

The Implication of Iraqi Invasion of Kuwait, A Legal Study within the Framework of the UN Charter

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(Received 25.12.1417H, and Accepted 26.10.1418H)

ABSTRACT. The collective action taken under the aegis of the UN in 1991 has been hailed as a vindication of international Law and of the principle of collective security. It has also been seen as another example of the dominant role of power and national self-interest in international relations. Nevertheless the promise of a new world order based upon the rule of law still seems far from fulfillment, but there is renewed hope that the UN Charter will be taken seriously as an instrument of collective responsibility.

The response of states to the Iraqi invasion of Kuwait raised this hope. It was evident that the States acting through UN processes were mindful of the UN Charter and related general principles of law. Indeed, the consensus required for the Security Council decisions and common action could not have been achieved unless they have been seen as legitimate measures under the basic principle of international law. Nonetheless, national interests and power are the important determinants of states' action, especially, in time of crisis.

This study focuses mainly on the UN Charter provisions involved expressly or implicitly in the Security Council decisions. My comments are designed expressly to throw some light on the implications of those decisions for future action. Truly, one should not expect an event as extraordinary as the Gulf Conflict to be repeated in the future.

The Gulf Conflict has also increased an awareness of the economic and social deficiencies that contribute to internal tensions and to interstate conflicts. Economic development and enhanced employment opportunities are now seen as linked to the maintenance of peace.

Observance of the internationally recognized human rights and of democratic processes is also given more prominence on the agenda for creating a more stable international order. It remains to be seen how seriously those goals will be taken by states and to what degree a collective responsibility to maintain peace will be given practical effect. The Gulf Conflict, in some respects a great calamity, did demonstrate that many countries recognize a common responsibility to combat aggression, although they remain somewhat ambivalent about meeting the costs in lives and material resources. It may well be utopian to expect that wars will be prevented by a common obligation to protect each and all, but it is surely realistic for states to press for the goal of security through preventive measures and the commitment to uphold and, if necessary, to enforce the basic law of the UN Charter.

Introduction

The collective action taken under the aegis of the UN in 1991 has been hailed as a vindication of international Law and of the principle of collective security. It has also been seen as another example of the dominant role of power and national self-interest in international relations. Nevertheless the promise of a new world order based upon the rule of law still seems far from fulfillment, but there is renewed hope that the UN Charter will be taken seriously as an instrument of collective responsibility.

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The commentary that follows is presented under the following headings :

- (1) The Implicit reference to Article (2) Paragraph (4).
- (2) Measures taking under Article (41).
- (3) The applicability of collective self-defense under Article (51).
- (4) Resort to measure enshrined in Article (42).
- (5) The requirement of Article (48) upon Member States.
- (6) Recourse to Article (43) which required the conclusion of special agreements.
- (7) Compliance of UN forces with the humanitarian law of armed conflict.
- (8) The continuance of the UN authority in the aftermath of the cease-fire.

1. The Implicit Reference to Article 2 (4)

On August 2, 1990, the UN Security Council was faced with the massive Iraqi invasion of Kuwait and the purport annexation. This was the first time since the establishment of the UN that the entire territory of a member state was forcibly annexed. Nonetheless, it was not the first time that a state used force to seek recovery of territory it claimed as its own.

The Council acted with unanimity to condemn the invasion. It referred expressly to Articles (39) and (40) of the UN Charter, thus bringing the matter under Chapter VII and empowering the Council to impose mandatory measures. The first Resolution demanded the immediate and unconditional withdrawal of Iraqi forces⁽¹⁾. It also called upon both countries to begin intensive negotiations to resolve their differences. The Resolution did not specify what those differences were, but presumably they included the territorial and financial claims. However, it was a reminder of the problem faced by

(1) **Security Council Resolution 660**, August 2, 1990, *International Legal Materials*, vol.1325, 1990, p. 29.

the Council in seeking a peaceful solution to a conflict, and at that stage, the Council would normally wish to avoid legal judgments and leave room for negotiations.

It was surprising, however, that the Council did not condemn the invasion as a violation of Article (2) Paragraph (4) and an act of aggression. Clearly it was both. Yet Council Resolution 660 determined only that a breach of the peace has occurred which was a finding sufficient to apply measures under Chapter VII. Why there was not a finding of a violation of Article (2) Paragraph (4) or explicit reference to aggression, even the second Resolution⁽¹⁾ adopted four days after the first, did not explicitly refer to Article 2 (4) or to aggression. It did refer to the right of self-defense as applicable in response to the Iraqi attack. It also imposed sanctions under Article (41). Nonetheless, the statements made in the Council by its members left no doubt that they considered Iraqi's action as aggression and a violation of Article (2) Paragraph (4).

Iraqi's claim to Kuwait as Iraqi territory was not regarded by any member of the Council as a legal justification for the invasion. This point was significant since other invading states have justified their use of force as legal on the ground that the territory invaded was their own⁽²⁾. For instance, Argentina claimed that the Falkland were its territory despite British control for (150) years and therefore, it used force in 1982 to recover the islands⁽³⁾. Although, the Argentinean position was not accepted by the Security Council, nonetheless, the Argentinean claim received support from several states, especially those with active territorial claims.

In view of the persistence of irredentist claims, the Council unequivocally rejected Iraqi claim in order to stop any likelihood to be recalled in the future. It also affirmed that armed force may not be used to change the existing boundary of a state even if that boundary was established unjustly or by conquest, the unanimity on this issue of principle strengthened the Resolution force as an interpretation of Article (2) Paragraph (4). The Council also underlined its position in this regard by its decision in a later Resolution to guarantee the inviolability of the international boundary between Iraq and Kuwait which had been agreed to by the two states in 1963⁽⁴⁾.

2. Measures Taking under Article (41)

The Security Council acted with unprecedented speed to impose a trade and financial embargo upon a defiant regime in Iraq. Only four days after the demand for immediate withdrawal the Council realized Iraq's failure to comply, then the Council decided to require mandatory sanctions of a comprehensive character⁽⁵⁾.

(1) **Security Council Resolution 661**, August 6, 1990, *International Legal Materials*, vol.1325, 1990, p. 29.

(2) For instance, India claimed in 1961 that there was no legal frontier between it and Goa because the latter territory had been under the illegal domination of Portugal for (450) years and consequently the armed takeover by Indian troops was legal. However, a majority in the Security Council voted in favor of a draft Resolution requesting India's withdrawal from Goa, but the USSR vetoed the draft.

(3) **Statement of Argentina in UN Documents A/37/pv 51**, November 2, 1982.

(4) **Security Council Resolution 687**, adopted on April 3, 1991, after the fighting ceased. ILM, vol. 30, 1991, p. 846.

(5) **Security Council Resolution 661**, Supra Note 2.

Article (41), though not mentioned in the Resolution, clearly empowered the Council to take measures not involving the use of force to give effect to its decisions and to call upon all members to apply such measures. The Council decisions were legally binding under Article (25) of the UN Charter.

Article (41) is open-ended, it does not list all the measures that the Council may take under its authority. It does mention the complete interruption of economic relations and of air, sea and other means of communication. Resolution 661 required all states to ban imports and exports from Iraq and Kuwait. It also barred the transfer of funds to Iraq and Kuwait and in effect, required a freeze on the bank accounts effected. These sweeping sanctions were required notwithstanding any prior contract or license. Exceptions were made to provide for medical supplies and foodstuffs in strictly humanitarian circumstances.

A committee of the Council was set-up to monitor the implementation of the Resolution through reports of states on actions taken by them. A few weeks after the embargo Resolution, the Council found that Iraqi vessels were still being used to export oil. Alarmed by this, the Council called upon the states to co-operate with the Government of Kuwait if those states had maritime forces in the area to use such measures as might be necessary to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the embargo decision⁽¹⁾. This Resolution was understood to authorize states to use naval force to halt the shipping in question⁽²⁾.

