THE CRISIS OVER KUWAIT, AUGUST 1990 - FEBRUARY 1991

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I. INTRODUCTION

At 12:50 a.m. Baghdad time on January 17, 1991, the first attack aircraft of the coalition forces of 28 nations ranged against Iraq, and the first cruise missiles from the U.S. battleships *Missouri* and *Wisconsin* took off in coordinated strikes to attack military targets in Baghdad and throughout Iraq and occupied Kuwait. At about 6:30 Eastern Standard Time, or about an hour and a half after it began, prime time news viewers in the United States were able to see and hear the effects of the first attacks on Baghdad.[1] The offensive to liberate Kuwait, authorized by United Nations Security Council Resolution 678 to start no earlier than January 15, had begun. Iraq had spurned "one final opportunity, as a pause of goodwill,"[2] to leave Kuwait, which it invaded August 2, 1990.

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1. These states had contributed ground forces contingents, air forces, or naval vessels, by the end of January 1991: Argentina, Australia, Bangladesh, Belgium, Canada, Czechoslovakia, Denmark, France, Germany, Greece, Honduras, Italy, Kuwait, Morocco, Netherlands, Nigeria, Norway, Pakistan, Portugal, Saudi Arabia, Senegal, Soviet Union, Spain, Syria, Turkey, United Kingdom, United States, and other members of the Gulf Cooperation Council ("GCC"), Bahrain, Oman, Qatar, and the United Arab Emirates. The GCC, formed in 1981 during the Iran-Iraq War, includes Kuwait and Saudi Arabia and all other states lining the eastern shore of the Persian Gulf. Charter Establishing Gulf Cooperation Council, Including Rules of Procedure and Unified Economic Agreement, (signed May 25, 1981; in force November 11, 1981), reprinted in 26 ILM 1138 (1987); Nassib G. Ziade, Introductory Note, 26 ILM 1131 (1987), explains the GCC's genesis and development. Richard P. Johnson, *Conquering Fear in the Gulf* 115 No 3 Naval Inst Proc 78 (1989) analyzes the GCC in action. The GCC held a summit meeting in Qatar on December 22-25; its closing statement issued Christmas Day declared that war was the only alternative to peaceful Iraqi withdrawal from Kuwait. Peter Hayes, *Chronology 1990*, 70 Foreign Affairs 206, 232 (1991).

2. UN SC Res 678, UN Doc S/RES/678 (November 29, 1990), reprinted in 1 Dept State Dispatch 298 (1990). Special Warning No 84, published at 1 p.m. London time on January 12, 1991, had warned all shipping by Notice to Mariners ("NOTMAR") that unless Iraq complied fully with Resolution 678, "armed force may be used in the waters bordering. . . . Iraq and Kuwait and the Arabian Peninsula, including the Persian Gulf, North Arabian Sea and Red Sea." Defense Mapping Agency Hydrographic/Topographic Center, No 3 Notice to Mariners III-1.11 (1991). A similar Notice to Airmen ("NOTAM") was sent to all aviation units. Special Warning No 85, published as a

Operation Desert Shield had become Operation Desert Storm. Just over forty days and forty nights later, it seemed the war was nearly over.

As of January 31, 1991, the conflict had been primarily an air war, including coalition attacks on Iraqi command and control centers; chemical, biological and nuclear weapons production facilities; anti-aircraft missile and gun positions; air force planes and fields; ballistic missile launcher sites and mobile missile vehicle and launch sites; and, finally, increasingly heavy attacks on troop, artillery and tank concentrations, and supply and transportation centers.[3] Naval involvement was minimal, except for cruise missile launches from battleships, cruisers and submarines and carrier aircraft to support land-based air attacks, plus some successful coalition attacks on Iraqi vessels, offshore installations and a Kuwaiti island held by Iraq.[4] The ground war was relatively quiet, except for occasional artillery duels and rescues of downed pilots from Iraqi territory. Iraq defended against air attacks and responded with launches of Scud medium-range ballistic missiles against the Israeli cities of Haifa and Tel Aviv, and Dhahran and Riyadh in Saudi Arabia. Most later Scud attacks were blunted by U.S.-manned Patriot anti-missile missile batteries.[5] Israel was not a party to the conflict when Iraq launched Scuds against it. The Scud attacks were an attempt to draw Israel into the war; yet Israel refrained from any response, while promising a possible response for the future.[6] Aside from occasional aerial dogfights, artillery barrages, forays of minor naval vessels, and use of sea mines, some of which drifted as far south as Bahrain and the United Arab Emirates, Iraq's posture was largely defensive as of the end of January. Iraq set Kuwaiti oil facilities ablaze and released crude oil into the Persian Gulf in the largest oil spill in history (350 square miles) as an attempt to thwart an amphibious landing; this was part of the same defensive posture.[7]

NOTMAR at 12:30 p.m. London time on January 17, 1991, advised that hostilities had begun and warned of increased dangers to shipping. Defense Mapping Agency Hydrographic/Topographic Center No 3 *Notice to Mariners* III-1.12 (1991). Again, a similar NOTAM was sent to aviation units. A stronger NOTAM was sent August 24, warning of dangers to aircraft approaching military forces but advising that self-defense measures would be implemented so as not to interfere with overflight rights in international airspace. Both NOTMARs advised of the continuation of the ship interception procedures of Special Warning No 80, already in place for enforcing the embargo of Iraq and Iraqi-held Kuwait. 36 Defense Mapping Agency Hydrographic/Topographic Center, *Notice to Mariners* III 1.15 (1990). Iraq also issued its own warning to Iran. *Notice to Mariners* No 3/90. See also notes 50-52 and accompanying text.

3. George Church, *The Battle: So Far, So Good,* Time 20, 22-23 (January 28, 1991) (US ed).

4. George Church, *A Long Seige Ahead,* Time 23 (February 4, 1991) (US ed).

5. Church, *A Long Seige Ahead* at 21-22 (cited in note 4).

6. Church, *The Battle: So Far, So Good* at 20, 23 (cited in note 3).

7. Richard Lacayo, *A War Against the Earth,* Time 32 (February 4, 1991) (US ed); Michael D. Lemonick, *Dead Sea in the Making,* Time 40 (February 11, 1991) (US ed).

These events could invoke a treatise of analysis on the law of armed conflict;[8] selected aspects of the issues raised have been ably covered by others in this symposium. Yet, major issues remain to be addressed. Application of humanitarian law to prisoners of war ("POWs"), the civil populations, cultural, and other objects will pose major questions: POWs have been taken; complaints for destruction of non-military structures have arisen; protected targets, such as hospital ships, have been designated; and there undoubtedly will be claims concerning protected persons, for example, media representatives. Iraq's indiscriminate use of inaccurate weapons such as the Scuds, the use of chemical or nuclear weapons, and the destruction of the environment, will also give rise to further questions.

A national debate over the legality of a unilateral U.S. military response, reminiscent of that over Vietnam,[9] began with the dispatch of troops to Saudi Arabia. Senator Moynihan's *On the Law of Nations* has appeared fortuitously, urging application of the rule of law in foreign policy.[10] Columnist George Will echoed assertions, going back at least to the nineteenth century, that international law is a ghost, or a chimera.[11] Others, such as Senator Terry Sanford, assumed law could serve as a valid base and proposed that the United States work through the United Nations to resolve the crisis[12] or declare unilateral preemptive action.[13]

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8. See *Agora: The Gulf Crisis in International and Foreign Relations Law,* 85 Am J Intl L 63 (1991).

9. See generally Stanley Karnow, *Vietnam: A History* (Viking Press, 1983).

10. Daniel Moynihan, *On the Law of Nations* 148 (Harvard U Press, 1990). (Thesis: "A political culture from which the idea of international law has largely disappeared places its initiatives in jeopardy.") As the dust cover subtitle, *A historical and personal account of the role of international law in foreign policy,* would indicate, Senator Moynihan's sometimes anecdotal, conversational and serendipitous, but highly readable, account mixes Congressional policy, national law, executive action and national diplomacy with international law.

11. George Will, *The Perils of "Legality,"* Newsweek 66 (September 10, 1990) (US ed); see also John Austin, *The Province of Jurisprudence Determined* 12, 127, 141-42, 200-201 (Humanities Press, 1965); Hans J. Morgenthau, *Politics Among Nations* 282 (Knopf, 4th ed 1967); Panel, *Cuban Quarantine: Implications for the Future,* 1963 Proceedings Am Soc Intl L 1, 13, 14 (Remarks of Former Secretary of State Dean Acheson); L. Gordon Crovitz, *International Law Can't Substitute for War Against Saddam,* Wall St J A:11 (January 30, 1991). Senator Moynihan, among many others, would of course refute this view. See, for example, Louis Henkin, *How Nations Behave* 25-26, 89-90, 92-95, 97-98, 320-23 (Columbia U Press, 2d ed 1979); Moynihan at 1-14 (cited in note 10); Oliver Lissitzyn, *The International Court of Justice* 5-6 (Carnegie Endowment for Intl Peace, 1951); 1 Restatement (Third) of the Foreign Relations Law of the United States 17-18 (ALI, 1987) ("Restatement (Third)"). As Senator Moynihan would suggest, the Framers also believed that international law existed in 1787. Moynihan at 14-20 (cited in note 10); US Const, Art I, § 8, cl 3, 10-11; § 9, cl 8; § 10, cl 1, 3; Art II, § 2, cl 2; § 3; Art III, § 2, cl 2, 3; Art V, cl 2; Amend XIV, § 1.

12. Terry Sanford, *No, UN Pressure Will Work Best,* New York Times A:29 (August 24, 1990). See also The North Carolina Lawyers' Persian Gulf Statement of October 23, 1990, cited in John Healy, *Give Sanctions Time to Work, Neal Says on TV,* Winston-Salem J 8 (November 29, 1990).

13. Alfonse D'Amato, *Yes, Hussein Must Be Ousted,* New York Times A:29 (August 24, 1990). See also Abraham Sofaer, *Asking the U.N. Is Asking for Trouble,* Wall St J A:14 (November 5, 1990).

Other voices decried the use of force in any form, at any time, arguing that Kuwait was not worth the effort, that other nations were not supporting the cost of military operations, or that armed conflict was not the way to solve the problem.[14] The first cases filed in opposition to the U.S. force buildup were defeated on political question and ripeness grounds.[15] United Nations General Assembly Resolution 678 reopened a domestic Constitutional debate on whether the President could commit U.S. forces to armed conflict without formal approval from Congress. That point became moot on January 12, when Congress passed a joint resolution authorizing the use of force.[16] Congress subsequently passed a concurrent resolution in support of U.S. armed forces committed to the conflict.[17] As evidenced by the joint resolution, the Executive's prewar policies thereafter coincided with those of Congress and the Security Council in the crisis.[18] Nevertheless, a chorus of antiwar protests in the

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Congress considered separate resolutions in each house on the use of force before adjournment, but no resolution passed for Presidential action. See *Ange v Bush*, 752 F Supp 509, 510-11 (DDC 1990).

