE SEARCH FOR MODERN CHINA* 534 (1990). In fact, a special memorial holiday of July 17-24 was created as "Resist American Invasion of Taiwan and Korea Week." See REES, *supra* note 103, at 105. Stoessinger describes the irony well: "In the Korean War, the victim of aggression was tempted by aggression, and succumbed to the temptation." STOESSINGER, *supra* note 79, at 94. Nevertheless, U.N. Member States continued to be supportive of the use of force. Two Soviet resolutions charging that the U.S. had committed aggression against China were stunningly defeated. A.M. Rosenthal, *Anti-U.S. Charges Rejected in U.N.; Soviet Move to Call This Nation an Aggressor in China Fails in Political Committee*, N.Y. TIMES, Feb. 8, 1951, at A1.

the U.N. forces again reached the 38th Parallel.¹³² Armed with the General Assembly's resolution condemning the Chinese aggression, MacArthur publicly advocated extending the war to officially include China.¹³³

However, MacArthur failed to consider the implications of his advocacy of war against China. The U.N., after all, was not a war machine. Article 42 does not authorize interminable fighting. The General also underestimated Truman's moxie. Truman regarded MacArthur's conduct as a challenge to his authority as Commander-in-Chief and as an attack on his conduct of foreign policy.¹³⁴ On April 11, 1951, MacArthur was relieved of his com-

132. *U.N. Patrol Enters Seoul as Tanks Smash Red Lines*, N.Y. TIMES, Feb. 10, 1951, at A1.

133. REES, *supra* note 103, at 202-13. MacArthur set forth his proposal in a letter to Joseph W. Martin Jr., the U.S. House Minority leader. Walter H. Waggoner, *M'Arthur Rebuke Likely; High Aides Confer*, N.Y. TIMES, Apr. 8, 1951, at A1. MacArthur averred that Chinese Nationalist troops should open up a "second front on the Communist-held Mainland," and that "the fate of Europe should be decided in Asia." *Id.* Recently released State Department documents indicate that MacArthur may have been encouraged in his brashness by similarly-minded members of the Joint Chiefs of Staff. See *U.S. State Dept. Overnight Information Policy Guidance No. 697*, Apr. 20, 1951, 1 p., CONFIDENTIAL, declass. Mar. 27, 1975, TRUMAN LIBRARY, GEORGE M. ELSEY PAPERS. Truman, who had the previous November survived an assassination attempt by Puerto Rican nationalists, already had his hands full with awkward publicity arising out of their death-sentencing, wherein the assassin Oscar Collazo alluded to the many Puerto Ricans "fighting and dying" in Korea: "I'm not pleading for my life, I'm pleading for my cause. . . the right of my country to be free. Now you have Puerto Ricans fighting for the liberty of other people, but they cannot fight for their own liberty." Paul P. Kennedy, *Truman Assassin Sentenced to Die; Collazo Says He is a Martyr for Puerto Rico*, N.Y. TIMES, Apr. 7, 1951, at A1. Also following Truman like a bad penny was the trial of Julius and Ethel Rosenberg, who had both just been condemned to death. William R. Conklin, *Atom Spy Couple Sentenced to Die*, N.Y. TIMES, Apr. 6, 1951, at A1. MacArthur had further divided American public opinion, and Truman was furious. Topping off his bad week was the hair-raising statement of House Speaker Sam Rayburn, who picked up MacArthur's lead and forecast "World War III." John D. Morris, *A Third World War May be Near, Speaker Implies to the House; Rayburn Intimates Russians Mass Troops in Manchuria*, N.Y. TIMES, Apr. 5, 1951, at A1.

134. Truman was also feeling the sting of criticism at home as the Conflict plowed along, with no end in sight. *Truman for any Approach to Peace That is Honorable*, N.Y. TIMES, Feb. 25, 1950, at A1. The morale of U.S. servicemen hit an all-time low. Walter H. Waggoner, *Acheson Tells Bitter Marine to Have Faith in U.S. Ideals*, N.Y. TIMES, March 4, 1951, at A1; *id.* for text of letters. See also *Congressman Who Fought in Korea Urges War's End*, N.Y. TIMES, Apr. 3, 1951, at A3. The fighting was going on too long, and the Conflict became unpopular even in South Korea. George Barrett, *U.N. Losing Favor by Korean Damage; Civilians Returning to Homes are Stunned by Destruction of Allied Firepower*, N.Y. TIMES, March 3, 1951, at A2.

mand, and U.S. General Matthew Ridgway was placed in his stead.¹³⁵

135. REES, *supra* note 103, at 214-21; W.H. Lawrence, *Truman Relieves M'Arthur of All His Posts; Finds Him Unable to Back U.S.-U.N. Policies; Ridgway named to Far East Commands*, N.Y. TIMES, Apr. 11, 1951, at A1. In his memoirs, Truman complained specifically about the fact that MacArthur had issued a public statement in his capacity as U.N. field commander commenting on U.S. foreign policy: "By this act MacArthur left me no choice—I could no longer tolerate his insubordination." REES, *supra* note 103, at 442. Truman's comment has led scholars to question under whose authority a U.N. field commander can be legally dismissed, since although Truman as U.S. President was indisputably Commander-in-Chief of U.S. armed forces, he theoretically was not in command of U.N. forces pursuant to Article 42. His "Statement of Regret" only obliquely mentioned "the specific responsibilities imposed upon me by the Constitution of the United States, and the added responsibility which has been entrusted to me by the United Nations" as the source of his authority to dismiss the U.N. Field Commander. Text of Truman's statement *printed in* N.Y. TIMES, Apr. 11, 1951, at A8.

A more interesting test would have been for MacArthur to demand removal by the U.N. Security Council, Military Staff Committee, or Secretary General (although such a reproach would have been seen through American eyes as grossly insubordinate). Explicit in U.N. Charter Articles 46 and 47 is that the ultimate authority over the field command resides with the Security Council, advised and assisted by the Military Staff Committee. Although Article 47 is cryptically silent as to how a field command is relieved [paragraph 3 states that "[q]uestions relating to the command of such forces shall be worked out subsequently"], it implicitly cedes this authority to the Military Staff Committee, consisting of "the Chiefs of Staff of the permanent members of the Security Council or their representatives." U.N. CHARTER art. 47, para. 2.

Truman would have been correct to have sought MacArthur's removal through his Chief of Staff. However, he may not have been entirely wrong to act on his own initiative, since MacArthur was also still under his command in the U.S. Army. Indeed, dismissals of U.N. appointees who are also employed in their national governments by a Member State are actually quite a commonplace within the Organization. The problem is called "secondment" [Higgins v. Secretary-General of the United Nations, Judgment No. 92, UN Doc. AT/DEC/92, para. IV (1964)] and it arises when an individual is both an official employee of his Member State government (such as the foreign ministry), and at the same time is hired to work within the United Nations system (such as the Headquarters, Secretariat, or other division) as an international civil servant. See Theodor Meron, *Staff of the United Nations Secretariat: Problems and Directions*, 70 AM. J. INT'L L. 659, 678-91 (1976). The question of which employer—the Member State government or the U.N.—deserves first loyalty is still unresolved in practice, although Secretary-General Trygve Lie's averment that "[t]he independence of the Secretary-General and his sole responsibility to the General Assembly of the United Nations for the selection and retention of staff should be recognized by all Member nations and if necessary asserted, should it ever be challenged" is often quoted as authoritative. Opinion of Nov. 29, 1952, 7 UN GAOR, 2 Annexes (Agenda Item 75) 27, UN Doc. A/2364 (1953). The issue of whether dismissal from the Member State's employment automatically terminates one's U.N. employment has arisen several times [see, e.g., Yakimetz v. Secretary-General of the United Nations, Judgment No. 333, UN Doc. AT/DEC/333 (1984); Levchik v. Secretary-General of the United Nations, UNAT Judgment No. 192, at 16 (1974)], and was most recently considered in Qiu v. Secretary-General of the United Nations, Judg-

On June 23, 1951 the Soviets proposed a cease-fire and armistice.¹³⁶ These negotiations would prove to be complicated. The People's Republic of China demanded that all foreign troops withdraw from Korea. The United States, reluctant to let history repeat itself, found this unacceptable.¹³⁷ The North Koreans wanted the boundary redrawn at the 38th Parallel, but the U.S. insisted on the present battle line, which in many places was actually above the parallel.¹³⁸ The stickiest issue was that of prisoners. The U.N. Command held 171,000 prisoners, 50,000 of whom had no desire to return to their Communist homelands.¹³⁹ The Communists, however, were determined to get them back. This issue stalled further resolution of the Korean Conflict until after Stalin's death in 1953.¹⁴⁰ The armistice was finally signed on July 27, 1953, setting the boundary be-

ment No. 482, UN Doc. AT/DEC/482 (1991). While Qiu did not prohibit secondment outrightly, it did weaken it as acceptable practice. See John Knox, Comment, 85 AM. J. INT'L L. 686, 688 (1991). Under a theory of secondment, Truman could have relieved MacArthur of his general command for any reason, or no reason at all, and this would necessarily have entailed MacArthur's departure from Korea as well. Clearly, such a situation may be quite undesirable; it is undoubtedly an imperfection and an issue to be addressed in future Article 42 actions.

136. *The Recall and the MacArthur Hearings* in BURTON I. KAUFMAN, *THE KOREAN WAR: CHALLENGES IN CRISIS, CREDIBILITY, AND COMMAND* 190-91 (1986). The fact that the Soviets made the proposal gave rise to a unique set of public relations problems for the United States. Recently released State Department documents are especially enlightening as to the depth of U.S. government control over the media in reporting on the Conflict. See, e.g., *U.S. State Dept. Overnight Information Policy Guidance No. 747*, July 2, 1951, 1 p., CONFIDENTIAL, declass. Mar. 27, 1975, TRUMAN LIBRARY, GEORGE M. ELSEY PAPERS [Media instructed to use term "armistice" instead of "cease-fire" and should refrain from referring to Soviet-Communist overture as a "Communist peace offer," but rather as "Communists have requested an armistice"].

137. KAUFMAN, *supra* note 136, at 198.

138. *Id.* at 200.

139. Jaro Mayda, *The Korean Repatriation Problem and International Law*, 57 AM. J. INT'L L. 414 (1953); CIA Memo, Apr. 2, 1952, 1 p., SECRET, declass. Oct. 1, 1986 [Far East Command's psychological warfare office informs the U.S. Ambassador in Formosa that the majority of Chinese prisoners of war in Korea would, if permitted, choose to be repatriated to Formosa]; CIA Memo, Apr. 2, 1952, 2 p., SECRET, declass. Oct. 1, 1986 [Chinese Nationalist press reports from South Korea that "nearly 80 percent of Chinese prisoners of war" taken by the U.N. do not wish to be repatriated to the Communists]. Western media photographs usually showed fatigue-clad Asians broadly grinning in various positions of supplicant surrender, appropriately captioned: "This smiling Communist was happy to be captured." See, e.g., N.Y. TIMES, Sept. 22, 1950, at A3.

140. "With Stalin's death ended an epoch of almost total domination of the country by a single person." Mayda, *supra* note 139, at 306.

tween North and South Korea at the military line. A Neutral Nations Commission for Repatriation was set up for prisoner exchanges; of these, almost 22,000 chose to stay in South Korea or go to Taiwan.

Thus, the Korean Conflict lapsed into a settled stalemate. The border between North and South remains under guard and constant patrol to this day, and their peace is separate and uneasy.

2. *The Changing World Order*

The Korean Conflict was the first genuine Article 42 action. Its essence was that of emergency and rescue. The predominance of the U.S. in conducting the action belies the role of the U.N. in influencing both the conduct and outcome of the hostilities. Part of the reason for MacArthur's dismissal is that he could not accept that police actions were not "total" wars, and were not necessarily won or lost.¹⁴¹ The other factor was the expanded role of atomic weaponry. In this fight, the U.S. had grown more aware of the dreadful consequences inherent not in losing, but in winning. MacArthur's replacement, General Ridgway, wrote later of the Korean Conflict with penetrating insight:

The willingness to settle for a stalemate. . . was all that brought peace to Korea. . . . We had finally come to realize that military victory was not what it had been in the past—that it might even elude us forever if the means we used to achieve it brought wholesale devastation to the world or led us down the road of international morality past the point of no return.¹⁴²

141. For MacArthur, winning did not include stopping one's forces at the 38th Parallel—winning meant obliterating one's opponent. Embarking briefly upon a political career after his involuntary retirement, MacArthur addressed the 1952 Republican National Convention and bad-mouthed Truman: "It is fatal to enter any war without the will to win it." MacArthur had also failed to salute Truman, his Commander-in-Chief, on the latter's arrival to review the troops. This omission, although softened by a diffident handshake, was considered a mark of gross disrespect. See RICHARD WHELAN, *supra* note 94, at 232, including a photograph of the handshake; JAMES MCGOVERN, *supra* note 127, at 2-3 (1972). MacArthur's open display of contempt for Truman made it easy for the U.S. President to relieve him of his command. Nevertheless, this action raised legal eyebrows because the "command" in question was a U.N., rather than U.S. one, and such decisions should properly have been made by the U.N. Secretary General.