The Council's embargo of Iraqi trade was later augmented by Resolution 670 which ordered all states to deny permission to any aircraft destined for Iraq and Kuwait to overfly their territory except where the UN had given prior approval. The Resolution also included provisions to strengthen compliance with the economic sanctions. It authorized the Council's sanctions committee to continue monitoring the air embargo and also to continue gathering information from all members on their measures regarding trade and financial aspects of the embargo⁽³⁾.

In connection with the embargo, the Council took account of Article (50) of the Charter⁽⁴⁾. That Article provides that any state which finds itself confronted with special economic problems arising from preventive or enforcement measures taken by the Security Council shall have a right to consult the Council regarding a solution of those problems. This relief provision was invoked by twenty-one states that had suffered from the trade embargo⁽⁵⁾. They included oil-importing countries dependent on Iraqi oil and countries that made substantial exports to Iraq and Kuwait. It also was invoked by countries that had many migrant workers in Kuwait and were heavily

(1) **Security Council Resolution 665**, August 25, 1990, *ILM*, vol. **29**, 1990, p.1329.

(2) For instance, of previous example of use of force authorized by the Council in regard to an embargo was a specific authorization to the United Kingdom to use naval forces to block a particular vessel from delivering oil to Mozambique that was destined for Southern Rhodesia in violation of the embargo against the regime of that territory.

(3) **Security Council Resolution 670**, September 25, 1990, *ILM*, vol. **29**, 1990, p.1339.

(4) **Security Council Resolution 669**, September 24, 1990, *ILM*, vol. **29**, 1990, p.1330.

(5) **United Nations Documents S/2207**, 1990 and 22193, 1991.

dependent on them for financial remittances. Recommendations of the Council's Committee on sanctions urged states to increase financial and development assistance to the countries injured by the embargo. The UN specialized agencies and other international organizations were also asked to increase their aid to those countries. The Council did not arrange for any direct financial reimbursement to the claimant countries, but it declared that Iraq is liable to pay compensation for damage to Kuwait and other countries inflicted by the invasion and occupations⁽¹⁾. As a condition of the cease-fire, Iraq accepted in principle its liability as provided by the Council⁽²⁾.

Probably, the most controversial issue faced by the Council during the Gulf conflict was whether the sanctions under Article (41) would prove to be adequate to achieve the Council's objective. After the first two months, it was evident that the embargo was largely effective, particularly in stopping Iraq's oil exports and in cutting off the supply of significant imports of a technical and military nature. There appeared to be little doubt that the Iraqi economy was substantially damaged. However, it was much less clear whether such damage, even if continued, would bring about the demanded change in policy on the part of the Iraqi leadership and if so, when. The United States administration concluded by November 1990 that military action would probably be required to compel Iraq to withdraw from Kuwait. It also persuaded most of the other Council members to support a Resolution authorizing the states to co-operate with Kuwait to take the necessary means to up-hold and implement the prior Resolutions and to restore peace and security in the area⁽³⁾. The two members of the Council Cuba and Yemen opposed to the Resolution questioned its validity on the ground that the Council had authorized the use of force with determining that the Article (41) sanctions would be inadequate. In their view, that determination was required when force was authorized under the terms of Article (42)⁽⁴⁾.

There are two possible answers to this point, one is that Article (42) was not being applied, this issue is examined below. The other answer is that even if Article (42) was applied, the Council discussion showed that members considered that the economic sanctions would not be adequate to achieve the withdrawal of Iraq. Whether this supposition was well-founded can only be a matter of speculation in as much as armed force was used on January 16, 1991.

The end of the hostilities and the Iraqi withdrawal did not bring an immediate end to the sanctions under Article (41). The Security Council decided to maintain a selective embargo in order to ensure compliance by Iraq with all the conditions in the Resolutions. The Resolution adopted by the Council in April 1991, called for the

(1) **Security Council Resolution 674**, October 29, 1990, Security Council Resolution 686, March 2, 1991, ILM, vol. 30, 1991, p.568.

(2) Iraq notified the Council in April 1991 of its acceptance of liability in principle as demanded by Resolution 686.

(3) **Security Council Resolution 678, November 29**, 1990, ILM, vol. 29, 1990, p. 1565.

(4) Article (42) of the UN Charter starts with "... Should the Security Council consider that measures provided for in Article (41) would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces...".

acceptance by Iraq of a great number of conditions imposed by the Council as a basis for a formal cease-fire⁽¹⁾.

The sanctions under Article (41) were modified to a limited extent, in particular to allow the import of food and material for certain essential civilian needs and humanitarian purposes. The export of petroleum products would be permitted to the extent necessary to meet claims on Iraq and the cost of imports.

The conditions imposed on Iraq in the Resolution fell broadly into three categories. One related to Iraq's military capabilities. It required Iraq to destroy all chemical and biological weapons and all ballistic missiles beyond a limited range. It also demanded that Iraq agree not to acquire or develop nuclear weapons and to place all nuclear weapons useable material under the exclusive control of the International Atomic Energy Agency. It further required that Iraq agree to an International Commission that would inspect weapon capabilities and supervise the destruction or removal of those prohibited. A second category of conditions related to the liability of Iraq for loss damage to foreign states, nationals corporations as a result of the invasion and occupation of Kuwait. Specific reference was made to environmental damage and the depletion of natural resources. The Resolution called for fund to pay compensation claims and for a mechanism to determine the appropriate share to be contributed by Iraq, based upon the value of its petroleum exports and the needs of its economy. A third category of items in the Resolution related to the boundary between Iraq and Kuwait (1) and to the development of a UN observer unit to establish conditions for the withdrawal of the coalition forces from Iraq. Other provisions in the Resolution related to the repatriation of Kuwait and third-country nationals and to a commitment against terrorism. Some of the provisions of this Resolution are reminiscent of terms of such treaties of peace as the Versailles Treaty (2).

The April 1991 Resolution is probably the most of complex decision ever adopted by the Council. Its implementation requires a number of administrative and institutional measures by the UN Secretary-General, as well as, by national of states and international bodies. From the standpoint of the Charter and in particular of Article (41), the Resolution shows that economic and other non-forcible sanctions may be a means for enforcing UN requirements that extend beyond repelling aggression or ending hostilities. Iraq accepted the conditions while protesting that the sanctions were illegal and unfair⁽²⁾. Neither Iraqi contention is persuasive. Article (41) expressly allows for sanctions to give effect to the Council's decisions taken under Chapter VII. Such decisions must of course fall within the terms of Article (39) and therefore within the broad aim of maintaining or restoring peace and security. In this case, the Council's decisions rest in part on the premise that the measures taken serve to maintain the peace by reducing the military capabilities of a state that has been guilty of aggression and may be a continuing threat to international peace and security. Other provisions, particularly those on compensation for loss, are measures reasonably related to the establishment of a just peace in keeping with international law. While

(1) **Security Council Resolution 687**, 1991. Supra Note 5.

(2) Iraqi response to Resolution 687 is in UN Document s/22456, April 11, 1991.

those measures go beyond the original demands for Iraqi withdrawal, the Council had ample reason to take such action as part of the restoration of peace and security in the area. It is hard to take seriously the claim of an aggressor that its sovereign rights are violated by restraints on its military capability or by requiring it to pay for damage it caused. A distinction might have been drawn, in respect of reparations between the heavy responsibility of the Iraqi leaders and the burden of reparations on the people as a whole. One would expect this issue to arise when reparations are actually implemented.

3. Resort to Measures Enshrined in Article (42)

It has generally been assumed that the Council's authority to apply armed force under Chapter VII can only be found in Article (42). This assumption was also evidenced in statements made by some of the Security Council members. This is not surprising. For one thing, Article (42) is the only provision in the Charter that expressly empowers a UN organ to take action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Moreover, Article (39), the basic provision of Chapter VII, authorizes the Council to decide what measures shall be taken in accordance with Articles (41) and (42) to maintain or restore international peace and security. A reasonable inference is that if the Council decides on measures, they should be under either Article (41) which are not involving force, or Article (42) which are military⁽¹⁾. Hence, if Resolution 678 is a measure decided on by the Council involving armed force, Article (42) would necessarily apply.