14. Michael Kramer, *Toward a New Kuwait*, Time 26 (December 24, 1990) (US ed); George Church, *Is Uncle Sam Being Suckered?*, Time 38 (December 24, 1990) (US ed); Strobe Talbott, *America Abroad: Woodrow Wilson in the Gulf*, Time 43 (December 24, 1990) (US ed).

15. See *Ange* (cited in note 13), which dismissed a National Guardsman's suit on political question and ripeness grounds. *Dellums v Bush*, 752 F Supp 1141 (DDC 1990) (restated the overlapping powers of Congress and the Executive in the war power area and held that the Congressmen who had sued did have standing, but the court declined to decide the case, on ripeness grounds).

16. HR 77, Pub L No 102-1, 105 Stat 3 (1991). Resolution 77 was carefully worded and echoed the tone of the Cuban Missile Crisis resolution, see note 92. Compare the broad-brush force authorization given President Johnson by the Tonkin Gulf Resolution, HR 1145, Pub L No 88-408, 78 Stat 384 (1964), repealed by Pub L No 91-672, § 12, 84 Stat 2053, 2055 (1971). See also Louis Henkin, *Foreign Affairs and the Constitution* 108, 351 note 47 (Foundation Press, 1972).

17. S 2, 102nd Cong, 1st Sess, 137 Cong Rec S 963 (January 17, 1991); S 2, 102nd Cong, 1st Sess, 137 Cong Rec HR 566 (January 18, 1991). The vote was 98-0 in the Senate, 399-6 in the House, with 6 Congressmen voting "present." See also S 2, 102nd Cong, 1st Sess, 137 Cong Rec S 963-S 972 (January 17, 1991) and HR 566-HR 596 (January 18, 1991).

18. Compare, President George Bush, Address to the Nation, August 8, 1990, 1 Dept State Dispatch 52 (1990); President Bush, Opening Statement before News Conference, August 22, 1990, 26 No 34 Weekly Compilation of Presidential Docs 1281 (August 27, 1990); President Bush, Remarks at White House Briefing for Members of Congress on the Persian Gulf Crisis, August 28, 1990, 26 No 35 Weekly Compilation of Presidential Docs 1300 (September 3, 1990); President Bush, Address to the 45th Session of the U.N. General Assembly, October 1, 1990, 26 No 40 Weekly Compilation of Presidential Docs 1496 (October 8, 1990); U.S. Secretary of State James A. Baker, III, Isolation Strategy Toward Iraq, October 17, 1990, 1 Dept State Dispatch 204 (October 22, 1990) (statement before the Senate Foreign Relations Committee); Secretary Baker, Why America Is in the Gulf, October 29, 1990, 1 Dept State Dispatch 235 (November 5, 1990) (address before the Los Angeles World Affairs Council); Secretary Baker, Gulf Crisis: At a Crossroads, November 29, 1990, 1 Dept State Dispatch 297 (December 3, 1990) (remarks before the UN Security Council); President Bush, The Gulf: A World United Against Aggression, November 30, 1990, 1 Dept State Dispatch 295 (December 3, 1990) (opening statement before news conference); Secretary Baker, America's Strategy in the Persian Gulf Crisis, December 5, 1990, 1 Dept State Dispatch 307 (December 10, 1990) (statement before the Senate Foreign Relations Committee); President Bush, Address to the Nation, 27 No 50 Weekly Compilation Presidential Docs 50 (January 16, 1991); President Bush, State of the Union Address to the Congress, 27 No 5 Weekly Compilation of Presidential Docs 90 (February 4, 1991).

United States and European allied countries continued.[19] Other nations, particularly the European Allied countries, experienced similar types of upheaval in deciding to support the war.[20]

This article cannot concentrate on these aspects of armed conflict. The focus of this article is thus relatively narrow: the legal aspects of international armed conflict, particularly the actions of the United Nations, during the prewar crisis, August 1, 1990 through January 15, 1991. The evolution of the conflict and chronology of events during the crisis demonstrates how the U.N. Security Council has emerged as a potentially major player in a post-Cold War world, but the U.N. system has yet to be implemented completely as its founders envisioned it.[21] There are important aspects of international law, totally outside the law of the U.N. Charter ("the Charter"), that also have played a role in this crisis and will undoubtedly impact future crises as well; these are also considered.

Furthermore, law does not, and cannot, operate in a sterile vacuum; any decision-maker must confront the role of law in the social order.[22] There are other legal norms, some international, some at the national level, that impacted the crisis before the war and will continue to influence events.[23]

II. CHRONOLOGY OF CRISIS: THE SECURITY COUNCIL IN ACTION

On August 2, 1990, after the failure of a conference among Arab states the day before, Iraq invaded Kuwait. This action placed Saudi Arabia in fear of imminent attack.[24]

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19. See Nancy Gibbs, *A First Thick Shock of War*, Time 34 (January 28, 1991) (US ed); Michael S. Serrill, *Closing Ranks Behind the Yanks*, Time 67 (January 28, 1991) (US ed); Gustav Niebuhr, *War May Be Hell, But the Clergy Isn't of One Mind on Iraq*, Wall St J A:2 (January 28, 1991). As the war progressed, however, United States public opinion seemed to approve of the conflict. See generally Nancy Gibbs, *Can the Pro-War Consensus Survive?*, Time 32 (February 18, 1991) (US ed); Richard Zoglin, *Just Whose Side Are They On?*, Time 52 (February 25, 1991) (US ed).

20. See Serrill, *Closing Ranks Behind the Yanks* at 67 (cited in note 19).

21. For the early history of the United Nations and its antecedents, see Leland M. Goodrich, Edvard Hambro and Anne P. Simons, *Charter of the United Nations* (Columbia U Press, 3d ed 1969); Ruth B. Russell and Jeannette E. Muther, *A History of the United Nations Charter: The Role of the U.S. 1940-1945* (Brookings Inst, 1958).

22. See Harold D. Lasswell and Myers S. McDougal, *Jurisprudence in Policy-Oriented Perspective*, 1 U Fla L Rev 486, 487 (1967).

23. See note 12 and accompanying text.

24. Fouad Ajami, *The Summer of Arab Discontent*, 69 Foreign Affairs 1, 14 (1990). In his survey of the troubled waters of Arab politics, with its admixture of Islamic beliefs, Ajami states that there were three incursions into Saudi territory on August 3, 1990. See also Stanley Reed, *Jordan and the Gulf Crisis*, 69 Foreign Affairs 21 (1990); Edward L. Morse, *The Coming Oil Revolution*, 70 Foreign Affairs 36 (1990) and William B. Quandt, *The Middle East in 1990*, 69 Foreign Affairs 49 (1991). The United Kingdom had frustrated an Iraqi attempt to annex Kuwait in 1961; British troops had landed but eventually were replaced by Egyptian forces. The United Kingdom removed its troops in a

A. Resolution 660: The Security Council Acts

The Security Council passed Resolution 660, condemning the invasion, demanding Iraqi withdrawal, and calling upon Kuwait and Iraq to begin immediate intensive negotiations to resolve their differences. The Security Council supported all negotiation efforts, especially those of the Arab League, and decided to meet again to consider further steps to ensure compliance.[25] Nations such as the United States began unilateral and collective economic and diplomatic initiatives. The Bush Administration issued Executive Orders 12722 and 12723 that morning, Washington time, to block Iraqi and Kuwaiti assets.[26] United States Defense Secretary Dick Cheney and others began negotiations with Saudi Arabia and other states for self-defense agreements; the terms of these agreements have not been published.[27]

Invocation of U.N. Charter Articles 39 and 40 in Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, gave Iraq notice of the seriousness of the situation. The Security Council had bypassed Chapter VI, Pacific Settlement of Dis-

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month-long phased withdrawal several months later. Because of Soviet objection, the Security Council debate was inconclusive. James Cable, *Gunboat Diplomacy 1919-1979* 65-66 (St Martin's Press, 2d ed 1981). The British response in 1961 perhaps explains, at least in part, Iraq's enmity toward U.K. nationals held hostages in 1990. See also Marjorie M. Whiteman, 5 *Digest of International Law* 109-13 (1965).

25. UN SC Res 660, UN Doc S/RES/660 (1990), reprinted in 29 ILM 1325 (1990). For a summary of the debate, see *Pre-Dawn Council Meeting, Condemnation, Call for Withdrawal,* 27 No 4 UN Chronicle 9 (1990).

26. Executive Orders 12722-23, 55 Fed Reg 31803-05 (1990). The United States was not alone in such a rapid response. By September 6, the Secretary-General reported that 106 nations had reported actions taken to implement sanctions. Most sanctions were imposed pursuant to UN SC Res 661, UN Doc S/RES/661 (1990), reprinted in 29 ILM 1325 (1990), but some were unilateral national actions. See *Sanctions: 106 Countries Reply,* 27 No 4 UN Chronicle 13 (1990).

27. See, for example, Clifford Krauss, *After Years of Discreet Trade-Offs, U.S. Is Testing the Saudis,* New York Times A:10 (August 7, 1990). Other GCC members reached agreements with the United States later in August. Michael R. Gordon, *Cheney, On Quick Tour, Reaches Agreements on More Bases in Gulf,* New York Times A:1 (August 21, 1990). See remarks of President Bush (cited in note 18). The Case Act, 1 USC § 112b (1988), requires that all agreements other than treaties be transmitted to Congress within sixty days of coming into force. Failure to do so does not affect an agreement's validity under international or U.S. law. 1 Restatement (Third) § 312, Reporters' Note 5 (cited in note 11). Eventually all agreements, except those classified for security reasons, are published in the United States Treaties and Other Agreements ("UST") series and are indexed in the annual U.S. Department of State, *Treaties in Force.* Article 102 of the U.N. Charter requires registration and publication of treaties and other international agreements of U.N. members. However, the only penalty for failure to register is that no party to such treaties or agreements may invoke them before any U.N. organ, such as the Security Council, the General Assembly, or the International Court of Justice. The League of Nations Covenant, Article XVIII, was more strict: no unregistered treaty or agreement "[was] binding until so registered." Thus it is possible that for security reasons the Cheney agreements will not be available for public scrutiny, although Congress will see them under the Case Act. A U.S. treaty partner could publish an agreement among its treaties, or could register it with the United Nations under Article 102.

putes, which, although speaking of disputes "likely to endanger the maintenance of international peace and security," emphasizes resolution by nonviolent means: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, use of regional arrangements, or other peaceful means of the disputants' choice.[28] The Security Council, in citing Articles 39 and 40 of the Charter, indicated that it thought there was a chance for a peaceful resolution. The Council "determine[d]," under Article 39, that a "breach of international peace and security" had occurred in Iraq's invasion of Kuwait. However, it "[d]emand[ed]" that Iraq leave Kuwait and "call[ed] upon" Iraq and Kuwait to begin intensive negotiations. In doing so, the Council did not "decide" upon measures to be taken under Articles 41 and 42 of the Charter, an option under Article 39. Rather, the Council "call[ed] upon the parties . . . to comply with . . . provisional measures (for example, negotiations)."[29] Among the range of possible actions by the Security Council, this was perhaps the mildest prescription possible under Chapter VII. The Council did not cite, Resolution 3314 Definition of Aggression, passed by the U.N. General Assembly in 1974 by consensus. Referring to Charter Article 39, Resolution 3314 defines aggression and acts of aggression, stating in Article 2 that "the first use of armed force by a State shall constitute *prima facie* evidence of an act of aggression," although the Security Council may conclude that other relevant circumstances warrant a determination that such an act did not occur. Article 3(a) declares that invasion or attack by a state's armed forces on the territory of another state, or any military occupation, however temporary, resulting from such an invasion or attack, qualifies as an act of aggression. Article 5 declares:

> 1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
> 2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
> 3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.[30]

The Council also did not cite Assembly Resolution 2625, adopting by consensus the Declaration of Principles of International Law Concerning Friendly Relations Among States of 1970, which includes pledges to refrain from using force, or the threat of force, against the territorial integrity of states; to refrain from depriving peoples of their national identity;

28. Compare Charter of the United Nations [1945] 59 Stat 1031, 1 UNTS xvi (in force October 24, 1945) ("UN Charter").

29. Compare UN Charter at Arts 39-40 (cited in note 28) with UN SC Res 660 (cited in note 25).

30. UN GA Res 3314, 29 UN GAOR Supp No 19, UN Doc A/9619 & Corr 1 (1974), reprinted in 69 Am J Intl L 480 (1975).

to refrain from intervention in the domestic affairs of a state; and to respect the sovereign equality of states.[31]

Resolutions 2265 and 3314, like any Assembly resolutions passed under Charter Articles 10-14, do not impose legal obligations on U.N. members,[32] but their terms are at least evidence of international law and may be considered declaratory of the law.[33] Although not cited in Resolution 660, or any subsequent resolution dealing with the Kuwait crisis, Resolutions 2265 and 3314 may be a significant factor in postwar dispute resolutions, including war crimes trials.

B. Resolution 661 and Self-Defense

By August 6, 1990, the first of the Cheney agreements were concluded. On the same day, Council Resolution 661, approved pursuant to Chapter VII of the Charter, ordered an embargo of Iraqi and Kuwaiti ports, exempting medical supplies from its operation. Resolution 661 also "[a]ffirm[ed] 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," and "[d]ecide[d]," in paragraph 9, "that notwithstanding [the Resolution's embargo provisions], nothing in the present resolution [would] prohibit assistance to the legitimate Government of Kuwait," and called upon states to protect Kuwaiti assets and not to recognize the regime set up by Iraq. By this time, the Kuwaiti government and many Kuwaiti nationals had fled to Saudi Arabia and established a government in exile. Resolution 661 also allowed the states to keep the crisis on the Council's agenda.[34]

Besides the express affirmation of the right of individual and collective self-defense,[35] Resolution 661 is important for two reasons: it invoked all of Chapter VII, including Articles 41 and 42, and it included a "decision" by the Security Council to retain the crisis on the Council agenda. Article 41 permits the Security Council to decide on measures

31. UN GA Res 2625 (1970), reprinted in 9 ILM 1292 (1970).

32. Julius Stone, *Hopes and Loopholes in the Definition of Aggression*, 71 Am J Intl L 224, 225 (1977). See also D.W. Bowett, *Self-Defense in International Law* 249-68 (Manchester U Press, 1958); Ian Brownlie, *International Law and the Use of Force by States* 351-58 (Oxford U Press, 1963); Benjamin B. Ferencz, 1 & 2 *Defining International Aggression* (Oceana Pub, 1975).

33. 1 Restatement (Third) § 103(2)(d), Comment c & Reporters' Note 2 (cited in note 11).

34. UN SC Res 661 (cited in note 26). Eventually 106 states responded to the Council call. *Sanctions: 106 Countries Reply* (cited in note 26). Twice before the Council had voted sanctions against a state, a total economic embargo against Rhodesia in 1968 and an arms embargo against South Africa in 1977. See UN SC Res 253, UN Doc S/RES/253 (1968), reprinted in 7 ILM 897 (1968); UN SC Res 388, UN Doc S/RES/388 (1976), reprinted in 15 ILM 720 (1976); UN SC Res 418, UN Doc S/RES/418 (1977), reprinted in 16 ILM 1548 (1977). See also UN SC Res 411, UN Doc S/RES/411 (1977), reprinted in 16 ILM 1550 (1977).

35. See UN Charter at Art 51 (cited in note 28).

short of armed force to give effect to its decisions. These may include "complete or partial interruption of economic relations and of rail, sea . . . and other means of communication. . . ." Article 42, by contrast, contemplates that the Council consider that Article 41 measures would be inadequate to change the behavior of the offending nation. Measures permitted under Article 42 include "demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." Because Resolution 661 speaks in terms of "prevent[ion]" of imports and exports, sales or supplying of commodities or products, and a financial freeze, it contemplated only an economic embargo, permitted under Article 41, and not a blockade, which is an act of war.[36]

Use of the term "decision" was also important. Under Charter Articles 25 and 48, U.N. members pledge that they will carry out decisions of the Council. Thus, as contrasted with the hortatory language of Resolution 660, members were bound to carry out the Security Council's wishes in Resolution 661 and those that followed.[37] Continuing from Resolution 660 through Resolution 678 of November 29, 1990, the Security Council has declared that it remains "seized" of the crisis precipitated by Iraq's invasion of Kuwait.[38] Indeed, Resolution 674 declares that the Council has "decide[ed] to remain actively and permanently seized of the matter until Kuwait has regained its independence and peace has been restored in conformity with the relevant resolutions of the . . . Council."[39] Thus the Council has invoked, *sub silentio*, U.N. Charter Article 12(1):

> While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.[40]

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36. *Comprehensive Mandatory Sanctions Imposed Against Iraq*, 27 No 4 UN Chronicle 5, 6-7 (1990) and *Naval Blockade Endorsed*, 27 No 4 UN Chronicle 17 (1990), among other analyses existing, erroneously reported that a blockade was instituted.

37. Despite the obligatory language of U.N. Charter, Arts 25 and 48 as applied to "decisions" with respect to Resolution 661, Congress could decide in the future to force U.S. noncompliance with superseding legislation. See, for example, *Diggs v Shultz*, 470 F 2d 461 (1972) (cert denied). There is a presumption against invalidation of obligations in international agreements by later legislation. Compare *United States v Palestine Liberation Organization*, 695 F Supp 1456 (SDNY 1988). The international obligation of the United States would continue despite domestic abrogation by later Congressional action; 1 Restatement (Third) § 115(1) Comments a and b, Reporters' Notes 1 and 2 (cited in note 11).

38. UN SC Res 667, UN Doc S/RES/667 (1990), reprinted in 29 ILM 1332-33 (1990). See also note 2, 77-80 and accompanying text.

39. UN SC Res 674, ¶ 11, UN Doc S/RES/674 (1990), reprinted in 1 Dept St Dispatch 239, 240 (1990). UN SC Res 665, ¶ 5, UN Doc S/RES/665 (1990), reprinted in 29 ILM 1329, 1330. See *Kuwait's "Annexation" Declared Null and Void*, 27 No 4 UN Chronicle 14 (1990).

40. UN Charter at Art 12(1) (cited in note 28).

Thus there can be no use of the Uniting for Peace Resolution of 1950 ("UFP"),[41] adopted by the General Assembly when Soviet vetoes under Charter Article 27(3) barred further Council action during the Korean War. It was for this reason that the General Assembly agenda steering committee properly refused to allow Iraq to bring the crisis before the Assembly on November 9. Recently, however, the Assembly has been considering, through its committees, a draft resolution condemning Iraqi behavior that may fall outside Security Council-preempted issues.[42]

C. Interception, Air Embargo and the Hostages

Shortly after passage of Resolution 661, Iraq established a puppet regime in Kuwait and then annexed it as Province 19, declaring that Kuwaitis were now Iraqi citizens.[43] Security Council Resolution 662 of August 9, 1990, followed, declaring that the annexation was "null and void" and calling on all nations, international organizations and specialized agencies to refrain from action that might be construed as an indirect recognition of the annexation.[44] This was consonant with the General Assembly's Definition of Aggression Resolution, whose Article 3(a) denounces annexation of territory by force as an act of aggression; Article 5(3) declares that "no territorial acquisition . . . resulting from aggression is or shall be recognized as lawful."[45] As noted above, these acts by Iraq may have consequences after the conflict.[46]

On August 9, 1990, the President issued Executive Orders 12724 and 12725, revoking Executive Orders 12722 and 12723 and citing Resolution 661 plus the same U.S. law sources as in the August 2 orders.[47] On the same day, August 9, the President sent a War Powers Resolution notice to Congress.[48] The day before, the first elements of U.S. troops, the

41. UN GA Res 377, UN Doc A/1481 (1950), reprinted in 45 Am J Intl L 1 (Supp 1951). Practice after that war would tend to confirm use of the UFP process, despite Charter Art 24(1)'s statement that the Security Council has "primary responsibility for the maintenance of international peace and security. . . ." Jorge Castañeda, *Legal Effects of United Nations Resolutions* 81-116 (Columbia U Press, 1969). See also *Crisis in the Area of the Persian Gulf Casts Long Shadow Over Forty-Fifth Assembly*, 27 No 4 UN Chronicle 40, 43 (1990).

42. Paul Lewis, *U.S. Envoy to U.N. on Center Stage*, New York Times A:7 (November 10, 1990).

43. *Kuwait's "Annexation"*, 27 No 4 UN Chronicle 14 (1990).

44. UN SC Res 662, UN Doc S/RES/662 (1990), reprinted in 29 ILM 1327, 1328 (1990).

45. UN GA Res 3314 (cited in note 30).

46. See notes 30-33 and accompanying text.

47. Compare Executive Orders 12722-23, (cited in note 26) with Executive Orders 12724-25, 55 Fed Reg 33089-92 (1990).

48. Letter of President Bush to the Speaker of the House of Representatives, August 9, 1990, 26 No 32 Weekly Compilation of Presidential Documents 1225 (August 13, 1990), citing War Powers Resolution, 50 USC §§ 1541-48 (1988). On November 16, the President advised Congress, pursuant to the War Powers Resolution, that additional U.S. forces would be deployed to the region. Letter of President Bush to the Speaker of the House of Representatives and the President Pro Tempore of the

82nd Airborne, had arrived in Saudi Arabia; as of January over 500,000 members of a multinational force and its equipment had been programmed for duty in the Arabian Peninsula. Syria and Turkey stationed troops along their borders with Iraq. The multinational force began intercepting seaborne commerce to and from Iraq and Kuwait on August 16.[49] On August 17, the United States published Special Warning No. 80, which stated in paragraphs 1 and 2:

> 1. In response to requests from the legitimate government of Kuwait and in exercising the inherent right of collective self-defense recognized under Art. 51 of the U.N. Charter, United States forces will, in cooperation with regional and allied forces, conduct a maritime operation to intercept the import and export of commodities and products to and from Iraq and Kuwait that are prohibited by U.N. Security Council Resolution 661.
>
> 2. Affected areas include the Strait of Hormuz, Strait of Tiran, and other choke points, key ports, and oil pipeline terminals. Specifically, Persian Gulf interception efforts will be concentrated in international waters south of 27 degrees north latitude; Red Sea interception efforts will be conducted in international waters north of 22 degrees north latitude.[50]

This NOTMAR warned that all merchantmen "perceived to be proceeding to or from Iraqi or Kuwaiti ports, or transshipment points, and carrying embargoed material . . . will be intercepted and may be searched."[51] If vessels were determined to be carrying embargoed goods to Iraq or Kuwait, they would not be allowed to proceed with transit and would face the possibility of diversion to a port or anchorage for the mandated search. This possibility was to be exercised if it was required for safe navigation. The NOTMAR also provided:

> Failure of a ship to proceed as directed [would] result in the use of the minimum level of force necessary to ensure compliance. . . . Any ships, including waterborne craft and armed merchant ships, or aircraft, which threaten or interfere with U.S. forces engaged in enforcing this maritime interception will be considered hostile.[52]

Senate, November 16, 1990, 26 No 46 Weekly Compilation of Presidential Docs 1834 (November 19, 1990).