142. GEN. MATTHEW B. RIDGWAY, *THE KOREAN WAR* (1967). This statement clearly illustrates the dramatic shift in ideas. In 1950, Dulles had decried such situations, declar-

In a volatile situation involving the extreme bipolarity between two great powers, both of which possessed atomic weapons, the major goal was not to win, but to reclaim the peace and security. For the U.S., this precluded a total war. For the Soviet Union, it meant being much more conservative in promotion of the use of force to Soviet client-states. For both North and South Korea, it meant being satisfied with a good fence and chastened, if still unfriendly, neighbors and patiently waiting for reunification by nonviolent means.¹⁴³ While the experience certainly did not end war, it sobered the international community, highlighted new dangers of "Big Power" conflicts, and showed that the U.N. could effectively marshal its powers and resources and tug on the reins of power if it had to.¹⁴⁴

American bossiness in diplomatic matters attending the turning points of conflicts is also relatively old news, and, in the case of Kuwait, nothing of which to be ashamed.¹⁴⁵ While Professor Weston undoubtedly has his followers, the fact that the resultant international coalition of Member States was led by the U.S., and that the U.S. worked hard to persuade, cajole and even bully other Member States into doing its bidding, does not make the handling of the Second Gulf Crisis "illegitimate" or illegal under international law. Quite the contrary; this is the process of *politics* and outcomes, a product of those ends that are desired and worked for, and purely fortuitous events. In fact, the German reunification and the apparent collapse of the So-

ing that "limited policies inevitably are defensive policies, and defensive policies inevitably are losing policies." JOHN FOSTER DULLES, *WAR OR PEACE* (1950). Although one can try to point to Vietnam for the truth of this statement, the issue then becomes one of legitimacy.

143. As the case of Germany illustrates, such an event is not at all impossible, although not easily foreseen.

144. Except for the Cuban missile crisis, World War III has not yet emerged as a probability, and there have been no "Koreas" since the Korean Conflict.

145. Nevertheless, it must be noted that the conduct of James A. Baker III, U.S. Secretary of State, once overstepped the boundaries of diplomatic good taste on November 29, 1990, when Yemen voted "no" to Resolution 678. Sounding more like a mafia loan shark than the holder of one of the highest offices in the land, an angry Baker sent the Yemeni delegate a note, reading: "That is the most expensive vote you have ever cast." TRIUMPH WITHOUT VICTORY; THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR 182 (U.S. News & World Report eds., 1992) at 181. If the story is not apocryphal, Baker's conduct borders on boorishness, since Yemen's vote could hardly have come as a surprise.

viet socialist republic more than removed traditional impediments, such as the Soviet's Security Council veto of such Chapter VII actions;¹⁴⁶ these events heralded a new multipolar power structure, led unashamedly (if imperfectly) by the strongest pillar of the newly emerging capitalist security community—the U.S.¹⁴⁷ About this there is nothing immoral, and certainly noth-

146. Or, at least, such upheavals have subdued them. The improvement in U.S.-Soviet relations prior to the Second Gulf Crisis was undeniably fortuitous, to say the least. But unlike the Security Council's consensus in the Korean Conflict of 1950, when the Soviets boycotted the Security Council over the issue of China's nonadmission, the passage of Resolution 678 was not simply a stroke of luck or an oversight; "for the first time since the 1967 Six Day War," Rubinstein points out, "the Soviet Union did nothing to shield a prized client from the consequences of its military folly. Not only did Moscow watch from the sidelines as the Iraqi military machine that it had largely created was destroyed, but it gave Washington the green light to proceed." Rubinstein, *supra* note 77, at 56. See also Bill Keller, *Moscow Joins in Criticizing Iraq*, N.Y. TIMES, Aug. 4, 1990, at A6; Celestine Bohlen, *Arms Flow Halted by Soviets: Moscow Suspends Long Role as Nation's Main Supplier*, N.Y. TIMES, Aug. 3, 1990, at A10.

147. As a British writer has observed, "What distinguishes America is not its greater or lesser goodness, but simply its unrivalled power to do that which is good or bad." Mark Frankland, LONDON OBSERVER, Nov. 6, 1977. Professor Weston's objection to the predominant role of the United States in the Second Gulf Crisis is undoubtedly founded, at least in part, on larger and more ancient quarrels, stemming from that period of romantic American imperialism that so inspired no less than Dean Acheson to write of the Korean Conflict: "To back away from this challenge, in view of our capacity for meeting it, would be highly destructive of the power and prestige of the United States. By prestige I mean the shadow cast by power, which is of great deterrent importance. Therefore, we could not accept the conquest of this important area by a Soviet puppet under the very guns of our defensive perimeter with no more resistance than words and gestures in the Security Council." DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 405 (1969).

As was also true in the case of Kuwait, the United States was under no treaty obligation to come to Korea's defense as an ally. However, the fact that U.S. armed forces played a predominant role in both these conflicts should surprise no one. What other Member Nation alone could have marshalled sufficient forces? See Martin Walker, *The U.S. and the Persian Gulf Crisis*, 7 WORLD POL'Y J. 791, 794-5 (1990):

It is difficult to think of any other nation, at any time in history, that could within six weeks have deployed 150,000 army personnel some 5,000 miles from their bases, with tanks and guns and war planes to match, and without denuding any of its other outposts around the world. . . . The United States could lose the lot to a devastating chemical warfare attack, and awful though it would be, the U.S. military machine could not be seriously damaged by a loss of fighting power equivalent to the whole British army. Even losing all four aircraft carrier task forces now in the Gulf would still leave ten more to wreak revenge. Indeed, the world has not seen this kind of power since the days of the Roman Empire.

While an "international force" seems to possess the appearance of being more legitimate, or at least more neutral, than the forces of a great power, it is undeniable that U.N. troops, such as they now exist, are lightly armed, unevenly trained and few in num-

ing illegal.¹⁴⁸

While Professor Weston may decry the Bush Administration's international lobbying efforts as unseemly and gloat over the coalition's frangibility, these are picayunish concerns. The United States' lobbying effort (including the bowing, scraping, incessant pandering and paying for other's lunches that always accompanies an important vote) was totally the right thing to do, and it is hardly unheard of for Member States, especially poor and weak ones, to take material advantage of rich and powerful ones needing their votes.¹⁴⁹ There is no evidence at all that any Member State voted against its collective conscience or betrayed its national will because of American concessions. Moreover, the impermanence of the coalition hardly brands it as a failure or a fluke.¹⁵⁰ Perhaps some scholars and politicians ex-

ber. When faced with a serious foe, bent on conquest, practice shows that the Blue Helmets are little more than sitting ducks, easily routed and even murdered at will. They would not have lasted a "New York minute" against Saddam Hussein, and would not have compelled him to disgorge any of the fruits of his aggression.

148. Moreover, military strategists generally agree that "[c]ommand by committee has never succeeded in war, and a committee composed of generals from four different countries was not likely to be an exception." MAURICE, *LESSONS OF ALLIED CO-OPERATION: NAVAL, MILITARY AND AIR 1914-1918*, 123 (1942). Even in ancient times, military coalitions were usually led by the strongest member. The Delian League, which was a coalition of Ionian cities formed to protect the Aegean Sea against Persian invasion, was led by Athens, its strongest member; its ships were commanded by an Athenian admiral, albeit under the authority of the League Council. See WALTER L. WILLIAMS, JR., *supra* note 51, at 19.

The issue of American globalism as a "deep conviction" that American ideals, interests and security should be indiscriminately imposed upon the rest of the world for the good of humanity is a troublesome, but profoundly different, question. THEODORE H. VON LAUE, *THE WORLD REVOLUTION OF WESTERNIZATION* 166-96 (1987). See also WILLIAMS, *supra* note 78, at 53-83. In the Second Gulf Crisis, what matters is not who paid, or who went; what matters is the *multilateral nature of the consent for the use of force*.

149. "There's the one thing no nation can ever accuse us of and that is Secret Diplomacy," said the humorist Will Rogers. "Our foreign dealings are an open book, generally a check book." DONALD DAY, *THE AUTOBIOGRAPHY OF WILL ROGERS* (1949). The difficulty is to draw the line between politics and outright graft. See, e.g., Robert D. Novak, *Aristede's Taiwan Connection; Mystery: What Became of Millions in "Aid" the Nationalists Gave Him?*, N.Y. Post, Nov. 8, 1993, at 19.

150. That such alliances are considered unstable and short-lived is no secret. Alliances are, after all, political facts. "No undertaking," wrote Macauley in 1857, which requires the hearty and long-continued cooperation of many independent states is likely to prosper. Jealousies inevitably spring up. Disputes engender disputes. Every confederate is tempted to throw on others some part of the burden which he ought himself to bear. Scarcely one honestly furnishes the promised contingent. Scarcely one exactly observes the appointed day.

pressed too much unbridled enthusiasm, too exuberantly;¹⁵¹ certainly President Bush's pronouncement of a "new world order", without any initial definition of what he was talking about, has disappointed an expectant public and puzzled many commentators.¹⁵² Yet the coalition's true significance may even have been lost on the Bush Administration, which seemed to be offering it as the durable model of a brave new world.¹⁵³ It is not. "But," in the words of Barry Buzan, "it does suggest the general nature of

THOMAS BABINGTON MACAULAY 1ST BARON, 4 HISTORY OF ENGLAND 1980 (5th ed. 1857).

151. One could hardly be blamed for feeling good that the United Nations, usually taking its lumps for being too moribund, had finally stirred and, if not actually vanquished an evildoer, had at least caused it to taste the humiliation of televised retreat:

And hast thou slain the Jabberwock?

Come to my arms, my beamish boy!

O frabjous day! Callooh! Callay!

He chortled in his joy.

LEWIS CARROLL, THE JABBERWOCK IN THROUGH THE LOOKING GLASS (1972). It is a pity that Walter Lippman did not live to see the day, frabjous or otherwise.

152. The concept has a checkered reputation. "Global thinking is, no matter how you slice it, still globaloney." See *Clare Booth Luce, 1903-1987*, NEWSWEEK, Oct. 19, 1987, at 43. For a spirited defense of Ms. Booth's invention of the word, see Annette Richardson, "Globaloney" Rolls On, PUB. REL. J., Jan. 1991, at 6; Merrie Spath, *Quotebaloney?* PUB. REL. J., Aug. 1990, at 5. Part of the confusion (and amusement for those old enough to remember earlier New World Orders) was whether Bush was heralding a "new" New World Order, an "old" New World Order [see FREDERICK CHARLES HICKS, THE NEW WORLD ORDER (1920)], or perhaps, for Evelyn Waugh fans, the New World Order "revisited".

Those unhappy with U.S. military action in Kuwait did not hesitate to seize the cliché. See Michael Kinsley, *Law and Order: U.S. Hypocrisy Involving "International Law" vs. Iraq*, NEW REPUBLIC, Oct. 1, 1990, at 4, in which Kinsley complains:

order . . . is at the heart of international law, an area of thought the U.S. government has not had much time for during the past decade. Order, 'and the related concept of sovereignty,' assert that the status quo has its own legitimate claims, simply because it is the status quo and disturbing it risks 'chaos'—war, misery, death—as Bush now says.

For Bush's interpretation of the New World Order as an increased role of the United Nations in world affairs, see *I Can Call Spirits From the Vasty Deep*, ECONOMIST, Sept. 15, 1990 at 29: " 'We are now in sight,' [Bush] continued, 'of a United Nations that performs as envisioned by its founders.' " However, not even the ECONOMIST could pass up an editorial shot: "He did not add that the United States is \$670m in arrears in its payments to that admirable organization." *Id.*

But see Jay Winik, *The Quest for Bipartisanship: A New Beginning for a New World Order*, 14 WASH. Q. 115 (1991) and Bruce Russett & James S. Sutterlin, *The U.N. In a New Legal Order*, 2 FOREIGN AFF. 69-70 (Spring, 1991), as examples of serious scholarship quick to fill the lacunae of media sound-bites.

153. See Walker, *supra* note 147, at 791 (quoting Secy. of State James Baker's Address to the U.S. Congress), and 798-9. Rather than explain what he meant, Bush simply stopped using the phrase after being teased by the press.

security relations in a centre-dominated world, the mechanisms available, and the ability of the centre to isolate aggressors who threaten the recognized political order and the workings of the global economy."¹⁵⁴ International society is undoubtedly a stronger and safer place because of it.¹⁵⁵

154. Barry Buzan, *New Patterns of Global Security in the 21st Century*, 67 *ROYAL INST. INT'L AFF.* 431, 437 (1991). Buzan describes the Second Gulf Crisis as a model of seven concentric circles:

In the centre circle stood the United States, which was willing to lead only if followed and to fight only if given wide support and assistance. In the second circle were others prepared to fight—some members of the centre (principally Britain and France), and others of the periphery (principally Egypt and Saudi Arabia). In the third circle were those prepared to pay but not to fight, primarily Japan and Germany. In the fourth circle were those prepared to support but not to fight or pay. This group was large, and contained those prepared to vote and speak in favor of the action, some of whom (such as Denmark) also sent symbolic military forces. It also included the Soviet Union and China as well as a mixture of centre and periphery states. The fifth circle contained those states satisfied to be neutral, neither supporting nor opposing the venture, but prepared to accept UN Security Council resolutions. Within these five circles stood the great majority of the international community, and all the major powers. In the sixth circle were those prepared to oppose, mainly verbally and by voting. This contained Cuba, Jordan, Yemen, and a number of Arab states. In the seventh circle stood those prepared to resist—Iraq.

155. *Id.* at 438. Indeed, now (or at least for the moment), the world is almost entirely free of traditional great power conflicts. While the possibility of a nuclear strike:

can never be wholly eliminated. . . the actual likelihood of a threat to our national security from a Soviet invasion of Western Europe or a Soviet nuclear strike—the two threats for which we are most prepared today and to which we have for so long devoted so much of our wealth, talent and attention—ranks far below a host of non-Soviet, and even nonmilitary, threats to that security.

Theodore C. Sorensen, *Rethinking National Security*, 69, 3 *FOREIGN AFF.* 1, 2 (Summer, 1990). See also RICHARD H. ULLMAN, *SECURING EUROPE* (1990); *Soviet Disarray: And What of the Engines of War?* *N.Y. TIMES*, Dec. 10, 1991, at A19.