The argument is not entirely compelling. Although Article (42) is the only charter Article that expressly empowers a UN organ to take action by armed force, it does not follow that other provisions may not also apply. This point was made by the ICJ in its advisory opinion in the Expenses Case. The Court then rejected the argument that the armed force authorized by the UN in the Middle East and the Congo had to be based on Article (42). It declared "... the Court can not accept so limited a view of the powers of the Security Council..."⁽²⁾ The Court did not point to any alternative, but it suggested that the Council could act on a liberal construction of its authority derived from its general powers to maintain and restore international peace and security. On that approach⁽³⁾ the reference to Chapter VII in Resolution 678 would call for no further specification. As in the case of consensual peacekeeping operation, the Council would draw on the broad language of the Chapter provisions.

There are of course advantages to constitutional interpretation of such flexibility in cases where decisions are generally acceptable. On the other hand, invoking UN authority for coercive armed forces touches an especially sensitive area, often with far-reaching effects, confusion or uncertainty about the precise legal basis may well create friction. By avoiding reference in Resolution 678 to any particular Article of Chapter VII, the Council left the matter in doubt, giving to questions of authority that may require specific legal grounds. One hypothesis, suggested is that Resolution 678 is

(1) See **H. Kelson, H.**, *The Law of the United Nations*, Mc Millan, New York, 1950, pp. 744-745. See also **Russett P. & Sutrrelin, W. D.** *The UN in New World Order*, Foreign Affairs, Spring, 1991, p. 69.

(2) **ICJ Report 1962**, Advisory Opinion of July 20, 1962, pp. 151-167.

(3) This position was taken.

more compatible with an authorization of collective self-defense than with a conception of the Council as itself taking action by air, sea or land forces. There is no reason to doubt that the Council has authority under Article (51) to express approval of collective defense action in a particular case. This may not be compatible with Article (42) since its terms are flexible, allowing for a variety of actions.

To put it in another way, Resolution 678 may be read as consistent with both Articles (51) and (42). In regard to the latter, the Council's Resolution is an example of action taken by the Council involving the use of military forces. The word action does not mean here that those armed forces shall be under the control or command of the Council. That such command and control was contemplated under other Articles of Chapter VII and should not be read into Article (42). Recognizing Article (42) as a relevant source of authority together with Article (51) would not in itself enhance the Council's authority over the armed forces. It should not be forgotten that Article (51) gives the Council full authority and responsibility incases of self-defense to take measures to maintain and restore international peace and security. To be sure, the use of the term, action in Article (42) may mean enforcement in a mandatory sense rather than an authorization. But even if Article (42) allows for mandatory action, this should embrace the lesser power to recommend or authorize⁽¹⁾. It does not make sense to require a mandatory decision where a recommendation or authorization would suffice to achieve the desired action.

If we assume that the Council's Resolution 678 is also a form of action within the meaning of Article (42), the question arises whether the conditions of that Article have been met. One such condition is that the Council shall have made the determination required in Article (39). The Council did not so when in Resolution 660 if found that a breach of the peace had occurred. It also took provisional measures under Article (40) when it ordered withdrawal and negotiations⁽²⁾.

Article (42) requires that the Council, before acting under that Article, considers that measures provided for in Article (41) would be inadequate. At least two members of the Council agreed that the Council never did decide that the sanctions under Article (41) would be inadequate, consequently, they questioned the legal validity of Resolution 678. While it is true that the Council did not formally declare the inadequacy of the economic sanctions under Article (41), the debates indicate that several members believed that the sanctions would prove to be adequate to bring about a withdrawal by Iraq. Moreover, it is not unreasonable to infer that the Council decision authorizing the cooperating states to use force, impliedly recognized that sanctions would not prove adequate to compel Iraqi withdrawal. The defiant position taken by the Iraqi regime even after six months of sanctions added support to the belief that military action was needed to bring about its compliance. Whether a longer period would have been affective remains conjectual, but there is no doubt that the Council had the legal right to decide on the need for military action.

(1) See **Kelson**, Op. Cit., Supra Note, p. 756.

(2) **Security Council Resolutions 660**, 1990.

4. Recourse to Article (43)

It has been suggested that the Resolution authorizing force is incompatible with the requirement of Article (43) as the Security Council concluded special agreements with member states for the provision of armed forces and facilities to be on call for Security Council action. During the early years of the UN, and even recently, it was thought that such agreements were a condition precedent to collective military measures by the Security Council. Article (106) clearly suggests this interpretation⁽¹⁾. This view was held by the representative of states at the San Francisco Conference⁽²⁾ and was often expressed by commentators on the UN Charter⁽³⁾. On the other hand, no explicit language in Article (42) or in Articles (43) and (45) which refer to the special agreements⁽⁴⁾ precludes states from voluntarily making armed forces available to carry out the Resolution of the Council adopted under Chapter VII⁽⁵⁾. The voluntary response to the Resolutions in the Korean action is in point. In that case, sixteen states provided armed forces and military facilities to assist South Korea in repelling the North Korean aggression. They did so in response to a recommendation, and no legal argument was made by any member that a mandatory decision was necessary.

Article (43), though drafted in obligatory language, has never been applied. The Security Council has not taken the initiative to negotiate such special agreements, though Article (43) requires that this be done as soon as possible. It does not appear that any member state has ever requested such a negotiation. In effect, Article (43) has become a dead letter. Even when a majority of UN members emphasized the need for states to make armed forces available for services under the UN aegis, they did not urge recourse to Article (43) agreements. Thus, the General Assembly adopted Resolutions during the Korean War that recommended that each member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for services as a UN unit or units, upon recommendation by the Security Council or the General Assembly⁽⁶⁾. It is not surprising, of course, that at that time no consideration was given to agreements negotiated by the Security Council, then hopelessly split by the Korean action and more generally by the Cold War. The Collective Measures Committee, set up by the General Assembly in 1950 to consider means of strengthening collective military action, reported on various proposals but did not

(1) Article 106 of the Charter reads in part "... Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42..."

(2) See **interpretation in Report on Chapter VIII**, Section B, Document 881, 111/3/46, 12 UNICO Document 502, 508, 1945, quoted in Kelson *Supra* Note 19, p. 756.

(3) See **H. Goodrich**, *The UN and the Maintenance of International Peace and Security*, Joint Int. Business Ventures, New York, 1961 pp. 398-405, see also **Kelson**, *Supra* Note 19, p. 756, see also **Saksena** *The UN Collective Security*, Stevens Sons, London, 1969 c. m.

(4) In 1948 UN Secretary General Lie stated that action under Article (42) required the Agreements under Article 43, See UN GAOR, 2, Annexes at 10, UN Document A/656, 1948.

(5) **D. W. Bowett**, *UN Forces* F.A. Fraeger Inc., New York, 1964 277, 1964. See also **Sohn**, *The Authority of the UN to Establish & Maintain a Permanent Force*, AJIL, vol. 52, 1958, p. 230.

(6) **General Assembly Resolution 372 (IV) Paragraph**, November 3, 1950, *General Assembly Resolution 503 (VI)*, paragraph (2), January 12, 1952.

suggest any use of Article (43)⁽¹⁾. Whatever measures were considered were not linked to the agreements under Article (43). The underlay premise was that if member states supported use of armed forces under the UN, they would be expected to provide the means without legal compulsion.

The fact that Article (43) agreements have not been concluded and have not been found necessary for military measures does not mean that the Article is devoid of present interest. One implication of the Article is important. It makes clear that member states cannot be legally bound to provide armed forces unless they have agreed to do so. It, thus, affirms a limitation on the authority given to the Council of Article (42) and by Articles (48) and (49). True, this important point rests on an inference, not express language. However, there is added support in the legislative history of the Charter and in the process of ratification for concluding that the Security Council may impose an obligation on a member state to make armed forces available unless that state has agreed to do so through a special agreement with the Council concluded for that purpose⁽²⁾.