49. Michael Kramer, *Must this Mean War?*, Time 14 (August 27, 1990) (US ed). The United States and its coalition partners also reported deployments to the area to the Security Council, in accordance with U.N. Charter, Articles 51 and 52. *Vessels Intercepted* 27 No 4 UN Chronicle 15 (1990). On August 22, 1990, the President called up selected reservists and national guardsmen. Executive Order 12727, 55 Fed Reg 35027 (1990). On November 13, their tours were extended by Executive Order 12733, 55 Fed Reg 47837 (1990). On January 18, additional reservists were called up by Executive Order 12743, 56 Fed Reg 2661 (1991).

50. Special Warning No 80 (cited in note 2). Later NOTMARs continued the Special Warning No 80 terms.

51. Id.

52. Id.

On August 25, Resolution 665 authorized these interceptions.[53]

Responding to Iraq's verbal and physical pressure on nations to close their embassies and consulates, Iraq's denial of access of third-state nationals to their consuls, and Iraq's refusal to allow third-state nationals to leave Iraq and Kuwait, the Security Council passed Resolution 664 on August 18, demanding an end to such tactics.[54] Although it cited no authority, the Council undoubtedly relied on the 1961 Vienna Convention on Diplomatic Relations,[55] the 1963 Vienna Convention on Consular Relations,[56] and the Fourth Geneva (Civilians) Convention, which provides a qualified right of aliens' departure during armed conflict.[57] Iraq is also a party to these conventions.[58] Later Council resolutions have referred explicitly to norms contained in these conventions: Resolution 666, demanding that Iraq look to the safety and well-being of third-state nationals;[59] Resolution 667, again demanding release of third-state nationals;[60] Resolution 670, confirming applicability of the Fourth Convention to Kuwait, and reminding Iraq and individuals of liability for "grave

53. UN SC Res 665 (cited in note 39). Resolution 665 was adopted only after the Council received reports of United States and other nations' implementing interception measures. Both *Comprehensive Mandatory Sanctions* at 6-7 and *Naval Blockade Endorsed* at 17 (cited in note 36) erroneously reported that a blockade was instituted. The Council acted under U.N. Charter, Article 41, not U.N. Charter Article 42, which would have approved a blockade. See also *Vessels Intercepted* at 15 (cited in note 49).

54. UN SC Res 664, UN Doc S/RES/664 (1990).

55. Vienna Convention on Diplomatic Relations, [1972] 23 UST 3227, TIAS No 7502, 500 UNTS 95 (signed April 18, 1961; in force April 24, 1964).

56. Vienna Convention on Consular Relations, [1970] 21 UST 77, TIAS No 6820, 596 UNTS 261 (signed April 24, 1963; in force March 19, 1967).

57. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Arts 4, 13-14, 35-36, 47-48 [1955] 6 UST 3516, 3520, 3526-28, 3540, 3548, TIAS No 3365, 75 UNTS 287, 290, 296-98, 310, 318 (signed August 12, 1949) ("Fourth Convention"). For further analysis, see Jean S. Pictet, 4 *The Geneva Conventions of 12 August 1949* 45-51, 118-28, 232-42, 272-77 (Ronald Griffin and C.W. Dumbleton trans) (International Committee of the Red Cross, 1958). Although there is a general human rights norm permitting departure from any country, including one's own, this may be curtailed during "time of public emergency," for example armed conflict and occupation, and presumably this exception would be claimed by Iraq if it has filed a statement of derogation. See International Covenant on Civil and Political Rights, Arts 4, 12, 999 UNTS, 171, 174, 176 (signed December 16, 1966; in force March 23, 1976). Iraq, but not the United States, is a party to the International Covenant on Civil and Political Rights. United Nations, *Multilateral Treaties Deposited with the Secretary-General as of 31 December 1989*, UN Doc ST/LEG/SER.E/134 (1990).

58. Department of State, Office of the Legal Advisor, *Treaties in Force* 296, 307, 370 (US Government Printing Office, 1990).

59. UN SC Res 666, ¶ 2, UN Doc S/RES/666 (1990), reprinted in 29 ILM 1330-31 (1990) ("international humanitarian law including, where applicable, the Fourth Geneva Convention"). See *Council Acts on Hunger and Suffering*, 27 No 4 UN Chronicle XVIII (1990), for a summary of the Council debate.

60. UN SC Res 667, ¶ 3 (cited in note 38) ("Vienna Conventions on diplomatic and consular relations and international law"). See *Diplomats Must Be Protected*, 27 No 4 UN Chronicle 19 (1990) for a summary of the Council debate.

breaches" of the conventions;[61] Resolution 674, adding violations of the U.N. Charter, the conventions and international law. Resolution 674 also reminded Iraq of its liability under international law "for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait. . . ." and invited states to collect data "for restitution or financial compensation by Iraq. . . ." [62] Later resolutions, such as Resolution 678's force authorization, incorporated the earlier ones by reference.[63] Although Iraq initially had declared that alien nationals of some coalition states (for example the United Kingdom and the United States) would be held as human shields while other states' nationals were free to depart, eventually all alien nationals were allowed to leave.[64] The remaining diplomatic and consular staffs in Kuwait closed their doors and departed through Baghdad. Coalition force embassy staffs in Iraq first were reduced and then left Baghdad just before January 15. Iraqi embassies in coalition force capitals remained open, albeit with reduced staffs.[65]

Resolution 666 of September 13, besides reiterating applicability of the Fourth Convention, also requested that the Secretary-General "seek urgently, and on a continuing basis, information"[66] from United Nations and other humanitarian agencies on availability of food in Iraq and Kuwait, particularly for children, expectant mothers, and the sick and elderly. The Security Council, acting through a committee of the whole, would receive reports on such categories and would decide on exemptions for humanitarian purposes. These reports would be provided through International Committee of the Red Cross ("ICRC") or other humanitarian agency auspices. Medical supplies are also exempted from the Resolution 661 embargo if they are for civilians.[67] In a similar vein, Resolution 669 of September 24, in accordance with Article 50 of the Charter, ap-

61. UN SC Res 670, ¶ 13, UN Doc S/RES/670 (1990), reprinted in 29 ILM 1334, 1336 (1990).

62. UN SC Res 674, ¶¶ 1, 8-9 at 240 (cited in note 39) (violations of the U.N. Charter, Diplomatic and Consular Conventions, Fourth Convention and international law).

63. UN SC Res 678, UN Doc S/RES/678 (1990), reprinted in Dept State Dispatch 298 (1990). See also UN SC Res 677, UN Doc S/RES/677 (1990), reprinted in 1 Dept State Dispatch 298 (1990).

64. The International Committee of the Red Cross ("ICRC") tried to intercede with Iraq on these issues, with no success, except to obtain release of Iranian prisoners of war remaining in Iraq after the 1980-88 Iran-Iraq war. *Iran/Iraq: More than 70,000 POWs Repatriated; Jordan: Joint Operation,* No 177 ICRC Bull 1, (October 1990); see also *Gulf Crisis: ICRC Proposals Turned Down,* No 177 ICRC Bull 2, 4 (October 1990); *Middle East: Major Operational Challenge for ICRC* and *Gulf Crisis: ICRC Response,* No 176 ICRC Bull 1 (September 1990); *Half a Million Stranded in the Sand,* 27 No 4 UN Chronicle 8 (December 1990).

65. Patrick E. Tyler, *Foreign Envoys Leave Baghdad As Fear Grows,* New York Times A:11 (January 11, 1991); *Iraqi Ambassador to Quit Britain,* New York Times A:11 (January 25, 1991); *Bonn Orders 28 Iraqis Out,* New York Times A:11 (January 25, 1991).

66. UN SC Res 666 at 1331 (cited in note 59).

67. *Council Acts on Hunger and Suffering,* 27 No 4 UN Chronicle 18-19 (1990).

proved assistance for states hurt by the embargo, such as Jordan. This Resolution allowed a state so affected to consult with the Security Council if "confronted with special economic problems arising from" carrying out Council decisions.[68] As a major trading partner, Jordan had received much of its petroleum from Iraq. Jordan also had borne the brunt of the refugee exodus from Iraq.[69]

As noted above, Resolution 670 of September 25 imposed an air embargo analogous to Resolution 661's land and sea embargo. Rather than allowing interception of aircraft, as permitted by Resolution 665 for vessels, Resolution 670 established control over aircraft through a requirement for denial of takeoff and overflight rights and through states' control of domestic carriers. Food and medical supplies for humanitarian purposes were exempted but remained subject to Council control. Besides the Fourth Geneva Convention, Resolution 670 cited the 1944 Chicago Convention on International Civil Aviation as well as "international law."[70] The Chicago Convention, not applicable to military or other state aircraft, declares that nations may allow civil aviation overflights or landings subject to agreements.[71] Although the United States did not have a formal agreement with Iraq, its arrangement with neighboring Jordan is typical.[72] Such arrangements with Iraq or Kuwait were suspended by Resolution 670, which specifically cited the "trumping provision," Article 103 of the Charter, which declares that Charter obligations prevail over obligations under other international agreements, including bilateral air transport treaties.[73] Resolution 670 also reaffirmed applicability of the Fourth Geneva Convention to Kuwait and that Iraq was bound to comply fully with its terms "and in particular is liable . . . in respect of the grave breaches committed by it, as are individuals who commit or order the

68. UN SC Res 669, UN Doc S/RES/669 (1990), reprinted in 29 ILM 1333 (1990). Jordan was not alone; eight other states requested consultations under U.N. Charter, Art 50. *Sanctions: 106 Countries Reply* (cited in note 26). See also *To Alleviate Economic Hardship*, 27 No 4 UN Chronicle 20 (1990) for a summary of Council debate on Resolution 669.

69. See notes 64 and 68.

70. Compare UN SC Res 661 (cited in note 26) and UN SC Res 665 at 1330 (cited in note 39) with UN SC Res 670 at 1335 (cited in note 61) citing, *inter alia*, Convention on International Civil Aviation, 61 Stat 1180, TIAS No 1591, 15 UNTS 295 (signed December 7, 1944; in force April 4, 1944) ("Chicago Convention"). Like all nations, the United States has procedures for registering and regulating aircraft in international flights. See Federal Aviation Act, 49 USC App §§ 1401-06, 1508-10, 1515-15a, 1521-23 (1988).