Temporary coalitions such as the one described by Buzan, *supra* note 143, may be less onerous and costly to maintain than traditional alliances. *But see* Walker, *supra* note 147, at 797-98, for an opposing view:

The diverse nature of the coalition illustrates the second paradox of the Bush Doctrine, which is that the White House thrills to the idea of global leadership but seems to shrink from the loneliness that leadership usually entails. The result once again, as in the Korean and Vietnam wars, is a U.S. military operation hedged in by junior partners, burdened by all the responsibility of command, and bound by all the constraints of a formal alliance. The difference is that during the Korean and Vietnam wars, the United States could afford to put its money where its strategy was.

III. ARTICLE 42: CAN IT STAND ALONE?

Although both the Korean Conflict and the Second Gulf Crisis involved large-scale conflicts and mobilized the armies, navies, and air forces of many Member States, neither action gave rise to the formulation of an Article 43 agreement. Despite the plainly obvious existence of Article 42 forces in both cases, it is reasoned by some that an Article 42 force without an Article 43 agreement is in fact an Article 51 force. However, this is not a question of putting the cart before the horse as much as it is the Strict Charter Constructionists' claim that one cannot build and effectively use a cart and horse without first drawing up an engineering plan "proving" their existence.

Both Professor Weston and Professor Michael Glennon subscribe to the "no Article 42 without Article 43"¹⁵⁶ school of tautological thought, as do other prominent legal scholars. This argument is premised on a historical anomaly. Article 43 is a unique Charter provision that dates from an earlier day when the idea of world government was taken far more seriously than it is now.¹⁵⁷

Article 43 pledges Member States "to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities . . . necessary for the purpose of maintaining international peace and security."¹⁵⁸ It further provides that these special agreements "shall be negotiated as soon as possible on the initiative of the Security Council" and "be subject to ratification by the signatory states in accordance with their respective constitu-

156. See Michael Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM.J. INT'L L. 74, 80 (1991); and Burns Weston, *supra* note 33, at 516, 519.

157. See generally GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (1960), for a comprehensive and detailed plan for the maintenance of world peace through the United Nations and the establishment of global institutions, including global legislative authority and global police enforcers. Although stymied by the Cold War and our reluctance to "think the unthinkable," see HERMAN KAHN, *THINKING ABOUT THE UNTHINKABLE* (1962), the world government movement persists "as an alternative to collective doom, a movement whose political failure has obscured the psychological and moral authenticity of its impulse towards species politics and a species self." See ROBERT JAY LIFTON & ERIC MARKUSEN, *THE GENOCIDAL MENTALITY: NAZI HOLOCAUST AND NUCLEAR THREAT* 64 (1990).

158. U.N. CHARTER art. 43, para. 1.

tional processes."¹⁵⁹ Because no Article 43 agreements have yet been concluded "on the initiative of the Security Council," Professors Glennon and Weston allege that Article 42 actions simply cannot exist.¹⁶⁰ For the following reasons, this conclusion is erroneous.

The most obvious argument for the severance of Article 42 from Article 43 is that, had the Charter's authors really wanted to make these articles one inseparable concept, they would have simply drafted it that way. However, they did not. There is also no provision or explicit reference in the Charter as to the alleged oneness of the two articles. Grotius would surely have frowned upon relying on a treaty's parts, rather than construing it as an indivisible whole; however in modern times it is not only possible, but "now constantly found necessary to dissect a treaty into several parts and give them separate treatment."¹⁶¹ Modern scholars have indeed pondered "what absurdities would result from a pedantic insistence upon the wholeness of the treaty and the inseparability of its provisions."¹⁶²

Article 43 provides a contractual mechanism for rendering armed forces to the Security Council¹⁶³ and gives the action a mandatory character.¹⁶⁴ It is in these qualities that its essence

159. *Id.* at para. 3.

160. *See gen.* Glennon and Weston, *supra* note 156. This reasoning might be infinitely more defensible as a tautology if Article 42 was placed subsequent to, instead of before, Article 43 in the Charter.

161. ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 474 (1961). This is admittedly a departure from the traditional idea of *totem praefectur unicuique parte*, and yet another example of the modern trend towards maximicide. THOMAS BRANCH, *PRINCIPIA LEGIS ET AEQUITATIS* (3 Rep. 41). *See also* SHABTAI ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 256-61 (1970).

162. MCNAIR, *supra* note 161. *See also* H. TOBIN, *THE TERMINATION OF MULTIPARTITE TREATIES*, 250-65 (1933).

163. Although in practice, this comes closer to "duty" when read in conjunction with Article 25. It is different from other Charter articles in that it not only sets forth behavior, but requires Member States to "contribute" and "make available" tangible things; Member States agree to furnish "armed forces" and "facilities"; "assistance" includes a possible plethora of tangible things, including money in hard currencies, and tangible rights such as the "right of passage."

164. *See* ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 226-7 (1963), footnotes omitted:

As for the use of force itself, the Security Council, in the absence of the member for the Soviet Union, recommended that members of the United Nations should furnish aid to the Republic of Korea. Thus the failure to implement the obligatory arrangements envisaged in Article 43 was circumvented by a 'recommendation' to

lies. It has the unique feature of providing a limited role for Member Nations' "constitutional processes" through ratification, a role that is not found elsewhere in the Charter.¹⁶⁵ The result of this is to make each Member Nation's international legal obligation *erga omnes* part of its domestic, municipal law.¹⁶⁶ That is Article 43's only purpose.

Article 43's linkage to Article 42 is historical in nature, dating back to the San Francisco conference¹⁶⁷ and shadowed by similar provisions in the defunct Covenant of the League of Nations.¹⁶⁸ Due to intense disagreement over just about every aspect of the use and creation of the League Members' armed forces as a "world army," no definite provisions for an armed force were ever established under the Covenant. Thus, the League lacked even a basic commitment to voluntarism,¹⁶⁹ al-

all the individual members.

See also LELAND M. GOODRICH & ANNE P. SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 426-7 (1962).

165. See Glennon, *supra* note 156, at 76. Glennon chooses pithy quotes from the U.S. Congressional debates, citing the Fulbright and Connally Resolutions as evidence that Article 42 action is foreclosed until the creation and adoption of Article 43 agreements through each Member State's "constitutional processes." But the quoted language invoked by Glennon dates from 1943, when the Senate and the House were preparing the way for the San Francisco Conference and the adoption of the Charter (and not Article 43 specifically), as "appropriate international machinery with power to establish a just and lasting peace." In adopting the Charter, all Member States adopted Articles 42 and 43 as well. The "constitutional processes" to which Glennon's quotes allude are aimed at ratifying the Charter as a whole, and not just a specific article or two.

166. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 200 (1990), describing such "an obligation arising not out of a specific promise to another, but from an obligation *erga omnes* which is not specifically assumed but is inherent in the status of an endorser." See also Prosper Weil, *Towards Relative Normativity in International Law?* 77 *AM. J. INT'L L.* 413, 420-422 (1983), on the issue of voluntarism in international law and the blurring of obligations *erga omnes* with "what one is tempted to call obligations *omnium*" (an admittedly larger question, at last calling to account the sloppy reasoning that so often accompanies incident analysis). The danger Professor Weil rightly perceives is that this type of moral and emotion-based thought is permeating international law, to the law's detriment. Our resolution of this dilemma will depend largely upon our progress from apology to utopia, like the search for the holy grail. For a truly superior and aptly titled book on this subject, see MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

167. See CONNAUGHTON, *supra* note 29, at 5-10.

168. Walter L. Williams, Jr., *supra* note 51, at 27-36.

169. See I. MILLER, 2 *THE DRAFTING OF THE LEAGUE COVENANT* 733 (1928). Article 16 fell far short of being a requirement:

It shall be the duty of the Council. . .to recommend to the several Governments concerned what effective military, naval or air force the members of the League

though it did manage to authorize some use of military forces on two minor occasions.¹⁷⁰ Woodrow Wilson rationalized this weakness, claiming that although it was not expressly provided for in the Covenant, "armed force" was "in the background. . . . But that is the last resort, because this is intended as a constitution of peace, not as a League of war."¹⁷¹

shall severally contribute to the armed forces to be used to protect the covenants of the League.

170. These were during the Leticia Dispute and the Saar Plebescite. A third, the Vilna Dispute, is generally cited; however, because of Polish and Lithuanian obstructionism, forces were never actually sent out, although plans were in fact made for a multinational force to be used through the League; its mission was "simply to perform police duties." 2 LEAGUE OF NATIONS OFF. J. 7 (1921). In the Leticia Dispute, the League simply incorporated the troops of the Colombian disputant, but "internationalized" the force by entitling it to fly the League's flag with the Colombian standard. The League/Colombian troops, however, saw no action, especially after Peru withdrew its forces. 15 LEAGUE OF NATIONS OFF. J. 977 (1934). The troops supplied through the League during the Saar Plebescite were the most "international," consisting of Dutch, Swedish, British and Italian forces. This League force numbered 3,300 soldiers, and was equipped with armored cars and tanks. A photograph of the "international force" at Saarbruck headquarters shows a helmeted legion, armed with sash-tied swords and rifles with bayonettes. THE SAAR PLEBESCITE: LEAGUE OF NATIONS, QUESTION 1 18-21, at 19 (*publ. by* the Geneva Info. Section, 1935). Its mission was to stick around the coal-rich valleys until the last vote was counted, and prevent anyone from making trouble. It saw no action. Switzerland had been asked by the League to grant the force passage through an alpine pass, but Switzerland refused. See SARAH WAMBAUGH, THE SAAR PLEBESCITE, 282-5, 319 (1930); see *gen.* W.R. BISSCHOP, THE SAAR CONTROVERSY (1924); SARAH WAUMBAUGH, A MONOGRAPH ON PLEBESCITES (1920).

171. See I. MILLER, THE DRAFTING OF THE COVENANT 216-7 (1928). Franklin Roosevelt, then Assistant Secretary of the Navy, was more pragmatic. "The League may not end wars," he cautioned, "but the nations demand the experiment." JAMES M. BURNS, *supra* note 22, at 70. Nevertheless, Roosevelt pushed for U.S. membership during his 1920 Senate campaign, challenging his isolationist opponent:

If the United States can enter the existing League of Nations in such a way that the will of the League cannot be imposed on us against our will, and if it is made clear that our constitutional and congressional rights regarding war are in every way preserved, would you then, Senator Harding, favor our going in?

Id.

This was, of course, the major issue, and on this rock foundered all attempts at U.S. membership.

One of Roosevelt's biggest (and most quotable) election-time blunders has been overlooked by League scholars, probably because it was said during the campaign, and quickly retracted. When doubts were raised about the influence the United States could carry in such a body, amid allegations that Britain would control six League votes, Roosevelt claimed that:

The United States would control a dozen—namely those of her little brothers to the south. Indeed, he went on, he and Daniels really controlled two of these votes, for they 'had something to do with the running of a couple of little republics.' He

In 1945, at the San Francisco Conference, it was agreed that Member States were not obligated to render to the Security Council armed forces in excess of those provided for in each one's special Article 43 Agreement.¹⁷² It was not the provision of some forces, but the idea that the Security Council might become a manpower drain on Member States' militaries, that was the object of concern. This raised an *inference* that a Member State cannot, or is not required to take any military action under Article 42 until or unless it has concluded an Article 43 special agreement.¹⁷³ This inference is erroneous. According to Oscar Schachter, "Article 106 [of the Charter] clearly suggests that interpretation."¹⁷⁴ However, inference and interpretation alone do not make a rule, nor do they provide a solid basis for Weston and Glennon's contentions. Article 106 reflects the political understanding of the time at its creation, that the then-great powers would be primarily responsible for maintaining international peace and security in the post-war period.¹⁷⁵ In fact, it was the U.S. that urged inclusion of a Charter provision for extending the Moscow Declaration interim commitment "to cover the period up to the coming into force of the [Article 43] special agreements by which the Security Council would be supplied with armed forces and facilities."¹⁷⁶ This matter-of-fact-

added with a smile that while in the navy he had written Haiti's constitution himself.

Id. at 75-6. Even if true, it was an outrageous thing to say, and Roosevelt soon found himself issuing apologies to the whole of Latin America. Like all candidates, he explained that he had been misquoted by the press.

172. U.N.C.I.O., Documents, XII at 508. The Congressional Record on the debates shows that the United States and other Member Nations clearly wanted a strong Security Council, with a military force. Despite all the quotes available to the contrary, the issue of an armed force had been a problem with the League; it was not a problem in principle at San Francisco.

173. *See gen.* Glennon, *supra* note 156.

174. Schachter, *supra* note 43, at 452, 463.

175. GOODRICH, HAMBRO & SIMONS, *supra* note 45, at 629.

176. *Id.* at 629-30. The Moscow Declaration is composed of several individual declarations; of concern here is the *Declaration of Four Nations on General Security*. It was signed by the United States, the United Kingdom, the Soviet Union and China. *See Tripartite Conference in Moscow, October 19-30, 1948*, 38 AM. J. INT'L L. Supp. of Docs. 3, 3-7 (1944). Also printed in U.S. DEPT. OF STATE PUBL. 2298, TOWARD THE PEACE DOCUMENTS at 6 (1945), and in RUSSELL & MUTHER, *infra* note 177, at 977. Paragraph 5 of the Declaration established a commitment to the maintenance of international peace and security, and provided that the four nations would "consult with one another and . . .

ness is also reflected in reports of the Dumbarton Oaks Conference,¹⁷⁷ unanimously approving the concept of giving the Security Council powers to undertake military measures.¹⁷⁸ The plain meaning of the words "as in the opinion of the Security Council enable it to begin" unambiguously leaves "the exercise of its responsibilities under Article 42"¹⁷⁹ up to that U.N. organ, and to no other organ, agency or Member State. Moreover, "[n]othing in Article 106 precludes the five powers from making forces available so that the Security Council can act despite the absence of Article 43 Agreements."¹⁸⁰

While Article 106's linkage of Article 42 to Article 43 cannot be ignored, it should not be accorded greater significance than it deserves. This linkage is found nowhere in Chapter VII of the Charter.¹⁸¹ Furthermore, the Charter does not restrict the use of anyone's imagination on ways to voluntarily supply the Security Council with armed forces other than those proscribed in Article 43.