5. The Requirement of Article (48) Upon Member States

Another relevant Charter Article in Chapter VII is Article (48), which imposes an obligation on members to take action required to carry out the decisions of the Council as the Council may determine. Article (48) is a key Article in Chapter VII. It implements the enforcement measures decided upon by the Council by giving the Council the right to impose a duty to act upon some or all member states. It is more specific than Article (25), which provides generally that members have agreed to carry out decisions of the Council, Article (48) centralizes within the Council the power to determine which members shall take action required by Council decisions under Chapter VII. Hence, the mandatory decisions by the Council in the Gulf conflict are covered by Article (48), whether or not it is mentioned⁽³⁾. For instance, the sanctions not involving force imposed by Resolution 661 under Article (41) are given obligatory effect by Article (48). Article (48) is particularly applicable where the Council requires action by a given state or group of states. Presumably, that is why the Council referred expressly to Article (48), as well as to Article (25), in its Resolution 670, which prescribed action in regard to air transport and freezing of assets by states in a position to such action.

Article (48) was not applicable, however, to the use of armed force authorized by the Council Resolution 678. It was clear under that Resolution, as well as, under Resolution 665 on the naval blockade that the military measures were not required action. Hence, by its terms Article (48) did not apply to such permissive action,

(1) **Report of the Collective Measure Committee**, 7, UN GAOR Supp. No.17, UN, Documents A/2215, 1952.

(2) See **UNICO Report**, Supra Note 33, see also **Glennon A.**, the Constitution and Chapter VII of the UN Chapter, *AJIL*, 86, 1991. Note. Congress, the President and the Power to Commit Force to Combat, *Harvard Law Review*, vol. 81, 1968, pp. 1771-1800.

(3) Although Article (48) refers generally to the action required to carry out the decisions of the Security Council it must mean the decisions that are made under Chapter VII involving action that is legally required. It would not apply to all decisions made by the Council in the sense of Article 27. The important distinction between binding and non-binding decisions is not erased or blurred by Article (48).

whereas, it did apply to the mandatory economic and transportation embargoes required of all members.

Article (48) is also significant as the basis for the binding Charter of the Council's decisions that imposed conditions on Iraq to be carried out after the cease-fire, in particular in Resolution 687, discussed earlier. These conditions were accepted by Iraq, obviously under duress, but they are obligatory by virtue of Articles (48) and (25) irrespective of Iraq's acceptance.

6. The Applicability of Collective Self-Defense under Article (51)

The legal concept of collective self-defense was invoked in the Gulf conflict almost immediately after the invasion by Iraq. Kuwait requested the aid of other countries and steps were taken by Saudi Arabia, the United States and the United Kingdom to lend assistance. The Security Council in its Resolution 661, which adopted sanctions under Article (41), also included in its preamble a paragraph that affirmed the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait⁽¹⁾.

This was the first time the Council recognized in a Resolution that the right of collective self-defense is applied in a particular situation. It is interesting that the Council did so in the same Resolution in which it adopted economic sanctions. Presumably, the members did not consider at the time that measures of self-defense were inconsistent with, or terminated by the Council's non-forcible sanctions. I will return to this issue below.

In affirming the applicability of collective self-defense in the Gulf situation, the Council recognized that third state had the right to use force to aid Kuwait, even though those states themselves had not been attacked and had no treaty or other special links with Kuwait. The point has some importance because earlier legal commentary by respected scholars suggested a contrary position⁽²⁾. The Council's affirmation supports the position that any state may come to the aid of a state that has been illegally attacked. However, the Council took no position on whether such aid must have been requested by the victim state, as held by the ICJ in the Nicaragua case of 1986⁽³⁾. The question was not an issue in the Iraq-Kuwait case since Kuwait had expressed its desire for assistance.

While the Council's affirmation of the right of collective self-defense was not legally required, it served to bolster the case for naval action against Iraq to enforce the embargo. It also supported the contention that it would be legitimate for the third states to use force, if necessary, against Iraq to compel its withdrawal. Since there had been an armed attack, the only additional requirements would be the conditions imposed by General International Law, namely, that the self-defense measures would be necessary

(1) **Security Council Resolution 661**, Supra Note 2.

(2) **D. W. Bowett**, *Self-Defense in International Law* Oxford Un. Press, 1958, pp. 216- 218. See also **Kelson**, *The Law of the UN*, McMillan, New York, 1950, p.792.

(3) **Military and Para-Military Activities in and against Nicaragua** (Nicaragua V United States) 1986, ICJ Report 14, 105, Paragraph 199, Judgment of June 27, 1986.

and proportional to the end thought⁽¹⁾. The determination of those conditions would be left, in the first instance, to the states resorting to self-defense, but the Council could, if it so decided, order termination of the self-defense measures.

The right of collective self-defense, however, came into question a few weeks after the UN imposed the sanctions under Article (41). The perception that such sanctions were not likely to bring about an Iraqi withdrawal had led to proposals for military action. Saudi Arabia, the United States and other states considered that such action would be permissible under collective self-defense, based upon the necessity to compel the aggressor to withdraw unconditionally. As against this position, it was argued by other states and some international lawyers that the right of self-defense no longer applied when the Security Council had adopted measures it considered necessary to repel the armed attack⁽²⁾. This argument rested upon the language of Article (51) which safeguarded the right of self-defense, until the Council has taken measures necessary to maintain international peace and security. If these words are taken literally, the right of self-defense would be overdone whenever, the Security Council adopted measures considered in case of an armed attack on a state. This would be an implausible, indeed absurd, interpretation. A Council decision that calls upon an invader to withdraw and to cease hostilities is certainly a necessary measure, but it could not be intended to deprive the victim state of its right to defend itself when the invader has not complied with the Council's order. A reasonable construction of the provision in Article (51) would recognize that the Council has the authority to adopt a measure that would require armed action to cease even if that action was undertaken in self-defense. However, this would not mean that any measure would preempt self-defense. The intent of the Council as expressed in its decision would determine whether the right to use force in self-defense had been suspended by the Council.

In the Iraq-Kuwait case, the principal argument that collective self-defense was suspended by Council action relied upon the fact that the Council had adopted mandatory economic sanctions under Article (41). It was obvious that such economic sanctions were adopted in the hope that they would be effective in bringing about the withdrawal of Iraqi forces. While this was the hope, the Resolution contained no indication that self-defense rights were meant to be terminated by the adoption of sanctions. Indeed, the very Resolution No. 661, that first adopted the economic sanctions included the preambular paragraph, referred to above, affirming rights of individual and collective self-defense. The adoption of sanctions and the simultaneous affirmation of self-defense are surely inconsistent with an intention to bring an end to self-defense measures. It is, fair however, to say that the Council discussion showed that the Council members desired economic sanctions to be used in lieu of military measures. On the other hand, it was made clear by some participating states, notably, Saudi Arabia, the United States, and the United Kingdom that failure of economic sanctions might make it necessary to resort to armed force under Article (51). In their

(1) *Ibid*, paragraph 194, p. 103.

(2) **A. Lawis**, (1990) United States Preparing Draft on Claim against Baghdad, *New York Times*, Nov. 1, p. 12, Column 1.

view, no further authorization by the Council was required if collective self-defense proved necessary.

Significantly, no state contested the ultimate right of the Council to prohibit all military action by a state, even if defensive. Article (51) is entirely clear that self-defense claims are subject to the Council authority. The Council may order a claimant to cease military action even if that action was legitimate defense. However, a decision of that character would need the unanimous concurrence of the permanent members, hence, it could not be adopted over the objection of one or more of those members. In the Gulf case, the Council would not have been able to adopt a Resolution terminating or suspending the right of self-defense as long as a permanent member opposed that proposal⁽¹⁾.