71. Chicago Convention at Arts 3, 5-16 (cited in note 70).

72. Air Transport Agreement [Jordan-United States] [1979-1980] 32 UST 2652, TIAS No 9868 (signed February 21, 1980; in force June 8, 1980).

73. See also note 27.

commission of grave breaches."[74] The Fourth Convention defines "grave breaches" thus:

> Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[75]

As a party to the Convention, Iraq cannot absolve itself from these violations.[76]

D. Resolution 678, Authorizing Force

On November 29, Resolution 678 authorized U.N. members cooperating with Kuwait "to use all necessary means to uphold and implement [Resolution 660] and all subsequent resolutions and to restore international peace and security in the area," unless Iraq used its "one final opportunity, as a pause of goodwill," to comply with the Council's resolutions, on or before January 15, 1991.[77] By incorporating through reference all previous resolutions, Resolution 678 provides that the use of force in self-defense, as affirmed in Resolution 661, remains as a Council-approved option. However, January 15, 1991, was not an ultimatum deadline as contemplated by the 1907 Hague Convention (III) Relative to

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74. UN SC Res 670, ¶ 13 at 1336 (cited in note 61). For a summary of the Security Council debate on the resolution, see *More Sanctions Imposed*, 27 No 4 UN Chronicle 21 (1990).

75. Fourth Convention at Art 147 (cited in note 57). For further analysis, see Pictet, 4 *The Geneva Convention* at 596-603 (cited in note 57) noting similar provisions in the other three Geneva Conventions relating to armed conflict.

76. Fourth Convention at Art 148 (cited in note 57). On January 17, when fighting erupted, the ICRC President "solemnly reminded States of their obligation to apply . . . international humanitarian law [including the Fourth Convention's protections for civilians] which they had undertaken to respect." Jean de Courten, *The Middle East Conflict: Position of the ICRC*, No 181 ICRC Bull 1 (February 1991).

77. UN SC Res 678 (cited in note 63). UN SC Res 677 (cited in note 63) had been passed the day before, condemning Iraqi attempts to alter the Kuwaiti population's demographic composition and directing the Secretary-General to maintain a Kuwait-certified copy of the population register. UN SC Res 662 (cited in note 44) had condemned Iraqi declarations that Kuwait was now part of Iraqi territory; UN SC Res 677 was passed after Kuwaiti insurgents succeeded in smuggling a copy of the register out, along with records of securities and other assets. Although the Kuwait government was in exile in Saudi Arabia, its economic policy was executed in London. Kramer, *Toward a New Kuwait* at 28-29 (cited in note 14).

the Opening of Hostilities,[78] as described for World War I so vividly in Barbara Tuchman's *The Guns of August.*[79] Resolution 678 did, however, reaffirm Resolutions 660 and 662, the Council's initial directive to Iraq to vacate Kuwait and its condemnation of the annexation of Kuwait; Resolutions 661, 665, 666, 669 and 670, concerning ship interception, the air embargo, and an affirmation of the inherent right of individual and collective self-defense; 664, 667 and 674, dealing with hostages and the diplomatic and consular missions.[80]

This is how matters stood as of January 15, 1991, as to decisions taken by the Security Council pursuant to its authority under Article 48 of the Charter, which obliges nations to obey such decisions.[81] The dozen resolutions, described on a chronological basis, raised peripheral legal issues, some nearly moot with the beginning of Operation Desert Storm, and some with potential vitality for the future.

III. ISSUES ON THE PERIPHERY OF THE COUNCIL RESOLUTIONS

Besides those issues immediately tied to the Security Council resolutions, for example, violations of diplomatic and consular immunity, taking hostages, violation of other humanitarian and human rights norms, ship interceptions, and the air embargo, the Council's decisions involved four other questions: self-defense, including anticipatory self-defense; the role of the Secretary-General; conflict management as contemplated by the Charter; and the possible role of the International Court of Justice.

A. Self-Defense Under the Charter and the Security Council Resolutions

Article 2 of the U.N. Charter declares that U.N. Members "shall act in accordance with the following Principles." Article 2 declares:

78. Hague Convention (III) Relative to the Opening of Hostilities, Arts 1-2, 36 Stat 2259, 2271 (signed October 18, 1907; in force February 28, 1910). Iraq, Kuwait and Saudi Arabia are not parties to this convention, whose Article 3 states that the convention can only be invoked as among parties; the United States as a party to the convention would not, therefore, be bound under the convention's terms in its relations with these countries.

79. Barbara W. Tuchman, *The Guns of August* 91-157 (Dell Pub, 1962). However, Tuchman's description of the frantic last-minute diplomatic maneuvering has been echoed in the Kuwait crisis and war as deadlines approached. See note 111 and accompanying text.

80. UN SC Res 678 (cited in note 63). Both the North Atlantic Council of NATO and the European Community expressed firm support for Resolution 678 in December, a month before Desert Storm. North Atlantic Council Statement on the Gulf, December 17, 1990; Final Remarks from the European Community Summit Meeting, December 16, 1990, 1 Dept State Dispatch 354-55 (1990).

81. UN Charter at Art 48 (cited in note 28).

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. 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.

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

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially 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.[82]

Article 51, part of Chapter VII, recites:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[83]

Article 52(1) allows "regional arrangements" for dealing with the maintenance of international peace and security, provided that they are consistent with the purposes and principles of the United Nations, stated in Charter Articles 1 and 2. The Council may use such regional arrangements as enforcement measures, but no enforcement may be taken without the Council's authorization, and the Council must be informed of

82. Id at Art 2.

83. Id at Art 51.

activities undertaken or contemplated by such regional agencies, according to Articles 53(1) and 54.[84]

Resolution 660 of August 2 invoked Charter Articles 39 and 40:[85]

> ARTICLE 39
>
> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
>
> ARTICLE 40
>
> In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.[86]

Thus between August 2 and August 6, when the first set of the Cheney self-defense agreements were in place, there was no "decision," by which U.N. members would be bound under Articles 25 or 48 of the Charter, to govern states' actions with respect to the crisis. The Council only "decided" under Resolution 660 to meet again to discuss the issue, thus *sub silentio* invoking Article 12(1) of the Charter to bar General Assembly action.[87] No affirmative obligations on U.N. Members, other than Iraq and Kuwait, were at issue. The preamble and paragraph 9 of Resolution 661, passed August 6, affirmed "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," and allowed assistance to

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84. Id at Art 52(1).

85. UN SC Res 660 (cited in note 25).

86. UN Charter at Arts 39-40 (cited in note 28).

87. *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment* (Nicaragua v US), 1986 ICJ 14, 392, 431-34 *("Nicaragua Case")* found that the International Court of Justice ("ICJ") had competence alongside the Security Council under UN Charter, Article 24, which gives the Council "primary responsibility" for maintaining international peace and security, citing *Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment)* (US v Iran) 1980 ICJ 3, 21-22 *("Iran Hostages Case")* which said that a matter falling under UN Charter, Article 36 could be heard by the ICJ at the same time the Security Council is exercising authority. These cases are not relevant in this dispute because no one has petitioned the court for redress. The Council has been proceeding under U.N. Charter, Chapter VII (action with respect to threats to the peace, breaches of the peace, and acts of aggression) not Chapter VI (pacific settlement of disputes). In any event, prior ICJ decisions do not set precedents in the common-law sense. Statute of the International Court of Justice, Arts 38(1), 59 [1945] 59 Stat 1031, 1060, 1062, Treaty Ser No 993 (signed June 26, 1945; in force October 24, 1945) ("ICJ Statute"). However, the Court's citation of the *Iran Hostages Case* in the *Nicaragua Case* shows that the Court examines its prior decisions as secondary sources and as evidence of practice. Resort to the ICJ is a possibility for some aspects of the crisis. See notes 104-12 and accompanying text.

Kuwait.[88] Significantly, Resolution 661 invoked all of Chapter VII of the Charter, whose Article 41 contemplates decisions on use of armed forces to give effect to its "decisions" and calls upon U.N. members to apply measures such as "interruption of economic relations, such as the embargoes and interdiction directed by Resolutions 661, 665 and 670.[89]

The United States' August 2, 1990, Executive Orders,[90] which utilized national law to freeze Iraqi and Kuwaiti assets located within the United States, can be seen as either retorsions (unfriendly but legal responses under international law) or reprisals (legal only if in proportion and in response to Iraq's preliminary act in violation of international law) designed to force Iraq's return to legality.[91]

The August 9, 1990, Executive Orders, by invoking Resolution 661, must be seen as the United States' attempt to implement its Charter obligations. Thus from August 2-6, when the Council took its first Chapter VII decision, the collective security effort contemplated in the Cheney agreements rested, legally speaking, on self-defense as found in Article 51 of the Charter. Resolution 661, not superseded as to its allowances for self-defense and aid to Kuwait (which could include military assistance for

88. UN SC Res 661 at 1326 (cited in note 26).

89. Id; UN Charter, Chapter VII (cited in note 28).

90. See note 26 and accompanying text.

91. *Case Concerning Air Service Agreement Between France and the United States* (France v US), 18 UN Rep Intl Arb Awards 417, 443-46 (1978) ("Air Service Agreement Case"); 1 Restatement (Third) §§ 203(2) at 84 (cited in note 11). For a pre-Charter example of the disproportionate use of force for reprisals, see the report on the Naulilaa Incident, Green Hackworth, 6 *Digest of International Law* 154-55 (US Government Printing Office, 1943), summarizing *Responsibility of Germany for Damages Caused in the Portuguese Colonies of South Africa* (Germany v Portugal), 2 UN Rep Intl Arb Awards 1011 (Versailles Treaty Arb 1928). See also *Iran Hostages Case* (cited in note 87); Lassa L.H. Oppenheim, 1 *International Law* 345 (Hersh Lauterpacht, ed) (David McKay, 8th ed 1955). A clear example of retorsion against Iraq was when the other states limited the size of Iraq's foreign diplomatic delegation. Iraq soon reciprocated these actions. Given media-reported pronouncements by Iraq that the U.N. coalition has committed aggression against it, Iraq may assert a right of reprisal such as its massive oil discharge. However, Iraq's actions may still be illegal under international law. See Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, Arts 35(3) (signed June 8, 1977; in force December 7, 1978), reprinted in 56 ILM 1391, 1408-09, 1414 (1977). This is a relatively new principle and may not be part of customary law. Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Conflicts* 286, 290-291, 358, 369 (Martinus Nijhoff, 1982). Protocol I has the status of treaty law for several coalition partners such as Kuwait and Saudi Arabia, but neither Iraq nor the United States are party to it. International Committee of the Red Cross, *1989 Annual Report* 120-23 (1990). See also Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques [1979] 31 UST 333, TIAS No 9614 (signed December 10, 1979; in force October 5, 1978), which forbids deliberate manipulation of natural processes (as opposed to artificial processes like drilling for oil) to produce widespread, long-lasting or severe effects to destroy, damage or injure a party to the convention. Kuwait is party to the Convention, but Iraq is not. UN Convention on the Law of the Sea, Art 194 (2), UN Doc A/CONF 02/122 (signed December 10, 1982), reprinted in 21 ILM 1261, 1308 (1982), provides that states must take all measures necessary to ensure that their activities are conducted so as not to cause pollution damage to other states and their environment.

self-defense), reaffirmed the right of a collective security for self-defense. Thus between August 6 and August 25, when Resolution 665 approved seaborne interception, the interception effort of the United States and other nations rested on the right of collective self-defense as articulated in the agreements[92] and affirmed in Resolution 661, and as established rights of reprisal and retorsion under international law. After August 25, the interception issue was governed by Resolutions 665, 666, 669 and 670. Resolution 678, the force authorization, again confirmed the Resolution 665, right to intercept, and the Resolution 661, Article 51 self-defense right.[93]

1. *Other Self-Defense Situations.* The Council Resolutions did not cover all situations. For example, if Iraq had moved against Saudi Arabia, the Resolutions would not have applied; the Cheney agreements would have applied as Saudi Arabia's right of self-defense under Article 51 of the Charter. Similarly, an Iraqi attack on Turkey would have triggered the North Atlantic Treaty Organization ("NATO") Agreement, which provides for collective self-defense by all NATO nations if there is an attack on a NATO member.[94] Media reports indicated that NATO aircraft were sent to Turkey to bolster that right.