Although the U.S. posited that the provisions of Chapter VII regarding military enforcement measures would remain inoperative until the creation of Article 43 special agreements,¹⁸² scholars have found it "difficult to harmonize such a conclusion out of the language of Articles 2(5), 25, 39, 42, and 49. Members

with other members of the United Nations with a view to joint action on behalf of the community of nations." *Id.* at 5. Paragraph 6 provided "[t]hat after the termination of hostilities they will not employ their military forces within the territories of other states except for the purpose envisaged in this declaration and after joint consultation." *Id.* at 6.

177. RUTH B. RUSSELL & JEANNETTE E. MUTHER, *HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES, 1940-1945* 680-87 (1958).

178. *Id.* The report notes: "One cannot overemphasize the importance of this unanimous vote, which renders sacred the obligation of all states to participate in the operations." U.N.C.I.O. XXII, Doc. 881, 508, *quoted in* ROBERT E. SUMMERS, *DUMBARTON OAKS* (1945). For related documents, see U.S. DEPT. OF STATE, *DUMBARTON OAKS DOCUMENTS ON INTERNATIONAL ORGANIZATION* (1944).

179. See U.N. CHARTER art. 106.

180. GOODRICH, HAMBRO & SIMONS, *supra* note 45, at 631.

181. The one place it is found, as Professor Glennon notes, is in Trygve Lie's memoirs which, insightful though they may be, are not especially persuasive. See Glennon, *supra* note 156, at 77. More intriguingly, this alleged linkage apparently did not stop Secretary General Trygve Lie from finding an indeterminate legal basis for his United Nations "guard" and "peacekeeping" forces—entities totally unprovided for in the U.N. Charter.

182. U.N. SCOR, 2d Sess., 138th mtg. at 53 (June 4, 1947).

are under the obligation to 'accept and carry out' the Council's decisions and to afford 'mutual assistance in carrying out the measures' the Council decides upon."¹⁸³

These measures are not inevitably stymied because of the non-existence of any Article 43 agreements. In a 1954 speech about the Korean crisis, Secretary-General Dag Hammarskjold commented that:

those who planned the aggression from North Korea made two grave miscalculations:

They calculated that the world could be persuaded to regard this as a civil war instead of an attack upon an independent nation that had been made, in effect, a ward of the international community by the majority of the United Nations. They also saw the United Nations without power to resist the aggression in any case, for the cold war had indefinitely postponed the conclusion of the agreements that would have placed the intended military forces at the disposal of the Security Council. . . .

Both calculations proved to be wrong.¹⁸⁴

According to Hammarskjold, not only was the "conscience of the international community aroused" by North Korea's aggression, but the United Nations' military response set an important precedent—"one of those precedents upon which the common law of peace can be founded and developed."¹⁸⁵ Specifically, Hammarskjold pointed out that Article 42 actions need not be dependent upon Article 43 agreements:

Without any command by supranational authority [i.e. Article 43 agreements], the majority of Members of the United Nations responded to the challenge of armed aggression against a small and distant neighbor in a way that the Members of the League of Nations failed to do in the 1930's. This was a significant step toward the goal of genuine collective security, because the precedent itself provides a new and powerful deterrent

183. See GOODRICH, HAMBRO & SIMONS, *supra* note 45, at 316. According to Schachter: "No explicit language in Article 42 or in Articles 43, 44, and 45 (which refer to the special agreements) precludes states from voluntarily making armed forces available to carry out the resolutions of the Council adopted under Chapter VII." Schachter, *supra* note 43, at 464.

184. 2 PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS, DAG HAMMARSKJOLD, 1953-1956 270 (Andrew W. Cordier & Wilder Foote eds., 1972).

185. *Id.*

against another such aggression anywhere in the world.¹⁸⁶

Even more provocative is the August 9, 1990 statement by the Soviet delegate to the Security Council, insinuating that they would consider the use of force against a former client-state by saying "We are prepared to undertake consultations immediately in the Security Council's Military Staff Committee, which, under the Charter of the United Nations, can perform very important functions."¹⁸⁷

Anyone paying attention at the Security Council meeting would have immediately turned to Article 46, which states in its entirety: "Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee."¹⁸⁸ Article 47, paragraph 3 of the Charter unambiguously defines the nature of the Military Staff Committee's very important functions in that ". . . [t]he 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."¹⁸⁹ The fact that it was the Soviet Union, and not the U.S., that first raised the possibility of armed force during the Second Gulf Crisis, has passed al-

186. *Id.* at 270-1. Things did get briefly out of hand during the Korean Conflict. In September 1950, U.S. Secretary of State Dean Acheson proposed the notorious "Uniting for Peace" resolution--the immediate creation of a true Articles 42 and 43 international force (in which he also included a proposal for a "peace patrol") that would *not* be subject to Security Council veto—a position met with strong and immediate opposition from the Soviet Union. *Uniting for Peace*, GA Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950), reprinted in U.N. YEARBOOK 193 (1950). See Thomas J. Hamilton, *U.S. Bids Assembly Take Powers of U.N. Council to Bar Aggression; Asks Each Nation to Set Aside Special Troops to Serve World Body*, N.Y. TIMES, Sept. 21, 1950, at A1; *Text of Speech by Secretary Acheson at Plenary Session of the U.N. General Assembly*, N.Y. TIMES, Sept. 21, 1950, at A6; cf. *Address by Vishinsky in the Assembly's General Debate*, N.Y. TIMES, Sept. 21, 1950, at A6. Despite its flawed constitutional basis, Acheson's call to arms was quickly taken up by Chile, Belgium, and The Netherlands. A.M. Rosenthal, *U.N. Treaty Urged; Chile Backs Universal Pact, Backed by Arms, to Stem Aggression*, N.Y. TIMES, Sept. 24, 1950, at A1. See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 84, 96-7 (1993), for a critical evaluation of Acheson's plan.

187. S/PV.2934, Aug. 9, 1990, reprinted in 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 106.

188. U.N. CHARTER art. 46.

189. U.N. CHARTER art. 47, para. 3.

most unnoticed.¹⁹⁰

It cannot be doubted that the Soviets believed that they were entitled to make a planned, concerted use of force in the absence of an Article 43 agreement. Article 47, paragraph 3, refers to "*any armed forces placed at the disposal of the Security Council . . .*" (emphasis added). Neither Article 43 nor its proposed agreements are mentioned anywhere in Article 47, where they logically should be if Article 43 agreements are as essential as Weston and Glennon claim they are. While it is true that neither the Military Staff Committee nor the Security Council strategically directed the coalition forces, this is not because of any illegitimacy or lack of authority, but simply a matter of practicality. The Military Staff Committee was unprepared to undertake strategic direction of armed forces at the time of the Second Gulf Crisis due to its general lack of involvement in U.N. matters during the Cold War.

Those opposing this view will point to the Korean Crisis as proof to the contrary, forgetting how different the world was then. The issue of fighting a total war using atomic weapons to defeat the Communist menace was particularly grave in 1950.¹⁹¹ Only five years earlier, Truman had dropped two atomic bombs on the Japanese, not just to end the war, but to alert the Soviet Union and all other enemies that the U.S. possessed this weapon of destruction, and was willing to use it.¹⁹² The use of these atomic weapons irretrievably changed the nature of warfare. Although the U.N. recognized the implications and took immediate steps to place some curbs on production and proliferation,¹⁹³

190. Throughout the Second Gulf Crisis, however, the Soviets emphasized that they were "against *reliance* on force and against *unilateral* decisions." S/PV.2934, *supra* note 48, at 106 (emphasis added). The repetition of this phrase throughout the Security Council debates in the various statements of the Soviet delegates indicates that, while the Soviet Union was not adverse to using force, and had clearly implicated armed force as an available option, it did not want to "rely" upon such force as the sole option, and hoped ultimately for a more conciliatory solution. If armed force was to be used, the Soviets made it plain that they wanted it to be a multilateral decision.

191. See JOHN W. SPANIER, *supra* note 79, at 15-40; JOHN MUELLER, *supra* note 22, at 117-31.

192. P.M.S. Blackett, *A Check to the Soviet Union*, in *THE ATOM BOMB: THE GREAT DECISION* 49-53 (Paul R. Baker ed., 1968).

193. Statute of the International Atomic Energy Agency, Oct. 26, 1956, 8, U.S.T. 1093, T.I.A.S. 3873, 276 U.N.T.S. 3. See also LAWRENCE SCHEINMAN, *THE NONPROLIFERATION ROLE OF THE INTERNATIONAL ATOMIC ENERGY AGENCY: A CRITICAL ASSESSMENT*

by 1950 the Military Staff Committee was technically out of its league.¹⁹⁴

During the Security Council debates on the Second Gulf Crisis, the Colombian delegate insisted that Resolution 665 was based upon Article 42, and could stand alone without Article 43 agreements. While it urged the Security Council to devise Article 43 agreements for the future, Colombia did not claim that the Council was without authority to act:

We are under no illusion that when the Council comes to vote on this draft resolution it will be establishing a naval blockade, even though it may not say so, and that—though the Council may not say so either—it is acting pursuant to Article 42 of the Charter. That neither worries nor frightens us, but we wish to be candid: We feel concern about other points of this draft resolution; we share anxieties. . .over the fact that. . .the Security

(1985); PAUL SZASZ, *THE LAW AND PRACTICES OF THE INTERNATIONAL ATOMIC ENERGY AGENCY* (1970); OTTO HEILBRUN, *ATOMIC WEAPONS AND ARMIES* (1965). Neither the Military Staff Committee nor Article 43 had been envisaged with atomic weapons in mind. See RUSSELL & MUTHER, *supra* note 177, at 675-80. On the eve of the U.N. Conference, Henry Stimson pointed to the gap between modern civilization's "moral advancement compared with its technical development" of atomic war, and warned:

No system of Control heretofore considered would be adequate to control this menace. Both inside any particular country and between the nations of the world, the control of this weapon will undoubtedly be a matter of the greatest difficulty and would involve such thorough-going rights of inspection and internal controls as we have never heretofore contemplated.

HENRY L. STIMSON & McGEORGE BUNDY, *ON ACTIVE SERVICE IN PEACE AND WAR* 635-6 (1947).

194. Significantly, the Second Gulf Crisis commenced in the wake of German reunification, which had resulted in a profound and fundamental change in NATO defense doctrine regarding the use of tactical weapons—moving away from "flexible response" strategy to "weapons of last resort." Jim Hoagland, *Bush Seeks Shift in A-Arms Policy*, WASH. POST, July 2, 1990, at A1. In fact, the whole purpose of Nato had suddenly been called into question, and was described as "a pact without a purpose, an army without an enemy." Glenn Frankel, *NATO Tries to Change With Times; London Summit to Assess Goals*, WASH. POST, July 5, 1990, at A1. "NATO must find a new reason to exist," warned the Washington Post. "If it fails, the United States, the alliance's main guarantor, may face a parallel loss of influence in Europe." *Id.*

In some ways, this diminishment of influence (in both West and East) paved the way for increased interest in reviving the Military Staff Committee—first, in the First Gulf Crisis (see, e.g., *Working With Moscow in the Gulf*, N.Y. TIMES, Sept. 26, 1987, at A26; Paul Lewis, *New Soviet Interest in U.N. Broadens*, N.Y. TIMES, Sept. 24, 1987, at A8), and again in the Second Gulf Crisis. See Frank J. Priol, *Crisis Breathes Life Into a Moribund U.N. Panel*, N.Y. TIMES, Sept. 6, 1990, at A20; Paul Lewis, *U.S. Seeks to Revive Panel that Enforces U.N. Decrees*, N.Y. TIMES, Aug. 15, 1990.

Council is delegating authority without specifying to whom. . . .

As we look forward to the future we believe that from the Council's point of view the lack of preparedness to cope with a situation such as prevails today must be avoided in future. For this reason we believe that, after 45 years, the Security Council must fully implement Article 43. . . . The Council must be prepared to deal with situations of this kind so it will not find itself faced with a *fait accompli*.¹⁹⁵

Article 42 clearly stands on its own and distinctly apart from Article 43, by reference to Article 39, which provides "[t]he 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."¹⁹⁶ This provision, which does not even mention Article 43 or require the conclusion of agreements of any kind, has been recognized by the U.S. State Department as being the Charter's pivotal provision. "If any single provision of the Charter has more substance than the others," claimed the U.S. Secretary of State, "it is this one sentence."¹⁹⁷ It is therefore no surprise that the Security Council relied upon Article 39, with its pointed reference to Article 42, for authorizing the use of force in Korea in 1950. The use of Article 42 armed forces through invoking Article 39 has been recognized by serious scholars as an "innovation" which provided "a means whereby a response could be carried out under United Nations auspices despite the fact that the Council did not have at its disposal the armed forces as originally intended under Article 43."¹⁹⁸

195. S/PV. 2938, Aug. 25, 1990, reprinted in 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 118.

196. U.N. CHARTER art. 39.

197. U.S. Dept. of State, Report to the President 90, cited in GOODRICH, HAMBRO & SIMONS, *supra* note 45, at 293.

198. *Id.* at 301:

During the short period that the Council was dealing with the Korean question, it directed its attention to the grave military situation. The search for a 'political' solution was left to the General Assembly, which had in any event been dealing with the problem of the independence of Korea since 1947.