The controversy over pre-emption ended when the Security Council adopted Resolution 678 on November 29, 1990, authorizing the states cooperating with Kuwait to use all necessary means to uphold and implement the Council's Resolutions if Iraq did not unconditionally withdraw on or before January 15, 1991. It was amply clear that necessary means included the use of armed force to bring about Iraq's withdrawal and compliance with other provisions of the twelve Resolutions adopted between August 2, and November 29. As of January 16, Resolution 678 was treated as the legal basis of the large-scale military action by the coalition of states that brought about the defeat of Iraq at the end of February 1991 and its withdrawal from Kuwait.

The precise Charter basis of Resolution 678 was somewhat uncertain. The Resolution itself declared that the Council was acting under Chapter VII, but it did not specify which Article of Chapter VII. It, thus, left several possibilities open to conjecture. One was that Chapter VII in general provided an adequate legal basis. Another view was that a Resolution authorizing armed force necessarily came within Article (42) and had to meet the requirements of that Article. Still a third position was that the authorization came properly within the scope of collective self-defense and that the Council was exercising its authority under Article (51).

A good case can be made for this latter position. One reason for treating Resolution 678 as falling within Article (51) is that it authorized the group of states identified as cooperating with Kuwait in resisting the invasion to take the necessary means to achieve the objectives previously declared by the Council and, in addition, to restore peace and security in the area. It is significant, in this respect that the Council did not decide that the armed forces of the cooperating states were to be placed at the disposal or under the control of the Security Council. No UN command was set up, no reference was made to a UN force or to use of the UN flag. These were features of the UN

(1) It has been suggested that if a proposed Resolution authorizing force such as 678 had been vetoed, collective self-defense action would have been barred. See **O'Connell D. P.** *Enforcing the Prohibition on the Use of Force*, Stevens, London, 1955. The UN's Response to Iraq's Invasion of Kuwait, ULJ, vol. 15, 1991, pp. 453-478. This suggestion is clearly wrong. It does not make sense to conclude that failure of the Council to endorse action by a state should bar that action when it is otherwise permitted by the Charter and International Law. A veto can obviously prevent a Council decision and therefore block the Council from prohibiting action. But a veto of a Resolution that would approve or authorize otherwise permissible action cannot have the legal effect of preceding that action.

authorized force in Korea, their omission here is a further evidence that means leaving timing, command and control to the participating states.

It may be asked why a new Resolution was required when the Council had already affirmed the right of collective self-defense soon after of the invasion. Measure, collective self-defense action did not require Council approval or authorization of self-defense. However, the Resolution served the political purpose of underlining the general support of the UN for the military measures if Iraq did not withdraw before, January 16, 1991⁽¹⁾. In addition, the resolution, supported by all of the cooperating states committed to collective action, clarified the objectives of the collective defense action.

Considering the action of the UN and the coalition as legally within collective self-defense calls for some further comment. To characterize the military action as collective self-defense rather than as a UN action does not imply that the use of force was wholly a matter of discretion for the cooperating states, nor does it mean that the Council lacked authority to place limits on the military action. Article (51) expressly recognizes that, in case of self-defense, the Council retains the authority and responsibility to take such action as it deems necessary to restore international peace and security. This language makes it clear that the Council may decide on the limits and objectives of the military action authorized as collective self-defense.

Resort to collective self-defense is also subject to requirements of necessity and proportionality even though those conditions are not expressly stated in Article (51). Both requirements were discussed in the Security Council and by the states concerned for several months. Indeed, the length and intensity of the open debates on those issues are without precedent in international bodies. One important issue, already noted was whether economic sanctions would be effective enough to make military action unnecessary or excessively costly in human lives and material. Though these issues were controversial, the conclusion reached by a majority of the Council and reflected in its authorization to use armed force may be regarded from the legal standpoint as an authoritative determination of necessity by the competent international organ acting on behalf of the entire UN.

It is worth noting that the debate in the Council and elsewhere ramified on whether the use of force was necessary or not. However, self-defense took a direction rather different from the way the issue had previously been discussed by international lawyers, the agreement advanced by opponents of the use of force contended, as noted above that economic embargo would prove to be effective in due course, in their view, force was not required as a matter of self-defense. The debate then centered upon whether that contention was well-founded.

The criterion of necessity, thus debated, is quite different from the view previously accepted that an illegal armed attack on a large scale is in itself sufficient to meet the

(1) Many states supporting action against Iraq regarded it as important for domestic political reasons to have UN authorization. See **Friedman S.**, Allies Tell Baker, Use of Force Needs UN Backing, *New York Times*, November 8, 1990 at A 14 Column 1. The UN Resolution authorizing force was probably of decisive importance in obtaining UN Congressional approval.

requirement of necessity for self-defense⁽¹⁾. The possibility that an economic blockade might cause the aggression to turn back was not seriously considered to be a legal reason for denying the right of self-defense. Admittedly, there might be prudential reasons for concluding that peaceful means in lieu of armed force would be sufficient to redress the wrong of an armed attack. But to introduce this possibility as a ground for concluding that armed self-defense against an attack or invasion is not necessary until peaceful means are sought and found unavailing would radically change the prevailing view of self-defense⁽²⁾. It is unlikely that states will move in that direction under existing international conditions.

7. Compliance of UN Forces with the Humanitarian Rules of Armed Conflict

An especially tragic aspect of the Gulf War was the extensive distraction of civilian lives and property that resulted from the coalition's aerial bombing and long distance missiles. Critics of the war, have called attention to apparent violations of the prohibitions in the international law of armed conflict against causing disproportionate and unnecessary suffering to non-combatants.

It is worth noting that no state in the coalition and no military commander suggested that the aggressor state or its inhabitants should be denied the protections of the law of armed conflict. Such suggestions have not been lacking in the past. For instance, the prosecution in the International Military Tribunal in the case against Nazi Leaders at Nuremberg argued that the criminal behavior of the defendants meant that their actions could not be regarded as legal warfare and therefore, must be considered to be common crimes such as murder, theft and the like⁽³⁾. This argument was not accepted by the Tribunal. But from time to time it has been suggested that armed forces resisting aggressors were not fully bound by the requirements of international law of armed conflict. In 1952, during the Korean War, some doubt was expressed by a committee of the American Society of International Law that the laws of war were fully applicable to a UN force opposing an aggressor⁽⁴⁾. The committee suggested that the UN should not feel bound by all laws of war but should select those rules that fit to purposes⁽⁵⁾. In contrast, the Institute de Droit International concluded in 1971 after some years of study and debate that UN forces engaged in hostilities, even if against an aggressor, must comply in all circumstances with the humanitarian rules of armed conflict, including the rule for protection of civilian persons and property⁽⁶⁾. While this conclusion concerned UN force, it would surely apply equally to national forces opposing an aggressor.

(1) Thus, when the Japanese attacked Pearl Harbor or when the Germans invaded Poland to begin World War II it was taken for granted that armed self-defense by the victim states met the requirements of necessity.

(2) See **O. Schochter**, The Right of States to Use Armed Force, *Mich. Law Review*, vol. **82**, 1984, pp. 1620-1635. See also, **Dinstein M.A**, *War Aggression and Self-Defense*, Manchester Un, Press, Manchester, 1988 p.216.

(3) **B. A. Meltzer**, Note on Some Aspects of Nuremberg Debate, *Ch., Law Review*, vol. **14**, 1946-47, pp. 455-461.

(4) **Report of Committee on Study of Legal Problems of the UN**, Should the Law of War Applied to UN Enforcement Action, *ASIL, Proc*, vol. **46**, 1952.

(5) *Ibid*, p. 220.

(6) **Institute de Droit International Annuaire**, vol. **II**, 1971, 465-470.

The coalition forces in the Gulf War expressed no doubt as to the applicability of the rules of armed conflict to their operations. They did charge from time to time that Iraqi actions violated those rules. The Security Council accused Iraq of grave breaches of the Fourth Geneva Convention on Protection of Civilian Persons and Property and the Council affirmed the liability of Iraq and of individuals who committed or ordered such grave breaches⁽¹⁾. However, Iraq made serious violations those would release the coalition forces from their obligations under the law of armed conflict.