92. UN SC Res 661 (cited in note 26); UN SC Res 665 (cited in note 39). Given the Cheney agreements, the legal regime for the crisis at this point is reminiscent of the Cuban Missile Crisis of 1962, although the analogy is not perfect. See Proclamation No 3504, 27 Fed Reg 232 (1962), implementing Joint Resolution of October 3, 1962, Pub L No 87-733, 76 Stat 697; Abram Chayes, *The Cuban Missile Crisis* (Oxford U Press, 1974); Robert A. Divine, *The Cuban Missile Crisis* (Quadrangle Books, 1971); Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (W.W. Norton, 1969); Carl Christol and Charles Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba,* 1962, 57 Am J Intl L 525 (1963); Sally V. Mallison and W. Thomas Mallison, *A Survey of the International Law of Blockade,* 102 No 2 US Naval Inst Proc 44 (1976); Brunson MacChesney, *Some Comments on the "Quarantine" of Cuba,* 57 Am J Intl L 592 (1963); McDevitt, *The UN Charter and the Cuban Quarantine,* 17 JAG J 71 (1963); Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense,* 57 Am J Intl L 597 (1963); Leonard C. Meeker, *Defensive Quarantine and the Law,* 57 Am J Intl L 515 (1963); Covey Oliver, *International Law and the Quarantine of Cuba: A Hopeful Prescription for Legal Writing,* 57 Am J Int L 373 (1963); John W. Robertson, *Blockade to Quarantine,* 17 JAG J 87 (1963); Quincy Wright, *The Cuban Quarantine,* 57 Am J Intl L 546 (1963). The U.N. Secretary-General argued, however, on August 16, 1990, that the unilateral interceptions would violate international law. Paul Lewis, *U.N. Chief Argues Blockade Is Hasty,* New York Times A:12 (August 17, 1990).

93. UN SC Res 661 (cited in note 26); UN SC Res 678 (cited in note 63); see also note 91 and accompanying text.

94. North Atlantic Treaty, Art 6, 63 Stat 2241, 2244, TIAS No 1964, 34 UNTS 243, 246 (in force April 4, 1949), as modified by Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, Art 2, [1952] 3 UST 43, 44, TIAS No 2390, 126 UNTS 350 (signed October 17, 1951; in force February 15, 1952).

Coalition force ships on the high seas also could have exercised self-defense rights.[95] It would seem, then, that the United States and other parties to the force would be free to exercise individual or collective self-defense rights under Article 51 in the face of an Iraqi-sponsored attack on neighboring nations in the coalition.

Iraq launched indiscriminately-fired Scud missile attacks against Israel. Some of these Scuds struck population centers, a clear violation of Article 2(4) of the Charter. Israel is not a member of the coalition arrayed against Iraq, although Israel is a U.N. member and, therefore, is subject to Security Council resolutions like all other members. The Charter is not a mutual defense pact like the NATO Agreement; however, Article 51 affirms Israel's right to respond in self-defense. Israel might choose retorsions or reprisals, although these options are limited under international law.[96]

2. *Anticipatory Self-Defense.* Besides the traditional and better-known "reactive" form of self-defense, the multinational force might face events calling for anticipatory self-defense, individually or as a group. The doctrine has its origins in the *Caroline* case of 1837, in which British naval forces attacked U.S. citizens aboard the *Caroline* in the Niagara River (the U.S. citizens were aiding rebellion in Canada). Great Britain asserted that the *Caroline's* destruction was an act of self-defense. By 1842, the United States and Great Britain had agreed that such a right, involving destruction of the source of an opponent's armed force before the shell or bullet is on the way, was proper under international law. United States Secretary of State Daniel Webster confirmed in a letter to the British ambassador that there were limitations to the doctrine: "[u]ndoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.' "[97] The response also must be proportional.

Since then, arguments have continued concerning availability of the doctrine and its scope in an age of radar-directed weapons, long-range supersonic missiles, and weapons of indiscriminate mass destruction such

95. Special Warning No 80 of August 17, 1990 and succeeding NOTMARs asserted "the inherent right of collective self-defense." See note 50 and accompanying text.

96. See note 91 and accompanying text.

97. Letter of U.S. Secretary of State Daniel Webster to U.K. Ambassador Lord Alexander B. Ashburton, August 6, 1842, John Basset Moore, 2 *Digest of International Law* 411-12 (US Government Printing Office, 1906); the letter from Daniel Webster to U.K. Minister, Henry S. Fox, April 24, 1841, in Kenneth E. Shewmaker, ed, 1 *The Papers of Daniel Webster: Diplomatic Papers* 58, 67 (U Press of New England, 1983).

as gas or biological warfare devices. Many commentators believe that anticipatory self-defense is still legally available, at least in the context of individual nations, and perhaps in the context of collective self-defense as well.[98]

Today the issue is moot, given the attack by the U.N. coalition of forces against Iraq and subsequent missile attacks by Iraq against Israel. However, the issue could have reopened if Iraq had threatened the attack capability of other nations not members of the coalition, such as Iran or Jordan, and the victim state had the capability to deliver an anticipatory response.

3. *Unilateral Action*. The United States or the multinational force could not have attempted to solve the Kuwait crisis by unilateral invasion of Kuwait or Iraq; in the absence of a claim of self-defense or Security Council authorization, Article 2(4) forbids such action, and the 1974 General Assembly Resolution 3314 specifies such unilateral actions as aggression.[99] Iraq has identified the January 17 attack as an act of aggression, and undoubtedly would have asserted that such an attack, unsupported by any claim of Council authorization or of self-defense, would also have been aggression. Even if the Cheney agreements provided for this kind of action, they would be unenforceable under Articles 52(1), 53(1) and 103 of the Charter, which repeat the supremacy of Charter norms over other treaties.[100]

However, and this is an important caveat, if United States or coalition forces had taken action, or if a state not part of the coalition (for example Israel or Jordan) had acted in self-defense under Article 51, then both the Charter and Security Council Resolutions such as 661, decided pursuant to the Charter, would have affirmed their right to unilateral action. For example, if the Cheney agreements provided for collective self-defense among Kuwait, Saudi Arabia, the United States and Persian Gulf nations, as they probably did, then Article 51 would have given these nations the right to proceed with self-defense measures against Iraq and Iraqi-held Kuwait, including anticipatory self-defense.[101] Technically

98. Anthony D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 Am J Intl L 584 (1983) summarizes views of some commentators. See Bowett, *Self-Defense* at 58-60, 142-44, 189 (cited in note 32), arguing that anticipatory self-defense continues under the Charter as before. For an opposing view, see also the *Nicaragua Case* (cited in note 87), and Brownlie, *International Law and the Use of Force* at 250-80 (cited in note 32). See also Note, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 Vand J Transnatl L 1161, 1206-22 (1989), which summarizes high seas incidents; George Bunn, *International Law and the Use of Force in Peacetime: Do US Ships Have to Take the First Hit?*, 39 No 3 Naval War Coll Rev 70 (1986).

99. See notes 30-33 and accompanying text.

100. UN Charter Arts at 52(1), 53(1) (cited in note 28); see notes 27, 73 and accompanying text.

101. See notes 97-98 for sources on anticipatory self-defense.

this right remained available after the January 15 deadline; nothing in Resolution 678 on the use of force limited it. Any other use of force after January 15 would have been authorized under both Resolution 678, which generally invokes Chapter VII, and Article 51 within Chapter VII.[102]

One might argue that the 1986 case of *Military and Paramilitary Activities in and against Nicaragua* ("*The Nicaragua Case*") in the International Court of Justice, which declared that collective in-country operations in Nicaragua were an illegal response to actions that did not constitute an armed attack,[103] applies to the Kuwait Crisis. *The Nicaragua Case* does not apply for three reasons: (1) it was concerned with Article 15 and 36 issues, the latter being part of Chapter VI of the Charter, and the Kuwait crisis has been under Chapter VII; (2) the Security Council has repeatedly affirmed the right of self-defense; (3) cases such as this, in any event, cannot operate as precedent in the common-law sense.[104]

B. The Role of the U.N. Secretary-General

The U.N. Secretary-General, identified by Charter Articles 97 and 98 as the chief administrative officer of the United Nations and with such other functions entrusted to him by the Council, has been an active player since the passage of paragraph ten of Resolution 661 of August 6. This Resolution requested him to report on the progress in implementing the embargo, the first report being due in thirty days.[105]

The Council also asked him to report, in Resolution 664, on Iraq's compliance with the Council's demand that nationals of third states be allowed to depart.[106] Resolution 666 asked him to use his good offices in facilitating delivery and distribution of food to Kuwait and Iraq.[107] Resolution 670 of September 25 welcomed the Secretary-General's use of good offices to advance a peaceful solution;[108] the same statement came in paragraph twelve of Resolution 674 of October 29.[109] Resolution 677 asked him to take custody of the Kuwaiti population register.[110] And since the force Resolution 678 of November 29 incorporated by reference all of

102. UN SC Res 678 (cited in note 63).
103. See *Nicaragua Case* (cited in note 87).
104. See note 87.
105. UN SC Res 661 at 1327 (cited in note 26).
106. UN SC Res 664 (cited in note 54).
107. UN SC Res 666, ¶ 7 (cited in note 59).
108. UN SC Res 670 (cited in note 61).
109. UN SC Res 674 (cited in note 39).
110. UN SC Res 677 (cited in note 63).

these, he had clear authority to make the "last-ditch" effort to avert war by visiting Baghdad just before January 15.[111]

The plain language of the resolutions cannot, of course, tell the whole story. For example, Charter Article 99 allows the Secretary-General to bring to the Council's attention "any matter which in his opinion may threaten maintenance of international peace and security;"[112] undoubtedly he has used this authority. The resolutions cannot describe the efficiency or thoroughness of the planning process, particularly the military planning process which has been used for forty-five years.[113] Acting under the Uniting For Peace Resolution ("UFP"), the General Assembly has charged the Secretary-General with peacekeeping force organization and management in the past.[114] Such a charge from the Assembly does not appear likely in this conflict. However, there could be a move in that direction later, perhaps in connection with a restoration of order in the area.