IV. RESOLUTION 678—VOID FOR VAGUENESS?

Part of the controversy surrounding Resolution 678 comes from the authors themselves, who seemed to omit their basis of authority.¹⁹⁹ Such omissions, however, are common practice. "Typically," Professor Weston admits, "the Council does not identify precisely the authority under which it is acting."²⁰⁰

Resolution 678 sets forth, in pertinent part:

The Security Council, Recalling and reaffirming its Resolutions 660 (1990) [et seq.] . . . 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 . . . 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 . . . 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. . . ."²⁰¹

Clearly, the Member States derive their authorization "to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore

199. The United States, which proposed the draft after consultations with other Member States, has typically upheld an expansive interpretation of the self-defense doctrine, and Republican administrations have always been reluctant to even appear to cede any "sovereign rights" to an international authority.

200. Burns H. Weston, *supra* note 33, at 519. Weston contends, however, that if the United States and other nations are going to take extreme military actions, sending men abroad to fight and die in foreign lands, the general public is entitled to know why, and the source of authority should not be kept a mystery.

201. Resolution 678 (1990), *reprinted in* 1 THE KUWAIT CRISIS—BASIC DOCUMENTS, *supra* note 43, at 98.

international peace and security in the area" from Chapter VII of the U.N. Charter. Furthermore, the request that "all States provide appropriate support for the actions" and "keep the Security Council regularly informed" is found in Chapter VII.²⁰² But, upon which article of Chapter VII did the framers of 678 rely?

Resolution 660 invokes Articles 39 and 40, which broadly provide for the Security Council to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42."²⁰³ Article 41 encompasses "measures not involving the use of armed force" and "may 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."²⁰⁴ Although extremely disruptive, Article 41 measures stop short of intentional violence. This is *not* true of Article 42 which provides for "such action by air, sea, or land forces" including "demonstrations, blockade, and other operations." It unambiguously permits the use of armed force.²⁰⁵

Resolution 678 seems not to invoke Article 51 self-defense at all, although its vestiges may be found in the language referring to "all foregoing resolutions."²⁰⁶ Resolution 661, a "foregoing" resolution, specifically relies on Article 51, "[a]ffirming the inherent right of individual or collective self-defense." However, reliance on this slight reference to support an expansionist inter-

202. "All necessary means," *et seq.* would logically include "such actions by air, sea, or land forces as may be necessary to maintain or restore international peace and security" as set forth in Article 42.

203. If Resolution 660 was enacted only pursuant to Article 51, the reference is curious indeed.

204. These are, admittedly, measures which a state may take on its own initiative, without any invasion of sovereignty in the traditional sense especially to the extent that such acts involve predominantly domestic considerations. However, such unilateral steps might violate other international legal instruments and agreements.

205. Nor is there any requirement that the Article 41 sanctions "be given time to work." Article 42's language on this point is quite specific, requiring only that "the Security Council consider that measures provided for in Article 41 *would be inadequate* or have proven to be inadequate," (emphasis added).

206. Resolution 678 stated generally that the Security Council is "[a]cting under Chapter VII of the Charter of the United Nations," and more specifically "[r]ecalling and [r]eaffirming its resolutions 660 (1990), 661 (1990), 664 (1990), 665 (1990), 666 (1990), 669 (1990), 670 (1990), 674 (1990) and 677 (1990)."

pretation of Article 51 is misplaced.²⁰⁷

Interestingly, according to Bob Woodward's account in *THE COMMANDERS*, Bush administration lawyers originally were in favor of Resolution 678 "spelling out directly the authority for use of force."²⁰⁸ While all other Security Council members agreed with the proposal, Soviet support was questionable.²⁰⁹ Woodward reports:

Baker presented Shevardnadze with a draft that included the phrase 'use of force.' 'Can you live with this?' Baker asked. 'After our Afghanistan experience, that won't fly with the Soviet people,' Shevardnadze said. There had to be some other way, an indirect way of saying it, a euphemism. The Soviets could support the idea of force but the resolution itself had to be vague.²¹⁰

After some debate, Baker agreed to have the resolution read "all necessary means."²¹¹ They agreed to rely on Baker's post-vote statement to "characterize the resolution as an unambiguous authority to use 'force.' That would be a permanent part of the record, and if no one objected, it would stand as the interpretation of 'all necessary means.'"²¹²

Therefore, although the international consensus eventually reached through the drafts and debates on Resolution 678 was of great political importance and probably a necessary prelude to any actual use of force, the *legal entitlement* to use aggressive Chapter VII force (as opposed to pure Article 51 self-defense) had been present all along since Resolution 660. As to Kuwait, Article 51 could only have really come into play *prior* to the enactment of Resolution 660. On August 2, 1990, when Resolution

207. See, e.g., HIGGINS, *supra* note 153, at 208-9: "Defence of the self cannot be collective; though there may exist collective security or mutual aid."

208. BOB WOODWARD, *THE COMMANDERS* 210, (1991). Fred Green, a senior lawyer for the Joint Chiefs of Staff, states that Woodward's reporting is "about 94% reliable." It is not clear from Woodward's account of this negotiation, however, whether this "spelling out" meant actually stating the Charter article relied upon, or simply some other language.

209. *Id.* See Eric Pace, *Envoys at U.N. Say Soviets Block Endorsement of Force Against Iraq*, N.Y. TIMES, Aug. 22, 1990, at A1.

210. WOODWARD, *supra* note 208, at 333-4. For an insightful view of the legal implications of this language, see Abram Chayes, *The U.N. Never Said Saddam Must Go*, N.Y. TIMES, Feb. 10, 1991, at D17.

211. WOODWARD, *supra* note 208, at 334.

212. *Id.* at 206-7.

660 was passed, the framers were not concerned with Kuwait's *defense*, but afforded themselves a wide array of options including economic sanctions, non-forcible measures such as the severance of diplomatic relations,²¹³ and Article 42 use of armed force. In fact, all the Second Gulf Crisis resolutions focus on punishment, intimidation, threat of expulsion, and a call to expell, rather than any claim of self-defense (which would have been purely illusory on the part of Kuwait). The date of each resolution is important to the analysis.

The U.S. had evidence of Iraq's extraordinary troop movements along Kuwait's border as early as July 16, 1990, when satellite photographs showed the unprecedented progression of Soviet-made T-72 tanks shooting across the southeastern Iraqi desert.²¹⁴ By the next day, more than 300 tanks and 10,000 men were in place on the rim of Kuwait, with new divisions moving towards Kuwait every day.²¹⁵ By the end of the week, Iraq moved over 35,000 of its troops to Kuwait's border within three days.²¹⁶ A week later, this number grew to 100,000.²¹⁷

213. This measure is set forth in Article 41, although paragraph 3 of Resolution 660, calling for "immediately intensive negotiations" and urging Member States to "support all efforts in this regard," clearly mitigates against it.

214. The C.I.A. first alerted the White House to "the possibility of an Iraqi attack on Kuwait" in early May 1990. PIERRE SALINGER & ERIC LAURENT, *SECRET DOSSIER: THE HIDDEN AGENDA BEHIND THE GULF WAR 26* (Howard Curtis transl., 1991). Evidence of Iraq's intention to use force against Kuwait steadily escalated. See Youssef M. Ibrahim, *Iraq Threatens Emirates and Kuwait on Oil Glut*, N.Y. TIMES, July 18, 1990, at D1, noting that Saddam Hussein "openly threatened to use force" against Kuwait if it did not reduce its excess production. In response, Kuwait convened an emergency session of its National Assembly, and sent envoys to Arab States to discuss Saddam's position. Caryle Murphy, *Iraq Accuses Kuwait of Plot to Steal Oil, Depress Prices*, WASH. POST, July 19, 1990, at A25. Although Western diplomats then hesitated to conclude that Kuwait expected an actual military attack, there was no doubt that Kuwait felt threatened. *Id.*

215. In addition to satellite photos, Iraq's military buildup was also spotted by a group of Western military attaches travelling overland to Baghdad across the Kuwait-Iraq frontier, on the weekend of July 20. Nora Boustany & Patrick E. Tyler, *Iraq Masses Troops at Kuwait Border*, WASH. POST, July 24, 1990, at A1. The attaches counted 2,000 to 3,000 Iraqi army vehicles moving south, transporting about 2 divisions of Iraq's elite Republican Guards. "Convoys included tanks, armored personnel carriers and ground-to-ground battlefield missiles," the Washington Post reported. *Id.* See also SALINGER & LAURENT, *supra* note 214, at 45.

216. WOODWARD, *supra* note 208, at 206-7. See also Caryle Murphy, *Mubarak Tries to Ease Crisis in the Gulf*, WASH. POST, July 25, 1990, at A1; *Iraq Deploys Troops Near Kuwait Border Amid Dispute on Oil*, N.Y. TIMES, July 24, 1990, at A9.

217. WOODWARD, *supra* note 208, at 210. See also *Iraqi Force Put at 100,000*, N.Y.

On July 25, 1990, Saddam Hussein, Iraq's president "a vie"²¹⁸ and commander-in-chief, summoned the U.S. Ambassador to Iraq, April Glaspie.²¹⁹ Hussein was perturbed by U.S. Secretary of Defense Dick Cheney's statement that the U.S. would "take seriously any threat to U.S. interests or U.S. friends in the [Gulf] region."²²⁰ "What can it mean," asked the Iraqi president, "when America says it will now protect its friends?"²²¹

TIMES, July 26, 1990, at A6.

218. WOODWARD, *supra* note 208, at 158, 208. Such forms of address are common among power-mad megalomaniacs, and are frequently made part of one's formal legal title for legitimacy-enhancement purposes. Both Hussein and Noriega had been declared "President for Life" and "Maximum Leader," respectively, by their legislatures, shortly before their altercations with the United States. See Caryle Murphy, *Iraqi Leader Gets New Title as Kuwaiti Anxiety Grows*, WASH. POST, July 20, 1990, at A12; Resolution No. 10, National Assembly of Corregimiento Representatives, Dec. 15, 1989, *printed in* U.S. Dept. of Commerce, Foreign Broadcast Information Service LAT-89-241 (Dec. 18, 1989) at 19, 20, from Spanish text in CRITICA (Panama City), Dec. 16, 1989, at 17, 27. "Baby Doc" Jean-Claude Duvalier first styled himself President "a vie" in a 1978 advertising supplement on Haiti published in the New York Times, but inherited his life-title from his father, who had been given this tenure by a group of favorite generals. Homer Bigart, *Duvalier, 64, Dies in Haiti; Son, 19, is New President for Life*, N.Y. TIMES, April 23, 1971, at A1. Haiti adopted a new constitution permitting presidency for life, allowing the elder Duvalier to dispense with the inconvenience of elections entirely. Albin Krebs, *Papa Doc, a Ruthless Dictator, Kept the Haitians in Illiteracy and Dire Poverty*, N.Y. TIMES, April 23, 1971, at A44.

219. SALINGER & LAURENT, *supra* note 214, at 45.

220. WOODWARD, *supra* note 208, at 210. When asked which friend he had in mind, Cheney was vague: "We have a lot of friends in the Persian Gulf," the U.S. Defense Secretary replied obliquely. Caryle Murphy, *supra* note 218. More Machiavellian is Kissinger's statement regarding the Shah of Iran: "We cannot always assure the future of our friends," he cautions, but "we have a better chance of assuring our future if we remember who our friends are." HENRY KISSINGER, *WHITE HOUSE YEARS* (1979).

221. WOODWARD, *supra* note 208, at 211. While Saudi Arabia may have been the first "friend" to come to Cheney's mind, the United States' oldest and most obvious "friend" in the region was Israel. While technically "at war" with every Arab state except for Egypt, Israel had good reason to be wary of Iraq. On April 1, 1990, Saddam Hussein had given a vitriolic speech, threatening to "make the fire eat up half of Israel if it tries to do anything against Iraq." *Id.* at 201. Interpreting this to mean that Iraq would turn its arsenal of chemical or biological weapons on the Jewish state, the State Department decried the speech as "inflammatory, irresponsible and outrageous." *Id.* Iraq, claiming to be stung by the United States' "overreaction", nevertheless had a special score to settle with Israel, which had previously destroyed Iraq's nuclear reactor. See Anthony D'Amato, *Israel's Air Strike Upon Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983).

Iraq's embarkment upon a markedly escalating course of threat-making as a substitution for international policy perplexed both Arab and Israeli military analysts. "I don't think war is imminent or is going to take place," concluded a top Jordanian political advisor. Jackson Diehl & Caryle Murphy, *Saber-Rattling Abounds but Deterrents Curb Both Sides*, WASH. POST, July 2, 1990, at A1. An Egyptian official added, "Saddam. . . is

Ambassador Gaspie responded that she had "direct instruction from the President to seek better relations with Kuwait."²²² At a later point in the meeting, Ambassador Gaspie stated, "[b]ut we have no opinion on the Arab-Arab conflicts like your border disagreement with Kuwait."²²³ Hussein replied that he

not suicidal. He knows he cannot win a war with Israel." *Id.* However, an Israeli military source cautioned: "We don't know Iraq. We don't understand Saddam. We don't know if he means what he says, or what he wants, or how to tell him what we want. That creates tension in itself and opens the way to dangerous misunderstandings." *Id.* Another Israeli expert declared, "Saddam is pushing the war strategy, saying that only by fighting Israel can anything be accomplished." *Id.* For his efforts, Saddam's reputation preceded his actual conduct only by a few weeks, landing him on the cover of U.S. NEWS & WORLD REPORT as *The Most Dangerous Man in the World*. Cf., *Iran, Iraq Optimistic About Talks*, WASH. POST, July 18, 1990, at A17.