Questions were raised in the Council and media as to whether the bombing by the coalition forces of Iraqi civilian dwellings and facilities violated the law's proscriptions of indiscriminate or excessive disproportionate attacks. The military leaders of the coalition responded that only sites of military significance were targeted, but they acknowledged that heavy collateral damage affecting civilians had occurred. Some of that damage evidently, resulted from inadequate information or error and involved the unintended destruction of non-combatant personnel and civilian dwellings. More important was the strategic bombing aimed at the infrastructure that supports military capacity such as power plants, bridges, roads, communications. Such bombing predictably devastated civilian life. A UN survey after hostilities ended found that most means of modern life support in Iraq were destroyed or rendered tenuous including food supply, water purification and other essentials. The enormous devastation that did result from the massive aerial attacks suggests that the legal standards of distinction and proportionality did not have much practical effect⁽²⁾.

The international law issues raised by the aerial bombings of Iraq are too complex to be discussed here in any depth. Nonetheless, some observations can be offered. As we noted earlier, the separation of the military targets and the civilian objects, has been implicitly affirmed in the specific sense that responsibility under the former was not considered to affect the position of the parties under the latter, all are equally bound, aggressor and defender alike. Second, all parties accepted in principle the customary law rule of distinction that is non-combatant protection⁽³⁾. All agreed that armed force may be directed only against military objectives. However, the hostilities revealed how difficult it can be to make a sharp separation between the military targets and civilian objects, especially in an industrial society where their commingling is widespread. The proposed lists of lawful targets, beginning with the 1923 Hague Rules including the more recent enumeration in the authoritative commentary of the International Committee of the Red Cross, mention structure and installations that may serve, in

(1) **Security Council Resolution 670, Sept. 25, 1990**, *ILM*, vol. **29**, p. 1334, and Security Council Resolution 674, *Supra* Note 12, on Violation by Iraq, See Meron T., *Prisoners of War Civilians and Diplomats in the Gulf Crisis*, *AJIL*, vol. **85**, 1991, p. 104.

(2) See **UN Document S/22366**, March 20, 1991, Report of Security-General's Mission to Assess Humanitarian Needs.

(3) Article (48) of Protocol I Additional to the Geneva Convention of 1949 provide, that "... in order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operation only against military objectives. Protocol I Additional to the Geneva Convention of August 12, 1949 and relating to the Protection of Victims of International Armed Conflicts, opened for signature December 12, 1977, *ILM*, vol. **16**, 1977, pp. 1391-1412.

some circumstances, both military and civilian objectives⁽¹⁾. No matter how smart the bombs may be, when they destroy a power plant partly serving military needs, civilian life is also likely to be profoundly damaged. The attempt of Protocol I of 1977 to prescribe a presumption in favour of considering an object to be civilian remains controversial, particularly as the presumption is believed by some to encourage a state to camouflage its military installations⁽²⁾.

The possibility also suggested the importance of clarifying the responsibility for violation of the principles of distinction and proportionality in connection with collateral civilian casualties. Here, too the problem is increased by the commingling of civilian uses and military objectives. In the Gulf War, commanders of the coalition forces maintained that they took every reasonable precaution to minimize civilian casualties, but they did not conclude that aerial bombing of legitimate military objectives was prohibited because civilian casualties would result. A relevant provision of Protocol I requires that a command do everything feasible⁽³⁾ to minimize civilian casualties⁽⁴⁾.

The Gulf war also raised an issue, long debated by experts, in regard to the responsibility of a state subjected to the threat on actuality of aerial bombing. It has been maintained that under customary law, the state in control of an area under attack and of its population has a legal obligation to protect the non-combatant civilians from casualties. Protocol I also recognizes that obligation⁽⁵⁾, through critics of the Protocol have charged that it is unduly disposed to place responsibility on those engaged in the aerial attack⁽⁶⁾.

In the controversy over the bombing of Iraq, the coalition forces charged that Iraq had placed important military facilities into civilian areas in some cases and had also moved civilian close to places of military importance. To what extent these charges were well-founded has not been evident in public records, but they do point up the complexity of determining responsibility for collateral damage resulting from aerial war. Since it is unlikely that new technology will entirely eliminate such collateral damage, the goal of providing protection to civilian populations remains a daunting task for states and their military branches.

8. The Continuance of UN Authority in Aftermath of the Cease-fire

The Security Council initially called for the withdrawal of Iraqi forces from Kuwait and the restoration of the legitimate government of Kuwait. Other objectives expressed in subsequent Resolutions included the payment by Iraq of compensation for damage to Kuwait and third states, the punishment of persons responsible for breaches of the

(1) The fundamental principle is generally accepted and regarded as customary law. See **Meron T.**, *Human Rights and Humanitarian Terms and Customary Law*, Stevens, London, 1989, pp. 62-70.25

(2) **W. H. Parks**, *Air Law and the Law of War*, *Air Force Review*, vol. **32**, 1990, pp. 138-139.

(3) What is feasible is not defined and it is far from clear that it provides much direction to the commanders in a war situation.

(4) *Ibid* pp. 156-158.

(5) See Article (51) Paragraphs (7) and (8) and Article (58) of Protocol Supra Note 46.

(6) See **Parks**, Supra Note 48 pp.157-164. See also Article 51 Paragraph (8), Articles (57) and (58) of Protocol I, Supra Note 46.

Fourth Geneva Convention, and the Restitution of assets taken by Iraq or under its authority. A more general objective was included in Resolution 678, namely to restore international peace and security to the area. This aim appeared to leave room for almost any action by the Security Council that might reasonably be related to ensuring continued peace and security in the Gulf region. Even apart from the Resolution, the Charter included several Articles that empower the Council to make recommendations on taking binding decisions under Chapter VII to maintain and restore international peace and security. It is relevant that enforcement action taken under Chapter VII is not subject to restriction of Article 2 (7) against intervention in matters which are essentially within the domestic jurisdiction of any state.

The discussion within and outside the Security Council during the conflict referred to various proposals to ensure that Iraq would not be a future threat to peace and security in the region. As mentioned above, the Council decided to destroy the installations in Iraq capable of mass destruction and particularly of nuclear, chemical and biological weapons. Limitations on the supply of arms and of high-technology instruments were also mandated in the Council Resolution of April 3, 1991. However, the Council did not call for the ouster of the Iraqi leader Saddam Hussain, and of his regime. The broad legal issue raised by these decisions and proposals relating to the sovereign right of Iraq is whether they would be considered compatible with the principles and purposes of the UN Charter, a requirement made explicit in Article (24) of the Charter. Presumably, a regime that has shown itself to have been an aggressor could be subject to some limitations in respect of its capability to use force. On the other hand, the principles of the Charter require respect for sovereign equality and the right of states to political independence and territorial integrity. These principles and related charter purposes may be considered to limit the authority of the Council to impose a regime on the defeated aggressor, even if the leader responsible for aggression and war crimes might be subject to prosecution by victim states, the people of the country would still be entitled to self-government and basic political rights.

The Council Resolution setting the conditions for a final cease fire implicitly recognized these rights by refraining from imposing constitutional decisions or changing the Iraqi regime. However, the savage repression of dissident minorities by the Iraqi forces after hostilities ended imposed severe strains on policy of non-intervention in internal affairs. The humanitarian concerns led to demands for UN involvement and proposals for military action by the coalition forces. The reluctance of some members of the Council to intervene with armed forces in an essentially internal affair has been attributed to their fear that it would be a precedent for coercive intervention into their countries which faced ethnic or religious opposition. An added element in the Iraqi situation was the larger scale exodus of the Kurdish and Shiite opponents into Turkey and Iran, giving rise to tension between those countries and Iraq. Taking account of that factor, a majority of the Council supported Resolution that condemned Iraq's repression of the Kurds and other groups as a threat to international peace and security⁽¹⁾. The Resolution went on to say that the Council insists that Iraq

(1) Security Council Resolution 688, April 5, 1991, *International Law Materials*, vol. 30, 1991, p. 858-28.

allow access by international humanitarian organization to all who need assistance in all parts of Iraq. It also requested that the Secretary General use all the means at his disposal to address the critical needs of the displaced population of Iraq. The Resolution was understood to provide further ground for continuing economic sanctions, but it did not refer to renewed military action.