C. Conflict Management Under the Charter and the Agency Principle

The only conflict management device mentioned in the Charter, aside from the Security Council itself, is the Military Staff Committee ("MSC"), consisting of the chiefs of staff of the permanent members of the Council plus an invited member representative, when that member's participation is required.[115] Among other tasks, the MSC advises and assists the Council on all questions relating to the Council's military requirements for maintaining peace and security, in addition to employing and commanding forces placed at the disposal of the Council. Article 46 of the Charter charges the Council with planning for application of armed force with the assistance of the MSC. From the inception of the United Nations, the Charter contemplated Council and MSC cooperation in maintaining peace and security. Nevertheless, the MSC

111. UN SC Res 678 (cited in note 63). See also Lisa Beyer, *Last Gasps on the Negotiation Trail*, Time 30 (January 21, 1991) (US ed). For the prior week's efforts, see Lisa Beyer, *Last Chance to Talk*, Time 15 (January 14, 1991) (US ed).

112. UN Charter at Art 99 (cited in note 28).

113. See notes 110-111 and accompanying text.

114. See generally Rosalyn Higgins, 1-4 *United Nations Peacekeeping* (Oxford U Press, 1970); United Nations, The Blue Helmets: A Review of United Nations Peace-Keeping, ISBN: 92-1 100275-3, UN Sales No E 85 1 18 (1985). U.N. peacekeeping forces were at work in Iran, Iraq and Lebanon even as the Kuwait crisis unfolded next door. See *UNIIMOG Mandate Reversed, Troop Withdrawals Welcomed*, 27 No 4 UN Chronicle 23 (1990); *UNIFIL Mandate Extended Until 31 January 1991*, 27 No 4 UN Chronicle 24 (1990).

115. UN Charter at Art 47 (cited in note 28).

atrophied, a victim of the Cold War.[116] However, the recent citation to the Military Staff Committee in Resolution 665 may indicate a renewal of interest in the MSC, which reflects the Soviet change of position in recent years with respect to U.N. participation.[117] However, there has been little indication of further employment of the MSC. The United States and other nations may be concerned about efficiency of command and control through the MSC, particularly in view of the fact that the MSC has not been an operational agency and may be inefficient simply because of disuse.

Thus far the Security Council has operated as a committee of the whole, at least since Resolution 661 established the Committee of the Security Council, informally known as the Sanctions Committee, with stated responsibilities: to examine the Secretary-General's reports commissioned by the Council; to seek information from other states regarding action taken by them concerning implementation of provisions of Council resolutions; and to meet and consider what shipments should pass to Iraq under the exceptions for humanitarian aid.[118]

Prior incidents of the Security Council's commanding military action have followed an agency principle. For the Korean War, Council Resolution 84 requested that the United States appoint the commander of a unified command to which all members were to provide assistance, including forces.[119] Additionally, when the Security Council decided to condemn Rhodesia's unilateral declaration of independence, it charged the United Kingdom as the administering power for suppressing the rebellion in 1965.[120] A separate resolution in 1966 called upon Portugal to bar oil shipments from Beira to Rhodesia and the United Kingdom to prevent "by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia."[121]

116. Goodrich, Hambro and Simons, *Charter of the United Nations* at 329-33 (cited in note 21); Moynihan, *On the Law of Nations* at 112-13 (cited in note 10). Michael Mandelbaum, *The Bush Foreign Policy*, 70 Foreign Affairs 5, 11 (1991).

117. Moynihan at 97-99 (cited in note 10); UN SC Res 665, ¶ 5, (cited in note 39).

118. UN SC Res 661, ¶ 6, at 1327 (cited in note 26); see also UN SC Res 666, ¶¶ 1, 3, 5-6 at 1331 (cited in note 59); UN SC Res 669 (cited in note 68); UN SC Res 670, ¶¶ 3-4, 6, 9 at 1335-36 (cited in 61).

119. UN SC Res 84, UN Doc S/RES/84 (1950), reprinted in Karel C. Wellers, ed, *Resolution and Statements of the United Nations Security Council (1946-1989)* 253 (Dordrecht, 1990). See also Edwin C. Hoyt, *The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy-Making*, 55 Am J Intl L 45 (1961); Josef L. Kunz, *Legality of the Security Council Resolutions of June 25 and June 27, 1950*, 45 Am J Intl L 137 (1951).

120. See UN SC Res 216 and 217, reprinted in 5 ILM 167-68, (1966). For the result, see Cable, *Gunboat Diplomacy* at 123-26 (cited in note 24); Daniel P. O'Connell, *The Influence of Law on Sea Power* 137-38, 174-75 (Manchester U Press, 1975). Two years later the Council approved an economic embargo against Rhodesia, an "illegal racist minority regime." See note 34.

121. UN SC Res 221, reprinted in 5 ILM 534 (1966).

In all cases, the Security Council had opted for the agency approach in the crisis. Resolution 678 authorizes use of force by the multilateral force.[122] If the crisis continues for some time, it is theoretically possible for the 678 authority to be withdrawn and an MSC-controlled command structure substituted. This result seems about as remote as the possibility of a total Security Council withdrawal of the crisis from its agenda, and instituting a General Assembly peacekeeping force such as the one operating in Lebanon today under Uniting for Peace principles. If Iraq had withdrawn from Kuwait voluntarily or after use of force under Resolution 678, a peacekeeping force could remain under Security Council auspices, with legal authority flowing from Chapters VI and VII of the Charter.[123]

D. The Potential Role of the International Court of Justice

One tantalizing issue is whether the jurisdiction of the International Court of Justice could be invoked. Although Iraq has not accepted the Court's compulsory jurisdiction under ICJ Statute Article 36(2), there is the possibility of invoking Article 36(1), which provides for jurisdiction in accordance with a treaty or by the parties' *compromis.*[124] The Optional Protocols to the Diplomatic and Consular Conventions, breaches of which have been claimed in the Council resolutions, provide for ICJ adjudication, with arbitration and conciliation as alternatives.[125] Iraq is party to both the conventions and the protocols.[126] There is the possibility of invoking the Court's jurisdiction through a bilateral treaty, as happened in the cases of *U.S. Diplomatic and Consular Staff in Iran ("Iran Hostages")* and *The Nicaragua Case,*[127] but there is apparently no such consent by Iraq to jurisdiction. The U.S.-Iraq commerce and navigation treaty, unlike those with Iran and Nicaragua, has no such jurisdictional agreement.[128] There has been no indication of any nation's proposal to litigate

122. UN SC Res 678 (cited in note 63).

123. See note 114 and accompanying text.

124. See UN SC Res 667, ¶ 3 at 1333 (cited in note 38); UN SC Res 674, ¶ 1 at 240 (cited in note 39); UN SC Res 678 at 298 (cited in note 63), referring to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (cited in note 56). ICJ Statute at Arts 36(1) and 36(2) (cited in note 87).

125. Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, Arts 1-3 [1972] 23 UST 3374-76, TIAS No 7502, 500 UNTS 241, 242-44 (signed April 18, 1961; in force June 24, 1964); Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Arts 1-3 [1970] 21 UST 325-27, TIAS No 6820, 596 UNTS 487, 488-90 (signed April 24, 1963; in force March 19, 1967).

126. US Dept of State, *Treaties in Force* at 287-88, 297-98 (cited in note 58).

127. *Iran Hostages Case* and *Nicaragua Case* (cited in note 87).

128. Compare Treaty of Commerce and Navigation [Iraq-United States] 54 Stat 1790, Treaty Ser No 960, 203 LNTS 107 (signed December 3, 1938; in force May 20, 1940), with Treaty of Friendship, Commerce and Navigation [Nicaragua-United States], Art 24(2) [1958] 9 UST 449, 467, TIAS No 4024, 367 UNTS 3, 32 (signed January 21, 1956; May 24, 1958) and Treaty of Amity, Economic

by ICJ *compromis*, or for the Security Council to seek an advisory opinion, as it might under the Charter and the Statute.[129]

Nevertheless, these alternatives remain. If the conflict is drawn out, and it settles into a *sitzkrieg*, or is concluded and settlement alternatives are weighed, the options of resort to ICJ or alternate dispute mechanisms may seem more attractive.[130] If a nation fails to abide by an ICJ decision, the other nation may bring the matter before the Security Council for recommendations or decision.[131] Thus if ICJ adjudication were sought and the Security Council defers further decision on some aspect of the conflict, the Council would still be able to respond if the parties did not abide by ICJ's decision.

III. CONCLUSION

"Never before in the 45-year history of the United Nations had the Security Council 'reacted with such unanimity to an invasion, occupation and purported annexation,' said Secretary-General Javier Perez de Cuellar."[132] Although this statement generally has been true, the Security Council's efforts during the early history of the Korean War and the repression of Rhodesia's illegal regime serve as precedents for some degree of unanimous action.[133] Nevertheless, the confrontation from August through January demonstrates how the Charter planners envisioned the functioning of enforcement measures against aggressors.[134]

Relations and Consular Rights [Iran-United States], Art 21(2) [1957] 8 UST 899, 913 TIAS No 3853, 284 UNTS 93, 134 (signed August 15, 1955; in force June 16, 1957). The Nicaragua-US treaty is no longer in force, having been denounced in the course of the *Nicaragua Case* litigation (cited in note 87).

129. UN Charter at Art 96(1) (cited in note 28); ICJ Statute at Art 36(1) (cited in note 87).

130. See *Nicaragua Case* and *Iran Hostages Case* (cited in note 87). Moreover, the Court's prior decisions have no precedential value in the common-law sense, except as between the litigants and the adjudicated issue. ICJ Statute at Arts 38(1)(d), 59 (cited in note 87); see also 1 Restatement (Third) of the Foreign Relations Law of the United States §§ 102-103 (ALI, 1987) (cited in note 11); UN Charter at Art 33 (cited in note 28). During the fall and winter of 1939-40, after German armies had conquered Poland at the beginning of World War II, and a German peace offer had been rejected, "[b]y mid-January it was clear that both armies would remain dug in for the duration of the winter. Impatient journalists seeking news began to complain of 'the phony war,' or of what some of them called the new doctrine of *sitzkrieg*." Gordon Wright, *The Ordeal of Total War 1939-1945* 19 (Harper & Row Pub, 1968). Germany had employed *blitzkrieg* ("lightning war") tactics in Poland, and England later endured the "blitz." My thanks to Associate Professor, Michael L. Hughes, of the Wake Forest University History Department, for research assistance on this source.

131. UN Charter at Arts 25, 36(1), 37(1), 38, 48, 94(2) (cited in note 28).

132. *Comprehensive Mandatory Sanctions* at 5 (cited in note 36).