222. WOODWARD, *supra* note 208, at 211. See SALINGER & LAURENT, *supra* note 214, at 45-63, for a transcript synopsis and interpretation of Gaspie's meeting with Hussein.

223. WOODWARD, *supra* note 208, at 212; SALINGER & LAURENT, *supra* note 214, at 58. In retrospect, this was definitely the wrong thing to say. Was Gaspie telling Saddam Hussein (in "diplospeak") that the United States would not respond if Iraq used force against Kuwait? Gaspie's curious statement is certainly open to that interpretation.

A similar circumstance arose in January, 1950 (three months before the Korean Conflict), when U.S. Secretary of State Dean Acheson gave a speech before the National Press Club, stating that South Korea was militarily dispensable within America's scheme of post-World War II global security. Acheson described America's Pacific defense perimeter with some precision and, notably, excluded Korea from the U.S. umbrella of protection. Subsequently, many critics charged that Acheson's speech had "invited" the North Korean attack, or had tipped off the Soviets that the United States would not defend South Korea because it was not worth the risk of total war. See ACHESON, *supra* note 147, at 358. Quite naturally, Acheson defended himself, pointing out that "Australia and New Zealand were not included either," but "the Russians" did not attack them. *But see* SPANIER, *supra* note 79, at 19-21: "In short, it was not American words but American policy that probably encouraged the Communists to believe that the United States would not defend South Korea."

While some historians contend this conclusion is overblown, the fact remains that such statements, made by persons in authority, send strong signals; enemies clearly feel their reliance on them to be well-placed. Statements such as Acheson's and Gaspie's are cases directly on point. There is a legal basis in international law for considering the statements and declarations (including silence and inaction, where protest would have been appropriate) of government officials as binding on their governments. See *Nuclear Test Cases (Australia v. France; New Zealand v. France)*, 1974 I.C.J. 253 at 267-70; *Temple of Preah Vihear (Cambodia v. Thailand) (Preliminary objections)*, 1961 I.C.J. 17 (Judgment objections), 1961 I.C.J. 17 (Judgment May 26, 1961), (Merits), 1962 I.C.J. 6, 32-4 (Judgment June 15, 1961); *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 P.C.I.J. (ser. A/B) No. 53, 36-7, 47-8, 51-2, 54-63, 72-3 (Judgment of Apr. 5). See also SIR IAN BROWNLIE, *supra* note 61, at 637-9; H. Thirlway, *The Law and Procedure of the International Court of Justice, 1960-1989, Part One*, 60 BRIT. Y.B. INT'L L. 8-17 (1989).

Bush's alleged disinterest in Iraq's "border conflict" was made all the more puzzling

would commence talks soon with Kuwait via the mediation efforts of his brother Arab President Hosni Mubarak of Egypt.

On August 1, 1990, with Ambassador Glaspie conveniently out of town, Iraq lined up hundreds of tanks within three miles of the Kuwait border in "a genuine line of death, miles long."²²⁴ A few hours later, Iraqi forces crossed into Kuwait and soon occupied its capital, Kuwait City.²²⁵

Resolution 660, passed by the Security Council the following day, makes no mention of Article 51. In fact, Kuwait, its puny 20,000 man army, hopelessly outnumbered from the start,²²⁶ made no pretense at a self-defense use of force, nor, curiously, did Kuwait ask for any outside assistance, when such an overture would have been undeniably appropriate and timely.²²⁷

by his same-day deployment of planes and combat ships in a "military exercise" with the United Arab Emirates. See Michael R. Gordon, *U.S. Deploys Air and Sea Forces After Iraq Threatens 2 Neighbors*, N.Y. TIMES, July 25, 1990, at A1. Although the U.S. Navy informed a House Armed Services subcommittee that U.S. ships in the Persian Gulf were on "alert status", both the Emirates and the Bush administration issued a speedy denial. See *U.S.-Arab Maneuvers Denied*, N.Y. TIMES, July 26, 1990, at A6. A U.S. military official, imbued with the deliberate mixed-message policy of the Bush administration, had this to say: We are not going to go to war, but you are going to see exercises and you are going to see ships." Nora Boustany & Patrick E. Tyler, *U.S. Pursues Diplomatic Solution in Persian Gulf Crisis, Warns Iraq*, WASH. POST, July 25, 1990, at A17.

224. WOODWARD, *supra* note 208, at 219.

225. Caryle Murphy, *Iraqi Force Invades Kuwait; Tanks, Troops Storm Capital*, WASH. POST, Aug. 2, 1990, at A17.

226. See Patrick E. Tyler, *Iraq's Hussein Acts to Ease Gulf Crisis as U.S. Debates Commitments*, WASH. POST, July 26, 1990, at A34. 1989 military statistics showed Iraq with one million men under arms, compared with 20,300 for Kuwait and 43,000 for the United Arab Emirates. *Id.*

227. In fact, far from asserting self-defense rights, both Kuwait and the U.S. gave vague and ambiguous responses when asked about using force to expel the Iraqis. See Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1. Bob Woodward notes, however, that on at least one occasion prior to the invasion, the Kuwaiti ambassador contacted Pentagon officials and confessed that he was very worried about Iraqi troop movements, although he made no request for military assistance. WOODWARD, *supra* note 208, at 219. It must be remembered that Kuwait had no formal treaty with any western state (except Great Britain; see, e.g., Dana Adams Schmidt, *British Still Run the Persian Gulf*, N.Y. TIMES, Jan. 3, 1960, at A16) providing for military assistance in the event of an armed attack, preferring instead to "play on the superpower rivalry during the Cold War." David Hoffman, *Delicate Gulf Balance Undone in a Lightning Strike*, WASH. POST, Aug. 3, 1990, at A25. Kuwait had even opposed a common security pact with its Gulf neighbors. See David B. Ottaway, *Gulf Arabs Form Force; Units Will be Used Against Aggressors*, WASH. POST, Nov. 30, 1984, at A1. Even when a U.S. Defense Intelligence Agency officer showed the Kuwaiti ambassador photographs of Soviet-made Iraqi tanks rolling towards his country, the am-

The Kuwaiti delegate, addressing the Security Council on August 2, 1990, initially seemed to reject the possibility of the use of force, urging the Security Council to use its good offices, including "principles of non-alignment and of Islam, righteousness and justice," to somehow reverse the invasion "by peaceful means and negotiations, and not through the use of force."²²⁸ Although he described Kuwait as "defenseless and helpless," he did not invoke any Article 51 self-defense provisions, or make any claim to traditional self-defense rights at all.²²⁹ However, the U.S. Ambassador Thomas Pickering announced that America would "stand shoulder to shoulder with Kuwait in this time of crisis."²³⁰

The White House plainly did not consider self-defense an option as to Kuwait on August 2, 1990. Bush himself stated to the press that he knew of the invasion but was "not contemplating the use of force" to rectify it: "I'm sure there will be a lot of frenzied diplomatic activity," Bush said glibly. "I plan to participate in some of that myself."²³¹ Later that same day, with a

bassador simply shrugged: "What can we do?" Like Neville Chamberlain with Hitler, the first reaction of Kuwaiti officials was passivity and appeasement. See Youssef M. Ibrahim, *Iraq Said to Prevail in Oil Dispute With Kuwait and Arab Emirates*, N.Y. TIMES, July 26, 1990, at A1. Kuwait clearly hoped that Iraq would be sated with its new role as "the OPEC policeman" and withdraw its forces voluntarily, having made its point about quota enforcement. *Id.*

228. S/PV.2932, Aug. 2, 1990, reprinted in 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 100.

229. *Id.*

230. *Id.* Other nations were notably more reticent: "I'm afraid we may have to sacrifice Kuwait as we knew it, to get out of this one," said one Arab diplomat. Youssef M. Ibrahim, *A New Gulf Alignment*, N.Y. TIMES, Aug. 3, 1990, at A1. Even as late as August 17, U.N. Secretary-General Javier Perez de Cuellar warned the United States: "Any intervention, whatever the country, would not be in accordance with either the letter or the spirit of the United Nations Charter." Paul Lewis, *U.N. Chief Argues Blockade is Hasty: Move by U.S. Military Would Violate Charter, He Says*, N.Y. TIMES, Aug. 17, 1990, at A12.

231. WOODWARD, *supra* note 208, at 225. One journalist on the White House scene described Bush's "frenzied diplomatic activity" in distinctly comical terms. Maureen Dowd, *The Guns of August Make a Dervish Bush Whirl Even Faster*, N.Y. TIMES, Aug. 7, 1990, at A8. Other writers criticized Bush for relying too much upon his version of "personal diplomacy," and not enough on red-flagged U.S. intelligence reports prepared by experts. SALINGER & LAURENT, *supra* note 214, at 111. In the case of the Second Gulf Crisis, Bush preferred to listen to King Hussein of Jordan and President Hosni Mubarak of Egypt (both of whom assured Bush that Iraq would never invade Kuwait), rather than his own intelligence experts who pointed out that the Hun was at the gate. *Id.* See Maureen Dowd, *The Longest Week: How President Decided to Draw the Line*, N.Y. TIMES,

greater understanding of the regional repercussions, Bush changed his tune slightly by saying "[w]e're not ruling any options in, but we're not ruling any options out."²³²

Four days later on August 6, 1991, the Security Council

Aug. 9, 1990, at A17; Ann Devroy, *For Bush, Moment of Decision Came Saturday at Camp David*, WASH. POST, Aug. 9, 1990, at A31.

232. WOODWARD, *supra* note 208, at 232-4. See also R.W. Apple Jr., *The Iraqi Invasion: Invading Iraqis Seize Kuwait and its Oil; U.S. Condemns Attack, Urges United Action*, N.Y. TIMES, Aug. 3, 1990, at A1. This language is the same quoted by Ian Brownlie of Oxford in his argument before the International Court of Justice on behalf of Libya, concerning the United States' threats to use force against Libya on the issue of extraditing two Libyan nationals accused of planting a bomb on a jet which exploded over Lockerbie, Scotland. See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.)*, Request for the Indication of Provisional Measures, Gen. List Nos. 88[U.K.] and 89[U.S.](Order of April 14, 1992), and related documents. See also Stephan Alderman and Len Freeman, *MP Claims Syrian Link in Lockerbie Bombing*, PRESS ASSOC. NEWSFILE, Jan. 21, 1992, at *Parliamentary News, Statement of British Foreign Office Minister of State Douglas Hogg*, on the issue of using force to extradite Libyan nationals: "I have ruled nothing in and I have ruled nothing out."

This ambiguous phrase was heavily used throughout the Reagan and Bush presidencies, almost to the point where it became something of a cliché, if not a slightly more dignified synonym for "none of your business." Reagan, when questioned on whether he would follow through on his 1980 threat to blockade Cuba, replied: "I rule nothing out and nothing in." *Reagan Says Haig Met Key Cuban*, N.Y. TIMES, Jan. 28, 1982, at A4. To put bite behind his subtle hint, Reagan added, "I would think that Cuba, if they were smart, would take another look and see if they did not want to join the western hemisphere." *Id.* Contrastingly the Bush administration first used the phrase to describe its mysterious position on new taxes: "We're not ruling anything in or out." Maureen Dowd, *Bush Eases Stand, Saying New Taxes can be Discussed*, N.Y. TIMES, May 8, 1990, at A1. Its taunting ambiguity found its niche, however, in the Gulf Crisis, where it substituted for diplomatic skills, if not basic verbal abilities. On the issue of sanctions against Iraq, Bush's Chief of Staff John Sununu cryptically replied, "I won't rule anything out. . . . I'm saying to you, the decision is—the President has not made any decisions. He gave you a kind of tone across the street, and I'm giving you one here about it, but I caution you all not to—not to jump to too many conclusions." *White House Regular News Briefing (verbatim transcript)*, FED. NEWS SVC., Aug. 5, 1990. Even the simple query as to whether Bush would be taking a summer vacation was answered elliptically: "Nothing's ruled out." *Id.* On using force against Iraq, Bush dodged: "I'm not going to discuss what I will or won't do."