Pressure for military protective measures by the coalition forces increased as Iraqi troops continued their attacks on the dissident minority refugees. Safety zones on enclaves were proposed, to be guarded by the armed forces of the coalition. Iraq objected on grounds that the internal conflict was a matter for Iraq alone to handle and that its acceptance of the cease fire terms of the Council did not extend to the exercise of authority and police powers by foreign forces in domestic affairs. Initially, the US, the U.K. hesitated to establish such enclaves, mainly because they feared continuing involvement in a civil war that raise difficult issues of a constitutional character. Subsequently, they did take such action over the objections of Iraq and the expressed misgivings of several other states. But the Security Council was not asked to authorize or endorse the protective measures in the safety zones, presumably because not all of the permanent members were prepared to support them. The absence of explicit Security Council endorsement, together with the basic charter provision against intervention in matters essentially within domestic jurisdiction, was cited by dissenting UN members as grounds for condemning the use of troops in the safety zones as charter violations of serious import. All states, it was argued, had reason to fear the effect of that precedent.

The legal case in support of the protective enclaves rests upon the Council's finding that Iraq's repression of the minorities a threat to international peace and security. This was a credible proposition in light of the trans-border consequences and the resulting tension with neighboring states. Added to this consideration was the close relation between the plight of the displaced Iraqis and the war against Iraq. It could not be ignored that the internal strife was in some respects a consequence of the international military action, placing responsibility of a political and humanitarian character on the coalition to prevent massive attacks by Iraqi forces against non-combatants belonging to particular ethnic and religious communities.

A further point of legal significance is that the foreign forces in the enclaves were limited to the necessary protective action for a relatively short period to allow for relief and the eventual return of the refugees. They did not seek to impose an internal regime of autonomy or minority rights. UN police forces were expected to replace the coalition forces. Iraq's acceptance of the UN relief operation, however, did not extend to UN armed forces. The Secretary General concluded that he could not legally send in UN forces unless the Security Council ordered Iraq to accept it or Iraq agreed to it⁽¹⁾.

(1) However, in May 1991, the Secretary-General did dispatch a small contingent of UN guards to perform minimal policing in an area where displaced Kurds were located and UN relief operations carried out. While the guards were not equipped to defend Kurds from Iraqi military attacks, the Secretary General's action was not expressly authorized by the Security Council or by Iraqi agreement. However, it could reasonably be regarded as implicitly authorized by the Council Resolution 688 of April 5, 1991 Paragraph (5) which requested that the Secretary-General use all the resources at his disposal to address urgently the critical needs of the refugees and displaced Iraqi population. No objection was raised in the Security Council to the deployment of the UN guards.

The impasse drew attention to proposals that UN peace-keeping troops be deployed where internal strife or disorder gave rise to the need for humanitarian assistance. It is unlikely that most states would approve a broad right of the UN to introduce troops for humanitarian purposes against the wishes of the state. However, one cannot exclude the possibility that the UN would invoke Chapter VII, and its mandatory authority under Articles (42) and (48), in cases of humanitarian necessity when the territorial state is unwilling or unable to premise its decision on a finding that the situation constitutes a threat to international peace and security in view of its transborder implications.

The ideal of collective security dominated much of the debate during the Gulf conflict, the political leaders of the coalition and their representatives in the UN proclaimed the necessity of common action against the aggressor⁽¹⁾. The legal historian had observed that collective security which was given legal effect in 1648 after the Thirty Years War since the Treaty of Munster which was a part of the peace of Westphalia which declared the common obligation of the states party to protect each and all and to aid the victim of aggression with advice and arms⁽²⁾. The aphorism that an attack upon one is an attack upon all was much quoted as the way to deter aggression and to enforce the peace⁽³⁾.

The latter-mentioned concept put in global perspective, was given legal form in the Covenant of the League of Nations. All League members accepted the legal obligation to act against an aggressor, they were committed to maintaining an indivisible peace and to defending any state attacked⁽⁴⁾. A potential outlaw state would face community sanctions and therefore, would be deterred from aggression. However, it was not universally applauded. Many feared it would sweep their countries into wars that were of no direct interest to them. Some legal philosophers viewed the idea as illusory, unworkable in a world dominated by national interests and power⁽⁵⁾. The Skeptics found confirmation of their views in the failure of the League of Nations to halt the aggressions of Japan, Italy and Germany. In contrast, World War II was perceived as a successful collective mobilization of law-abiding states against the Fascist aggressors. The victors moved to place the wartime alliance on a permanent institutional basis that would eventually include all states.

The UN Charter did not expressly refer to collective security but it did declare that collective measures against aggression and to prevent breaches of the peace were a major aim of the organization. Unlike the Covenant, it did not rely upon a self-

(1) According to earlier statements in century by Woodrow Wilson, Henry Stimson, Maxim Litvino, Winston Churchill and Franklin Roosevelt, one could have gone back three centuries earlier for similar statements by philosophers and public figures. A legal historian could have observed that collective security was given legal effect in 1648 after thirty years war since the Treaty of Munster, a part of the peace of Westphalia, declared it to be the common obligation of the states party to protect each and all and to aid the victim of aggression with advice and arms.

(2) **G. A. Mangone**, Short History, *International Organisation*, vol. 32, 1954.

(3) **E. Claude**, *Power and International Relations*, McMillan, New York, 1962, pp. 106-107.

(4) **W. Schiffer**, *The Legal Community of Mankind*, Prover Co., Boston, 1959. pp. 202-223 see also **Zimmern, A.**, *the League of Nations and the Rule of Law*, Stevens Sons, London, 1936, p. 265-31.

(5) See **E. Claude**, Supra Note 55, at 153 also see, **Morgenthau H.**, *Politics Among Nations*, Cornell Un. Press, New York, 1961, pp. 470-471, see also **Stromberg, R.**, the idea of Collective Security, Stevens, London, 1956, pp.250-263.

executing obligation to deter aggression. The responsibility to take collective measures was placed in the Security Council, a political body with wide almost unlimited authority to permit and even compel action by all member states. The price for that unprecedented grant of authority was the requirement of unanimity of the five permanent members. This ensured that collective action could not be applied against a major power, or as it turned out, against any state a permanent member chose to protect. The veto and the cold war, taken together, operated to bring collective security virtually to the vanishing point.

Understandably, the Gulf conflict and the success of the collective action under UN authority have led to a new perception. That success showed, for one thing, that unanimity of the permanent members is not a will of the wisp and that a good part of the international community would be prepared to support measures against aggression adopted by the Security Council. It also revealed that states may legitimately give effect to collective security without obtaining the authorization of the Security Council or of any UN body. This is not new. As we have seen, the Charter always included collective self-defense as a legal basis for coercion when a state has been attacked and other states are prepared to aid that state by economic sanctions and armed force. All regional defense alliances in the globe relied upon the principle of collective self-defense as the legal ground for commitments to aid the victims of aggression⁽¹⁾.

Thus, the experience of the Gulf conflict underlined two legal grounds for collective security. It showed that the Security Council was no longer hopelessly thwarted in meeting aggression by the absence of great-power unanimity. The Security Council could adopt forcible sanctions of a binding character and it could authorize military measures. But the Gulf situation also indicated that the Security Council action was not required where collective self-defense could provide the legal basis for measures against aggression. On that basis, authorization by the Security Council would not be required as a matter of the Charter's requirement. Despite that the Council could use its authority to bar or terminate collective self-defense measures. However, as this would require a decision of the Council, it could not be accomplished without the support of the five permanent members, in order to secure the nine required votes. Once again, the veto would impose itself as Council, in a case of this kind, the veto could be employed not to impair the collective action, but to ensure that such measures would not be barred by the Council's decision.