133. See note 120 and accompanying text.

134. See Goodrich, Hambro and Simons, *Charter of the United Nations* (cited in note 21), and Russell and Muther, *A History of the United Nations Charter* (cited in note 21).

Nation-states have followed most principles in Chapter VII of the Charter.[135] Indeed, the absence of any reference to the General Assembly's Definition of Aggression and Friendly Relations resolutions, passed by consensus during the height of the use of the UFP alternative, suggests that the Council, for now freed of the veto impediment by great power consensus, is seeking to write its own law under the Charter.[136] The Secretary-General has been at work as the Council contemplates the duties of his office within the context of the Charter.[137] The framework of collective security, from the venerable NATO agreement[138] to the Cheney agreements concluded in August,[139] is in place. However, the Military Staff Committee system, contemplated by Chapter VII, appears to have been bypassed in favor of the agency approach employed during the Korean War and the debate over Rhodesia.[140] Other organizations like the International Committee of the Red Cross have attempted to contribute to resolving the confrontation.[141] The World Court stands ready to play its role in resolving issues arising out of the confrontation.[142] Principles of reprisal, retorsion, and individual and collective self-defense, including anticipatory self-defense,[143] lurk as hidden issues as the conflict has unfolded on the sands of Saudi Arabia and on prime-time television the world over. Now that war has come and apparently gone, another round of issues, ranging from humanitarian law to conflict termination, will face the nations of the international community. Thus far, the legal regime contemplated by the Charter forty-five years ago has been employed relatively effectively.

At the national level, within the United States, the debate over sanctions or force has closed, as has the issue of war-making authority under the Constitution.[144] New questions of industrial mobilization,[145] increased or decreased participation in the war,[146] war termination, and the treatment of returning veterans[147] will confront the United States.

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135. See notes 24-80 and accompanying text.

136. See notes 30-33.

137. See notes 105-14 and accompanying text.

138. See note 94 and accompanying text.

139. See notes 34, 92, 100 and accompanying text.

140. See notes 115, 119-21, 123 and accompanying text.

141. See note 64 and accompanying text.

142. See notes 124-31 and accompanying text.

143. See notes 85-98 and accompanying text.

144. See notes 12-18 and accompanying text.

145. Executive Order 12742, National Security Industrial Responsiveness, 56 Fed Reg 1079 (1991).

146. See note 15-18 and accompanying text.

147. Soldiers' and Sailors' Civil Relief Act of 1940, 50 USC App §§ 501-91 (1990).

"[W]ar is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. . . . The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose."[148] Thus wrote Carl von Clausewitz in the early nineteenth century.

The foregoing analysis has traced the legal aspects of military force under the U.N. Charter and how it has developed in the crisis over Kuwait. However, as von Clausewitz would urge, there are other means of economic and diplomatic pressure, even now ongoing, to achieve ideological coercive and persuasive strategies.[149] As we have seen, unlike Cicero's day when one might say, *"Silent enim leges inter arma"* (the laws are inoperative in wartime),[150] law follows nations and their armies as they proceed to combat and then to settle accounts at the peace table.

Each nation, ranging from the most totalitarian like Iraq to the most open societies like the United States, also must consult its domestic legal system, as well as its domestic economic, moral and other values as part of the calculus of crisis and conflict decision-making.

There are four final observations. First, debates within democracies before and during war are not new; Thucydides reported them in the course of the long Peloponnesian War of the fifth century B.C.[151] Second, a democracy should avoid disruption of the national social and political fabric by a quick, effective conflict that minimally involves its civil society.[152] Third, "[W]ar is hell," as General William Tecumseh Sherman is supposed to have said.[153] Iraq's rape of Kuwait, indiscriminate attacks

148. Carl von Clausewitz, *On War* 87 (Michael Howard and Peter Paret, trans) (Princeton U Press, 1976).

149. See the law-science-policy alternatives for strategies, in Myres S. McDougal, Harold D. Lasswell and Lung-Chu Chen, *Human Rights and World Public Order* 135 (Yale U Press, 1980); Iesuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 Yale Studies in World Public Order 26-27 (1974); George K. Walker, *Sea Power and the Law of the Sea: The Need for a Contextual Approach*, 7 Ocean Devel & Intl L 299, 311 (1979), 83 Mil L Rev 131, 155 (1979).

150. Cicero, *Pro Milone* 4.11 (N.H. Watts, trans) (G.P. Putnam's Sons, 1931).

151. Compare, for example, the addresses of Pericles with that of Alcibrades and the debate over Mytilene. Thucydides, *History of the Peloponnesian War* 2.34-2.46, 2.59-2.65, 3.36-3.50, 6.15-6.19 (Rex Warner, trans) (Penguin Books, 1972).

152. George K. Walker, *Long and Short-Range Causes of The Pelopponesian War*, in US Naval War College Center for Continuing Education: Administrative Guide 34, 39 (March 1, 1984).

153. Attributed to General William Tecumseh Sherman. Sherman is reported to have said this in a brief, impromptu address to 5000 Union Army veterans and others at Columbus, Ohio, on August 11, 1880: "There is many a boy here today who looks upon war as all glory, but, boys, it is all hell." It was later shortened to "War is hell." Sherman later forgot that he had ever said it, much as the public almost immediately forgot the prepared address of President Rutherford B. Hayes, with whom Sherman shared the podium. See generally Lloyd Lewis, *Sherman: Fighting Prophet* 635-37 (Harcourt, Brace and Co, 1958); James M. Merrill, *William Tecumseh Sherman* 379-80 (Rand McNally, 1974); see also *Calley v Callaway*, 382 F Supp 650, 711-12 (MD Ga 1974) (dictum), rev'd, 519 F2d 184

on Israel and Saudi Arabia, and release of crude oil into the Persian Gulf have demonstrated the truth of his statement. No true account of conflict is pleasant, and the prospect of trench warfare laced with chemical attacks brings back revolting memories.[154] As Stephen Crane illustrates in *The Red Badge of Courage*, war brings out the best and worst.[155] Fourth, there are other factors at play on the international plane; von Clausewitz alluded to the "fog of war"[156] that surrounds any military operations. In 1815, Lord Byron wrote in *The Destruction of Semnacherib* of the death of King Semnacherib's army in a single night.[157] Semnacherib ruled Assyria, whose capital was Nineveh, now a ruin in today's Iraq. The event of which Byron and the biblical chroniclers wrote was a major de-

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(5th Cir 1975), cert denied, 425 US 911 (1976). The same sort of elision occurred with respect to von Clausewitz and the "fog of war" attribution. See note 156 and accompanying text. Edward Everett's speech, like that of President Hayes, suffered the same fate of consignment to obscurity when Abraham Lincoln delivered his Gettysburg Address in 1863.

154. Compare, Karnow, *Vietnam* (cited in note 9) with Erich Maria Remarque, *All Quiet on the Western Front* (A. Wheen trans) (Grosset & Dunlap, 1929) (a classic novel set during World War I, which depicts trench warfare from a German perspective). S.D. Landersman, *Will Hussein Use Gas?*, 117 No 2 US Naval Inst Proc 84 (1991), notes that not all gas casualties are fatal, and the percentages of deaths from other weapons were higher in other conflicts.

155. See Stephen Crane, *The Red Badge of Courage* (Random House, 1951).

156. Lance Morrow, *The Fog of War*, Time 16, 18 (February 4, 1991) (US ed). The phrase is said to have originated with Carl von Clausewitz at 117-121 (cited in note 148).

157.

The Assyrian came down like the wolf on the fold,
And his cohorts were gleaming in purple and gold;
And the sheen of their spears was like stars on the sea,
When the blue wave rolls nightly on deep Galilee.

Like the leaves of the forest when summer is green,
That host with their banners at sunset were seen;
Like the leaves of the forest when autumn hath blown,
That host on the morrow lay wither'd and strown.

For the angel of death spread his wings on the blast,
And breathed in the face of the foe as he pass'd;
And the eyes of the sleepers wax'd deadly and chill,
And their hearts but once heaved, and for ever grew still.

And there lay the steed with his nostril all wide,
But through it there roll'd not the breath of his pride;
And the foam of his gasping lay white on the turf,
And cold as the spray of the rock-beating surf.

And there lay the rider distorted and pale,
With the dew on his brow and the rust on his mail:
And the tents were all silent, the banners alone,
The lances unlifted, the trumpet unblown.

And the widows of Ashur are loud in their wail
And the idols are broke in the temple of Baal;
And the night of the Gentile, lunsmote by the sword,
Hath melted like snow in the glance of the Lord!

George Gordon, Lord Byron, *The Destruction of Semnacherib*, Jerome McGann, *Lord Byron: The Complete Poetical Works* 309-10 (Clarendon Press, 3d ed 1981). See also 2 Kings 18-19 and Isaiah 37:36-38. I am indebted to my colleague, Emeritus Professor Hugh W. Divine, for suggesting *The Destruction of Semnacherib*.

feat (perhaps attributable to plague and not the angel of death),[158] although the Assyrian empire did flourish for a time thereafter. Nevertheless, Assyrian hegemony in the Middle East was brief, lasting only during the seventh century B.C., and Assyria vanished as a world power as quickly as it rose.[159] Even as some have said that Iraq is a country that supports an army, Assyria was "the first complete embodiment of the power state on earth."[160] Over 2500 years separate us from Semnacherib and his hordes; other peoples have conquered or settled today's Iraq, and a newer faith, Islam, is a major factor in the confrontation over Kuwait. Even so, will history repeat itself in another precipitous decline of Iraq?

The response to these questions must be answered by the future, for which international law can supply only a few pieces of the puzzle.

158. Albert A. Trever, 1 *History of Ancient Civilization* 97 (Harcourt, Brace and Co, 1936). Given the loss of fresh water and sewage facilities in Baghdad and perhaps other Iraqi cities, the risk of epidemic infectious disease such as cholera or typhoid has increased, and more lives could be lost through this cause than on Desert Storm battlefields. In that respect, the mass death of Semnacherib's army could be repeated in the wake of the Gulf War. In any event, the demise of Saddam Hussein's vaunted army came almost as quickly as Semnacherib's.

159. H.W.F. Saggs, *The Might that Was Assyria* 85-121 (St Martin's Press, 1984). A remnant of the Assyrians still live in modern Iraq. William M. Carley, *How Iraq Attempted to Kill a Dissident in the United States*, Wall St J A:1 (February 27, 1991).

160. Herman Bengston, *History of Greece* 44 (Edmund Bloedow, trans) (U of Ottawa Press, 1980); see also Saggs, *The Might* at 243-68 (cited in note 159) and Trever, *History of Ancient Civilization* at 99 (cited in note 158). H.W.F. Sagg's description of the Assyrian army has striking parallels with the Iraqi forces. Andrew Burn, *The Lyric Age of Greece* 100-6 (Minerva Press, 1967) illustrates the analogous power politics, the role of sickness in decimating armies, and the rapid rise and fall of cultures, in the Middle East during the seventh century B.C. I am indebted to Assistant Professor James Garry DeVoto, of the Wake Forest University Classical Languages Department, for his suggestions on this point.