The Soviets were quick to distance themselves from Bush's evasiveness; Gorbachev told reporters, "I did not state that, I do not state that." Charged with creating a picture of U.S.-Soviet unity, Sununu put a Reaganesque spin on both Gorbachev's and Bush's talks: "[They] were careful in their selection of language," Sununu told reporters, "making sure that they were ruling nothing in and nothing out." John Omicinski, *War or Peace? Question Dominated Summit Talks*, GANNET NEWS SVC., Sept. 10, 1990. Without the slightest trace of irony, Sununu added that this exchange sent "a clear message" to Saddam Hussein. Martin Fletcher, *Symbolic Meeting "Lacks Substance"*, THE TIMES, Sept. 10, 1990, at *Overseas News*.

passed Resolution 661 affirming “the inherent right of individual or collective self-defense, in regard to the armed attack by Iraq against Kuwait,”²³³ and specifically invoked Article 51. However, Resolution 661 did not set forth any Article 51 plan or guidelines, but instead, merely recited a litany of *economic sanctions*.²³⁴ This August 6th invocation of Article 51 was inappro-

233. See Resolution 661 (1990). Here, what constitutes an “armed attack” is entirely unambiguous. However, it is beyond question that, by noon the same day, the invasion was a *fait accompli* as to Kuwait. Iraq’s tanks then moved posthaste towards the Saudi border. See Michael R. Gordon, *Iraqis Dig in Around Kuwait, Suggesting no Plan for Early Pullout; Brief Foray Into Saudi Arabia*, N.Y. TIMES, Aug. 15, 1990, at A14. In fact, why Saddam Hussein subsequently stopped at that juncture remains a mystery. Saudi forces would have been little more than speed bumps to his battalions. Certainly, Iraq’s contention of August 9, 1990, that Iraq only intended to reunite itself with “a part of the region cherished by Iraq—Kuwait,” is possible. However, it is more likely that, by that time, the United States had effectively communicated that it would defend Saudi Arabia, and Iraq backed off (or “blinked,” as Bush would say). See, e.g., Andrew Rosenthal, *Bush Sends U.S. Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, N.Y. TIMES, Aug. 8, 1990, at A1; Michael R. Gordon, *Bush’s Aims: Deter Attack, Send a Signal*, N.Y. TIMES, Aug. 8, 1990, at A1. Such Iraqi backtracks litter the pre-conflict engagement landscape. When Saddam Hussein held foreign citizens as “guests” and the United States protested this as an international law violation and claimed the right to use force to get them back, Hussein released them. Walter Goodman, *TV Critic’s Notebook; Iraq’s Leader Entertains “Guests” Not “Hostages”*, N.Y. TIMES, Aug. 24, 1990, at A11; Elaine Sciolino, *Iraqi TV Shows a Smiling Leader With Grim-Faced British Captives*, N.Y. TIMES, Aug. 24, 1990, at A1. See John F. Burns, *Iraqi Leader Says He Will Free Foreign Women and Children*, N.Y. TIMES, Aug. 29, 1990, at A1; Joseph B. Treaster, *Hostage Evacuation Flights Resume From Iraqi Capital*, N.Y. TIMES, Sept. 5, 1990, at A15. In fact, not only did Hussein release them, but he formally apologized to his “guests” and “heroes of peace,” acknowledging that his action was not “correct from the humanitarian and practical standpoints” and against “established norms,” and explaining that his hostage-taking had been a necessary self-defense measure to protect Iraq from attack. Patrick E. Tyler, *Standoff in the Gulf; Iraqi Leader declares He Will Free Hostages to Promote Diplomacy*, N.Y. TIMES, December 7, 1990, at A1. Use of the word “guest” brought a scolding from New York’s notorious hotelier Leona Helmsley, who paraphrased her own popular advertisements: “I know something about how to treat guests,” Ms. Helmsley lectured Hussein in a full-page New York Times ad. “The people held in your grasp are not guests. They are hostages.” *With the Mostest*, N.Y. TIMES, Sept. 23, 1990, at D7. President Bush referred to them as “inconvenienced people” until most of them were safely out. Andrew Rosenthal, *Bush Vows Not to be Cowed by the Taking of “Hostages”; Iraq Shifts Them to Targets*, N.Y. TIMES, Aug. 21, 1990, at A1. The euphemisms even inspired a William Safir column, *On Language; Foreign Guests and Hostages*, N.Y. TIMES, Sept. 2, 1990, at B16. However, Bush’s refusal to use the word “hostage” may not have been so much to appease Saddam Hussein, but to differentiate the incident from previous “hostage” crises that had resulted in damaging political fallout to his predecessors in office. The word “hostage” had come to denote a stalemate—an unsolvable dilemma—in U.S. foreign policy.

234. S.C. Res. 661, U.N. SCOR, para. 3, 4, & 5 (1990).

ropriate in that the Iraqi invasion, by this time, was over and complete.²³⁵ Yet, the issue of self-defense was undoubtedly foremost in the mind of Saudi Arabia's King Fahd, since President Hussein's forces were grossly excessive in number.²³⁶ As early as

235. The position of General Colin Powell and the Joint Chiefs of Staff was that "they were dealing with a huge, instant invasion that was now over and complete. Saddam's initial mission was accomplished." WOODWARD, *supra* note 208, at 223. According to Joseph Wilson, Deputy Chief of the U.S. Mission in Baghdad (and the highest ranking diplomat after Glaspie's departure), Saddam Hussein described his invasion of Kuwait as "a done deal." TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR, *supra* note 135, at 91.

236. WOODWARD, *supra* note 208, at 225. See also Michael R. Gordon, *Iraq Bolsters Invasion Force, Adding to Worry on Saudis*, N.Y. TIMES, Aug. 4, 1990, at A1. In one of the few truly hilarious diplomatic exchanges after the Kuwaiti invasion, Saddam Hussein attempted to assure the acting ambassador Joseph Wilson that he had no desire to invade Saudi Arabia. After all, Hussein reminded Wilson, Iraq had recently concluded a nonaggression treaty with Saudi Arabia and "Iraq respects its commitments." TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR, *supra* note 145, at 90; SALINGER & LAURENT, *supra* note 214, at 108. In this thoughtful diplomatic dialogue, Saddam went so far as to accuse the United States of *provoking* Iraq to attack Saudi Arabia—apparently with some cause. *Id.* at 138. "If you are really worried about Saudi Arabia," Saddam assured Wilson, "your worries are unfounded, but if you are showing that worry in order to worry Saudi Arabia, that is something else." *Id.* at 139. When Wilson pressed Saddam for a formal assurance, the Iraqi leader replied: "We will not harm those who do not harm us. Those who want our friendship will find us more than eager to be friendly. As for Saudi Arabia, the question has not even crossed my mind." *Id.* at 144. Proving that he could be coy as well as clever, Saddam said that Iraq's "relationship" with Saudi Arabia "is strong—tell me if you know something we don't." *Id.* Saddam also claimed to be unperturbed by the fact that Saudi Arabia had given sanctuary to the Kuwaiti royal family, but at the same time, left himself an excuse for future action: "It is natural, and we are not annoyed, that King Fahd receives the former ruler of Kuwait. . . . We will be annoyed only if they allow them to work against Iraq from Saudi Arabia." *Id.*

Iraq's invasion of Kuwait had left Saudi Arabia between a rock and a hard place. Apart from long-standing jealousies arising out of its oil wealth, Middle Eastern criticism had just weeks earlier focused on Saudi Arabia because of the Mecca tunnel disaster. See *1,400 Die in Mecca Stampede: Pilgrims Crushed in Tunnel Trying to Escape Heat*, WASH. POST, July 3, 1990, at A1. The significance of this tragic accident should not be underestimated in analyzing Saddam's subsequent actions against Saudi Arabia, whose monarchs' prestige rests largely upon their guardianship of Islam's most sacred shrines. Previously chastised for not controlling Islamic sect clashes within the Holy Cities of Mecca and Medina, the Mecca tunnel disaster "has caught them by surprise," explained an envoy of the Saudi Royal Family. "They are much embarrassed in an area that they thought had everything under control." Caryle Murphy, *Saudis Confirm 1,426 Killed by Crush in Mecca Tunnel*, WASH. POST, July 4, 1990, at A1. Iran, for example, lost no time in challenging Saudi religious leadership, calling the stampede "a bitter incident" for which Saudi Arabia "must answer to the Islamic World." Caryle Murphy, *Iran Says Saudis 'Must Answer' for Mass Deaths*, WASH. POST, July 5, 1990, at A23.

August 3rd, the U.S. shared photographic evidence with Saudi Arabia that Iraqi armored divisions were steadily moving through Kuwait towards the Saudi border.²³⁷ Saudi Arabia's military forces numbered less than 70,000 men; clearly the Saudis could not defend themselves without help.²³⁸ It is probable that Resolution 661 was written with Saudi Arabia in mind.²³⁹

The August 6, 1990 Security Council debates fully support this contention. The predominantly expressed concern of the Council was with Iraq's next conquest. Once again, the Kuwaiti delegate Ambassador Abulhasan made no plea for Article 51 assistance, nor did he assert any rights under it.²⁴⁰ Instead, he claimed that Iraq's aim in invading Kuwait was "based on expansionism, . . . Iraq is thus threatening the strategic interests of all the countries in the world, . . . [and] . . . the Gulf region

237. WOODWARD, *supra* note 208, at 243-46. See also Michael R. Gordon, *Iraq Bolsters Invasion Force, Adding to Worry on Saudis*, N.Y. TIMES, Aug. 4, 1990, at A1.

238. WOODWARD, *supra* note 208, at 225, 242. Woodward alleges that because the Saudis spent billions on American arms and military technology, the Saudis felt that, with all the hardware, there was an "implied contract" that the United States would protect them. *Id.* at 214. See also James LeMoyne, *Saudis Twist Arms Much Harder Now*, N.Y. TIMES, Sept. 22, 1990, at A5. According to LeMoyne, Saudi Arabia "unabashedly used the leverage its oil wealth brings. . . [to] strongly pressure foreign governments" to assist it. *Id.* "We told Japan and the Europeans that if they did not contribute to our defense we would have to consider closely all future contracts with their companies in Saudi Arabia," a Saudi official said. "I think they got the message." *Id.* See also R.W. Apple, Jr., *Iraqis Mass on Saudi Frontier; Arabs Agree to Meet on Crisis; Bush is Ready to Help if Asked*, N.Y. TIMES, Aug. 4, 1990, at A1.

239. For strict constructionalists, this enters the twilight zone of anticipatory self-defense. A more cynical possibility is that the United States, mindful that it would be difficult and controversial to reach a consensus for an Article 51 action as to Kuwait (at this late stage), brought Saudi Arabia on board to provide additional support and justification for sending armed forces into the region (an occurrence most Gulf States initially viewed with distrust and alarm). This possibility is far from remote. An "invitation" from a State visibly at risk would help to quiet protests such as the one from the Yemeni representative, who warned the Security Council against using Resolution 661 "as a pretext for intervention." S/PV.2933, Aug. 6, 1990, reprinted in 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 105. See also Thomas L. Friedman, *Battle for the Saudi Soul*, N.Y. TIMES, Aug. 4, 1990, at A1. The Saudis, however, never asked outrightly for U.S. assistance, and were initially reluctant to be "rescued." They had to be pressured and cajoled into "asking" for "help." See SALINGER & LAURENT, *supra* note 214, at 135-6, 147. See also *Excerpts from News Conference by Cheney and Powell at the Pentagon*, N.Y. TIMES, Aug. 9, 1990, at A16.

240. Although one could conceivably argue that, given that the right is "inherent," such assertions are unnecessary.

is one of the most vital regions."²⁴¹ The United States' warning that it would "not countenance the continuation or repetition of this aggression" was subtle, but definitely dared Iraq to "do it again."²⁴²

Three days later, Ambassador Pickering told the Security Council that, pursuant to Article 51, the U.S. had taken action "in consistency [sic] with Article 41 and Resolution 661 (1990)," which he described as "entirely defensive in purpose, to help protect Saudi Arabia."²⁴³ He reiterated:

As Resolution 661 (1990) affirms, Article 51 applies in this case. The Iraqi invasion of Kuwait and the large military presence on the Saudi frontier create grave risks of further aggression in the area. This being the case, my government and others are, at the request of Saudi Arabia, sending forces with which to deter further Iraqi aggression.²⁴⁴

The United Kingdom also accepted an invitation to help Saudi Arabia defend itself:

[A]t the request of the Government of Saudi Arabia my Government has agreed to contribute forces to a multinational effort for the collective defense of the territory of Saudi Arabia and other threatened States in the area. We will do so in accordance with Article 51 of the Charter of the United Nations, which members will recall was specifically reaffirmed in the preamble [sic] to Security Council resolution 661 (1990).²⁴⁵

At a later moment in the debate, the Iraqi delegate disclaimed that his nation had exercised any territorial imperative,

241. S/PV.2933, Aug. 6, 1990, *reprinted in* 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 102. See also Paul Lewis, *Security Council Votes 13 to 0 to Block Trade With Baghdad; Facing Boycott, Iraq Slows Oil*, N.Y. TIMES, Aug. 7, 1990, at A1.

242. Just the day before, President Bush was clearly contemplating some type of action on behalf of Kuwait, although not necessarily defense: "This will not stand. This will not stand. This aggression against Kuwait." TRIUMPH WITHOUT VICTORY; THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR, *supra* note 145, at 80. See also *Transcript of Bush's Impromptu News Conference*, N.Y. TIMES, Aug. 6, 1990, at A7, and WASH. POST, Aug. 6, 1990 at A14. In his remarks, Bush did not mention Kuwait in conjunction with Article 51, but averred: "And I want to see the United States move ahead soon with Chapter 7 (sic) sanctions." *Id.*, N.Y. TIMES at A7.

243. S/PV.2933, Aug. 6, 1990, *reprinted in* 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 105. The ambassador clearly meant "consistent."

244. *Id.*

245. *Id.* at 106.

and had nothing but respect for "the territorial integrity of all neighboring Arab States, including the brotherly country of Saudi Arabia."²⁴⁶ Iraq had not committed an act of violence against its brother-sister Kuwait, but had corrected an historic wrong inflicted on Iraq by "the colonizers," who "re-drew the geopolitical map of the region in order to weaken the Arab States."²⁴⁷ Iraq's "eternal and irreversible unity" with Kuwait was now "indestructible" and "complete."²⁴⁸

Interestingly, Ambassador Pickering disputed this contention by pointing out that Iraq, in 1963 (not so long ago), had recognized "the freedom, independence, the sovereignty and the territorial integrity of the State of Kuwait."²⁴⁹ The Ambassador's parting shot, though, was aimed at bolstering the idea of self-defense and collective self-defense of states *other than Kuwait*:

The notion that Iraq can take unilateral action to accomplish some Arab objective which only its President perceives, of course, leads us to wonder where does it end? Does it end in Kuwait? Does it move on to Saudi Arabia? Does it move to Jordan? Or does it move beyond, to other countries?²⁵⁰

Perhaps the most convincing proof of Resolution 678's Article 42 nature is Resolution 665 (1990), enacted on August 25, 1990. Resolution 665's basis is clearly Article 42, although it does not specifically say so. It called upon "those Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate

246. *Id.* at 109.