Since collective self-defense may well be the legal basis for future collective security actions, it becomes important to remind states that the conditions for self-defense, collective and individual are imposed by international law. The states claiming the right to use force in collective self-defense cannot be the final arbiters of its legality⁽²⁾. In its much-discussed judgement, the ICJ in the Nicaragua Case passed on the collective self-defense claim of the United States, the Court in that case affirmed the requirements of necessity and proportionality, as well as, the necessity of prior armed attack and a request for aid by the attacked state. The discussion in the Gulf conflict showed sharp differences of opinion over the necessity and proportionality of

(1) **M. A. Dinstein**, *Supra* Note 25, at 230-253.

(2) **O. Schachter**, *Self-defense and the Rule of Law, AJIL*, vol. 83, 1989, p. 259.

the military action taken by the coalition. It is likely that such questions will arise whenever collective self-defense measures are taken.

In consequence, UN organs and especially the Security Council will have a responsibility under Article (51) to consider issues of legality regarding the collective defense actions. In order to do so effectively, the Council will need adequate reports on the self-defense measures. Such reports should be timely and should give enough information concerning necessity, proportionality and the ends sought to enable the Council to make an informed judgement as to the legality of the action taken. It is doubtful that the reports submitted to the Security Council on the military actions by the coalition in the Gulf conflict were intended to be reviewed by the Council. Of course postaudits by the Council on compliance with such abstract standards as necessity and proportionality might be unproductive and perhaps even counter to the proper ends of collective self-defense. This suggests the need for further consideration by the Council and other appropriate bodies of the requirements of legitimate collective self-defense and of the role of the Council under Article (51). Up to now, this subject has not received much attention.

Conclusion

An obvious question raised is whether the precedent of collective measures supported by the near unanimity of the Security Council will prove to be a deterrent against acts of aggression. An expectation that the Council will act similarly in future cases has been viewed hopefully as a factor that will deter states with territorial claims or designs against their neighbours. It has been suggested that small and weak states may take comfort from the precedent.

But blatant aggressions such as Iraq's annexation of Kuwait are rare. National interest in taking costly action against a law-violating state may not seem as compelling in other cases. The application of collective security is bound to have a selective and uneven character, and extra population from the Gulf conflict is uncertain. A desirable outcome of the Gulf conflict, from an optimistic perspective, would be a sustained effort to strengthen preventive measures through collective action. Among the more obvious steps would be greater use of international peace keeping forces under UN or regional authority to perform monitoring and trip-wire functions in threatened regions. The introduction of military confidence - building measures, as suggested for Europe by the Conference on Security and Co-operation in Europe, is also likely to win support as a useful preventive measures. High on an agenda for preventive action in the M.E. and other troubled areas are arms limitation measures. These would be directed not only to countries in the region but to the supplying states. One principal aim would be to eliminate non-conventional weapons and to cut down on buildups of conventional military capabilities. The obstacles to achieving such restraints are generally recognised and easy solutions are not expected. The Security Council's Resolution on conditions of a cease-fire was a first step⁽¹⁾.

(1) In May 1991, President Bush proposed arms control measures for the M.E., including (1) Limits on the supply of weapons (2) Elimination of production and acquisition of material used for nuclear weapons (3) A freeze on producing and testing of ballistic missiles and their eventual lean, and (4) Prohibition of poison gas and biological weapons.

The Gulf conflict has also increased an awareness of the economic and social deficiencies that contribute to internal tensions and to interstate conflicts. Economic development and enhanced employment opportunities are now seen as linked to the maintenance of peace. Observance of the internationally-recognized human rights and of democratic processes is also given more prominence on the agenda for creating a more stable international order. It remains to be seen how seriously these goals will be taken by states and to what degree a collective responsibility to maintain peace will be given practical effect. The Gulf conflict, in some respects a great calamity, did demonstrate that many countries recognize a common responsibility to combat aggression, although they remain somewhat ambivalent about meeting the costs in lives and material resources. It may well be utopian to expect that wars will be prevented by a common obligation to protect each and all, but it is surely realistic for states to press for the goal of security through preventive measures and the commitment to uphold and if necessary to enforce the basic law of the UN Charter.

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الاجتياح العراقي للكويت وتأثيراته دراسة قانونية في نطاق ميثاق الأمم المتحدة

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المستخلص: إن الدفاع الشرعي الذي نفذت مظلة الأمم المتحدة في عام ١٩٩١ قد رحب به على أساس أنه انتصار للقانون الدولي ولبدأ الأمن الجماعي كما نظر إليه على أنه مثال للاستقرار والدفاع عن الشرعية الدولية المبنية على المصالح والعلاقات الدولية . على الرغم من ذلك فإن الأمل في قيام نظام عالمي جديد قائم على أساس من قواعد القانون الدولي لا يزال بعيد المنال ولكن يحدونا الأمل المتجدد في ميثاق الأمم المتحدة الذي يمكن أن نعتبره الأداة الرئيسية الموكول بها مسؤولية الدفاع الجماعي .

إن ردود فعل الدول من الاجتياح العراقي للكويت أوجد الأمل في أن الدول التي أوكلت من قبل الأمم المتحدة بمهمة القيام بعملية الردع الجماعي لديها من الحنكة والإدراك في وضع المبادئ العامة للقانون ذات الصلة موضع التنفيذ وأن الإجماع الذي توافر لإصدار قرارات مجلس الأمن في تفويض تلك الدول في القيام بالعمل الجماعي قد برهن بالدليل على تأكيد الإجراءات الشرعية في عالم الواقع على أساس من مبادئ القانون الدولي . وبالرغم من ذلك فإن المصالح الوطنية وعامل القوة قد لعبا دوراً مهماً في عملية التنسيق بين تلك الدول وبالذات في وقت الأزمة .

هذه الدراسة قائمة في الأساس على ما وجد من نصوص ذات صلة بالأزمة في ميثاق الأمم المتحدة ، سواء كانت نصوصاً صريحة أو ضمنية ، وأن تعليقاتي في هذا المجال تتركز بطريقة صريحة في إلقاء الضوء على التأثيرات والتفاعلات المتعلقة بالقرارات التي صدرت والعمل المستقبلي لمجلس الأمن . وفي الحقيقة لا يمكن أن أتوقع أن يوجد هذا التنسيق في أي حادثة غير عادية مثل مشكلة الخليج يمكن أن تتكرر في المستقبل .

إن نزاع الخليج قد زاد الإدراك في وجود خلل اقتصادي واجتماعي عزز آلية الاحتكاكات الداخلية والنزاعات الدولية بين الدول . ومن هذا فإن التنمية الاقتصادية وإيجاد فرص وظيفية أصبحت ضرورة ملحة ينظر إليها على أساس أنها الرابطة للحفاظ على السلم والأمن في تلك المنطقة وأن المراقبة الدولية قد أثبتت أن حقوق الإنسان والعمليات الديمقراطية يجب أن تعطى أولوية على مبدأ أكثر شمولية لإنشاء نظام دولي أكثر استقراراً لكن يبقى شيء وحيد يجب أن ننظر إليه بجدية ألا وهو الهدف الذي يجب أن تتبناه الدول بدرجة من الجدية ألا وهو المسؤولية الجماعية للحفاظ على السلام والأمن حتى يمكن أن تعطى تلك المفاهيم الأثر الفعلي في التنفيذ الفوري على أرض الواقع . إن نزاع الخليج يمكن أن ننظر إليه من عدة زوايا بأنه معضلة كبيرة وضحت لنا أن عدداً من البلدان قد اعترفت بالمسؤولية المشتركة لمحاربة الهجوم .