247. *Id.*

248. *Id.* at 108-09. See also *U.S. May Send Saudis a Force of 50,000; Iraq Proclaims Kuwait's Annexation*, N.Y. TIMES, Aug. 9, 1990, at A1. Although he claimed to draw a "line in the sand" at Saudi Arabia, Bush ruled out an immediate invasion and emphasized, "We're not at war." *Id.* "We have sent forces," Bush explained, "to defend Saudi Arabia." *Id.* See also *Excerpts From Bush's Statements on U.S. Defense of Saudis*, and *Excerpts From Bush's News Conference on the Iraqi Invasion of Kuwait*, both printed in N.Y. TIMES, Aug. 9, 1990, at A15.

249. S/PV.2933, reprinted in 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 109.

250. *Id.* at 109. See also Andrew Rosenthal, *Strategy: Embargo; U.S. Bets Its Troops Will Deter Iraq While Sanctions Do the Real Fighting*, N.Y. TIMES, Aug. 9, 1990, at A14; cf. R.W. Apple, Jr., *Gorbachev Warns Baghdad to Back Off or U.N. Will Act*, N.Y. TIMES, Aug. 25, 1990, at A1.

to the specific circumstances as may be necessary. . .to halt all inward and outward maritime shipping."²⁵¹ This resolution is remarkable. Without specifically invoking either Articles 42 or 51, Resolution 665 not only authorized the use of force, but "call[ed] upon those Member States" to use their *navies* to forcibly stop trade with Iraq.²⁵²

Any doubts about Resolution 665's Article 42 basis were dispelled by Ambassador Pickering, who acknowledged that it was "a historic and significant decision":

Our Charter was founded on the fundamental principle that the Security Council would carry a broad responsibility for the people of the world for international peace and security. The Charter empowers it to act in this regard, including the authority to decide to use armed force. The authority granted in this decision is sufficiently broad to use armed force—indeed, minimum force—depending upon the circumstances which might require it. This is a significant step. On only a few occasions in the past has this authority been exercised. . . .

The United States has vigorously sought and fully supports collective efforts to respond to this crisis. It supports collective efforts to enforce the trade sanctions strictly. United States naval forces, in coordination with other naval forces in the area, would use such minimum force only as necessary to accomplish that purpose.

[T]he Government of the United States will coordinate the actions of those of the many other nations that have sent naval forces to the region. . . . We are also ready to discuss an appropriate role in this process for the Military Staff Committee.²⁵³

The U.S. made a careful distinction between the Article 42 essence of the undertaking in Resolution 665, and its previous

251. S.C. Res. 665, U.N. SCOR, para. 1 (1990).

252. See Eric Pace, *U.N. Calls on Navies to Block Iraq's Trade; Resolution Permits Use of Force, U.S. Says*, N.Y. TIMES, Aug. 26, 1990, at A1.

253. S/PV.2938, Aug. 15, 1990, reprinted in 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 118-9. See Elaine Sciolino, *The Deadline: An Arbitrary Diplomatic Deal Becomes an Imminent Threat*, N.Y. TIMES, Jan. 15, 1991, at A10; Elaine Sciolino with Eric Pace, *The U.N.'s Watershed: Putting Teeth in an Embargo: How U.S. Convinced the U.N.*, N.Y. TIMES, Aug. 30, 1990, at A1. Sciolino and Pace contend that U.S. Secretary of State James A. Baker initially preferred an Article 51 action, but was persuaded by Soviet Foreign Minister Eduard A. Shevardnadze "to reinvigorate a moribund United Nations mechanism known as the Military Staff Committee as a collective way to resolve the Persian Gulf Crisis." *Id.*

claims to be acting under Article 51. The Americans regarded Article 51 as a safety net, always in place, always invocable if things turned nasty:

The new resolution—665 (1990)—addresses the application of the mandatory sanctions of resolution 661 (1990), specifically against maritime shipping. It lends the full weight and authority of the Security Council and, through it, the community of nations to the efforts of States that are deploying maritime forces to ensure that sanctions are respected. It does not address other aspects of sanctions or other provisions of resolution 661 (1990) and so clearly it does not diminish the legal authority of Kuwait and other States to exercise their inherent rights.²⁵⁴

The U.S. was making it clear that it did not feel compelled to go running to the Security Council if Iraq did something beyond the pale. Still, Ambassador Pickering clarified that this was not a self-defense matter under Article 51, for if it were, it would not be necessary to make the distinction. He stated:

Resolution 665 (1990) therefore provides *an additional and most welcome basis* under United Nations authority for action to secure compliance with the sanctions mandated by Resolution 661 (1990).²⁵⁵

Other representatives concurred. The French delegate, while cautioning that Resolution 665 “must not be understood as a blanket authorization for the indiscriminate use of force,” stated that the Resolution did provide for “the minimum use of force” to be used “only as a last resort” and “limited to what is strictly necessary.”²⁵⁶ “In each case,” France averred, “the use of coercion will require notification of the Security Council.”²⁵⁷ While the delegate from Malaysia expressed his country’s apprehensiveness, Malaysia supported the resolution, fully realizing that it was of an Article 42 nature and, hence, relatively new and untried:

[O]ne should not be so starry-eyed and imagine that, given the present realities, there can be an international force under a

254. S/PV.2938, Aug. 15, 1990, *reprinted in* 1 THE KUWAIT CRISIS: BASIC DOCUMENTS, *supra* note 43, at 119.

255. *Id.*

256. *Id.*

257. *Id.*

blue flag policing and enforcing United Nations injunctions. Given the need of the hour. . .the Security Council must, until that day comes, be content with only the beginning of United Nations control action, although Malaysia and others would have preferred a more assertive and prominent role for the United Nations.²⁵⁸

All subsequent Resolutions were enacted more vaguely under Chapter VII; no articles were expressly mentioned as providing specific authority. However, Resolution 678 does invoke Resolution 660, the "Articles 39 and 40" resolution;²⁵⁹ neither Article 51 nor its distinctive language is mentioned, although the words "all necessary means" clearly suggest that the use of force is permissible.²⁶⁰ Since Resolution 678 incorporates Resolution 660 (Article 42) and Resolution 661 (Article 51), the authoritative determination depends upon the facts of the situation. The Security Council has left both options open. The present facts favor Article 42, because Resolution 678 was enacted on November 29, 1990, which was months after Resolution 661 was passed.

As early as August 6, 1990 the U.S. and Saudi Arabia met to discuss defense actions and it was determined that at least seventeen weeks were needed to bring in sufficient forces to defend Saudi Arabia.²⁶¹ Saudi Arabia's "invitation" to the U.S.-proposed coalition was accepted the next day.²⁶² On August 8, President Bush appeared on American national television, demand-

258. *Id.*

259. S.C. Res. 678, U.N. SCOR (1990).

260. However, the fact that Hussein had not invaded Saudi Arabia, and was denying that he had any such intention, would have made the invocation of Article 51 as a basis for the use of force look pretextual.

261. WOODWARD, *supra* note 208, at 269. General Schwartzkopf estimated that an "offensive" plan to "kick Saddam out of Kuwait" would take eight to twelve months. *Id.* at 249. Also contributing to the delay, which, even without other factors being considered, incontrovertibly changed the character of the use of force from self-defense to enforcement, was the six-week "pause of goodwill" devised by then-President Gorbachev. The Soviet leader hoped to exploit Iraq's status as a U.S.S.R. client state, and his own personal popularity, to seek a peaceful solution. See Thomas L. Friedman, *How U.S. Won Support to Use Mideast Forces; A U.S.-Soviet Collaboration*, N.Y. TIMES, Dec. 2, 1990, at A1.

262. The reluctance behind Saudi Arabia's "invitation" has been almost ignored by Second Gulf Crisis writers (with the exception of SALINGER & LAURENT, *supra* note 214, at 169), but it speaks volumes about inter-Arab foreign relations and the fact that the United States often finds itself "out of the loop" when dealing with Middle East crises.

ing the "immediate, unconditional and complete withdrawal of all Iraqi forces from Kuwait."²⁶³ However, he described the current American troop movements as "wholly defensive."²⁶⁴ Nevertheless, at some point early thereafter, the Bush administration began to change its strategy to encompass *offensive* force options, including the more ambitious plan to *liberate* Kuwait, and this change took *time*.

Moreover, the Soviets insisted upon the language in Resolution 678 "to allow Iraq one final opportunity, as a pause of goodwill," to withdraw from Kuwait. Shevardnadze told Baker during their talks that the inclusion of this language was simply not negotiable. Without it, the Soviets could not support the resolution. President Gorbachev in particular thought that he could use the 47 days allowed in paragraph 2 to reach a diplomatic and peaceful solution. These negotiations, which were ongoing right down to the wire, also took *time*. While time is not everything, it is an important key, for the more time passes, the more the nature of one's undertakings change. The passage of time is a determinative factor in differentiating between Article 42 and Article 51 actions; neither type of defense is a completely static right.

CONCLUSION

Article 42 is not an easy subject to write about, but it is an exciting one, and its moment of truth is looming on the horizon. Its study raises more issues than it resolves, because there is nothing rarified about Article 42—it is all drama and danger.

Part of its fascination is that using Article 42 involves taking concrete steps and not simply mouthing the empty platitudes to which we have become so inured. Anodyne resolutions cannot obscure it—Article 42 demands action. Yet it involves a surrendering of "self" to work—the "self" in self-interest. It forces States to think differently.

Surrendering one's fate to the collective will always seems like such a fair and good idea, until it is one's turn. All notions of sovereignty aside, such things are inevitable in many ways.

263. See *Excerpts of President Bush's News Conference*, WASH. POST, Aug. 9, 1990, at A36.

264. *Id.*

Yet, the idea of ceding real authority and power—the power to topple, the power to kill, to vanquish—to an international organization is disquieting, especially when one's vision of the world and one's order of things are not universally shared.

Article 42 frightens even the bravest, most confident of nations; even though the U.S. propounded Article 42 uses of force in both Korea and Kuwait, it is not exactly bolting from the starting gate to promote the Article's further development.

Nevertheless, Article 42 is undeniably “back from the dead,” with or without Article 43 agreements. The time has come to study it seriously. Articles 42, 43 and 51 are shrouded in myths that must be dispelled by fresh scholarship. It will not be a painless undertaking.

Part of the problem is that, no matter how “modern” we think we are, we remain ultimately tribal in our outlook and world views. We naturally resist the new, even if it is better. But the world does eventually come around if one persists, and things can change simply through the momentum of life and death. Although this sounds grisly, it is not without its historical truth: when tyrants are toppled or die, things loosen up; with every new election, one's taxes go up or down; the same can be said for unbelievers and their influence.

Max Planck, the German physicist and discoverer of the quantum of action (also called Planck's constant), once wrote an important, and indeed quite fundamental, paper contributing to the understanding of the phenomena of heat. Those scientists who did not ignore him worked hard to discredit him, but he realized that, in the end, patience was everything:

Helmholtz probably did not read my paper at all. Kirchhoff expressly disapproved of its contents.

This experience gave me an opportunity to learn a remarkable fact: A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die.²⁶⁵

Or, more nicely put, things change. And if the flooding tide of world democracy means anything, it means the old way of do-

265. Paul F. Feyerabend, *Max Planck*, in 6 *ENCYCLOPEDIA OF PHILOSOPHY*, 312-14, at 312 (1967).

ing business will no longer hold. Article 42 does not exist in a vacuum—the politics that periodically resuscitate it from its comatose state are always unique, but their commonalities are not unknown. Both Korea and Kuwait have more in common than a capital consonant. Both were places where the U.S. had neither troops nor a strong tradition of defense, no meaningful expatriate populations or possessions, no real reason to be there, fighting. It is simplistic to say, “What about oil?” (for Kuwait), or “What about geopolitics and the spread of Communism?” for Korea. Even during the Falklands/Malvinas incident, it was alleged in some quarters that Britain had gone to battle only for the oil supposedly under the distant, frigid seas, or (somewhat inconceivably) to maintain a strategic position near the Antarctic Circle.

While such an economic realist rationale is not an invalid way of thinking, it is equally true that, not always, but sometimes, nations simply do what they think is right. Economics and greed do not tell the whole story. In Korea, Kuwait, and even the debacle in the South Atlantic known as the Falklands/Malvinas incident, the most compelling issue was the right of people to choose their destinies, and to be secure within their own borders. In Korea and Kuwait, and in the Falklands/Malvinas, nations and peoples had been annexed against their will; power and unmitigated violence screamed at them from the barrels of guns. It is not generally remembered in this cynical age, but thousands of innocent, ordinary Koreans died in a lightning strike before the first U.S. troops landed on their soil. Life was not so cheap in 1950 as it is today, and the world was genuinely horrified. Moreover, the U.N. had the political issue of Korea on its agenda since its inception. It could not sit idly by.

Self-defense is not only an art, but a luxury for many states. Armies are costly, and forming them for long periods carries its own dangers. The biggest advantage of self-defense is that it is so easy—a rollicking, free-for-all show, carried along by almost any pretext. While it will always have its place in international law, Article 42 provides a better, if more demanding, way of resolving violent international conflict. It will not stop conflict from occurring; it is not a doctrine of pacifism, but one of discipline and control. As such, it is far from being the favorite choice of States engaged in international struggles. The accept-

ance of Article 42 and its ability to develop as a legitimate source of international authority will be an arduous process.

The best is indeed the enemy of the good.