

## IRAQ, THE U.N. AND THE LAW\*

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*This paper discusses the international legal issues arising out of the Iraqi invasion of Kuwait and the United Nations response to the conflict. The author frames his analysis considering just war theory, international law and the United Nations Charter. After looking at the historical relations between Iraq and Kuwait, Professor Green examines the United Nations response to the conflict considering the related U.N. resolutions. Reference is made to the law of armed conflict and international law on the treatment of civilians and diplomats. Finally, the author briefly discusses legal problems faced by some of the states aligned against Iraq.*

*Le présent article discute des questions de droit international que soulèvent l'invasion du Koweït par l'Irak et l'intervention des Nations Unies dans le conflit. L'auteur fonde son analyse sur la théorie de la guerre juste, le droit international et la Charte des Nations Unies. Après une étude des relations historiques entre l'Irak et le Koweït, le professeur Green examine la réaction de l'ONU en invoquant d'autres résolutions onusiennes connexes. Il fait référence au droit de la guerre et au droit international qui régissent le traitement des civils et des diplomates. Finalement, il passe rapidement en revue les problèmes juridiques auxquels se heurtent certains des États alignés contre l'Iraq.*

The Iraqi invasion and annexation of Kuwait in 1990 raised a number of issues which may be examined from a variety of standpoints. There is the question of great-power politics and hegemony, of economic interest of third states, of oil distribution and pricing, of peace in the Middle East, including the question of Palestine, and regional settlement by the Arab states. Similarly, there is the question whether it is proper for democracies to risk war in defence of one autocratic ruler against another; or to accept as ally an autocracy which they have accused of being a terrorist state and a supporter of terrorists. In addition the question of the international rule of law and the significance of the Charter of the United Nations are of major concern both immediately and on a long-term basis. It is the purpose of this paper to avoid the more general questions and to concentrate on the legal issues involved.

In any conflict there is bound to be reference to the concept of the just war and this invasion is no exception. Broadly speaking, this concept was first formulated by Thomas Aquinas in his *Summa Theologica*, written about 1270. In this he stated:<sup>1</sup>

For a war to be just three conditions are necessary. First, the authority of the ruler within whose competence it lies to declare war... [J]ust as in the punishment of criminals they rightly defend the state against all internal disturbance with the civil arm..., [s]o also they have the duty of defending the state, with the weapons of war, against external enemies.... Secondly, there is required a just cause: that is those who are attacked for some offence merit such treatment. St. Augustine says<sup>2</sup> 'Those wars are generally defined as just which avenge some wrong, when a nation or a state is to be punished for having failed to make amends for the wrong done, or to restore what has been taken unjustly.' Thirdly, there

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<sup>1</sup> A.P. D'Entrèves, *Aquinas: Selected Political Writings*, (Oxford: Basil Blackwell, 1948), at 159-15. WAR (Qu. 40), The Conditions of a Just War, Art. 1.

<sup>2</sup> *Contra Faustum*, c. 420 A.D., Bk. LXXXIII.

is required the right intention on the part of the belligerents: either of achieving some good object or of avoiding some evil.... [However,] it can happen that even when war is declared by legitimate authority and there is just cause, it is, nevertheless, made unjust through evil intention. [As] St. Augustine says<sup>3</sup> 'The desire to hurt, the cruelty of vendetta, the stern and implacable spirit, arrogance in victory, the thirst for power, and all that is similar, all these are justly condemned in war.'

Basing himself on these views of Aquinas, the Bishop of Oxford maintains that a military exercise aimed at expelling the Iraqi forces from Kuwait fully satisfies the Thomistic conditions for a war to be just.<sup>4</sup> If, however, we are to assess the situation in the light of more modern glosses upon Aquinas' views,<sup>5</sup> we must recognize that war may only be resorted to as a last recourse when all other means of restoring justice have failed, that there must be a prospect of success, and that in its conduct there must be discrimination between combatants and non-combatants,<sup>6</sup> paying due attention to the principle of proportionality.<sup>7</sup> In the light of the modern view, the United States Conference of Catholic Bishops felt,<sup>8</sup> in mid-November, that there had not been sufficient recourse to diplomatic or other processes to accept that armed conflict had yet become justifiable.

It is perhaps irrelevant, especially in view of the significance of the provisions of the United Nations Charter, whether the Bishop of Oxford or the United States Catholic Bishops are correct in their assessment of the justness of the anti-Iraqi confrontation in the Gulf. More significant in assessing the present situation may be the assertion of Grotius,<sup>9</sup> basing himself on Cicero,<sup>10</sup> that "there is no Middle between War and Peace," and this was the general view until shortly before the Second World War, when the English Court of Appeal held<sup>11</sup> that war was a state of fact rather than of legal niceties, and could exist even while the parties continued to behave as if they were still at peace.<sup>12</sup> Moreover, the Geneva Conventions of 1949<sup>13</sup> have established the principle

3. *Ibid.* Bk. LXXIV; see, also, M. Khadduri, *The Islamic Conception of Justice* (Baltimore: Johns Hopkins University Press, 1984) at 172.

4. *The Times* (London), (3 Nov. 1990).

5. See, e.g., S.M. Cohen, *Arms and Judgment*, (Boulder: Westview Press, 1989) at 63-4.

6. See, e.g., Protocol I Additional to the Geneva Conventions of 12 August, 1949, 1977, ratified by Canada 1990, 16 International Legal Materials 1391, Art. 48, "... 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 operations only against military objectives"; see, also, Art. 57, 1.

7. *Ibid.* Art. 57, (a)(iii) "those who plan or decide upon an attack shall ... refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objectives, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

8. Washington Post and *The Times* (London), 12 Nov. 1990.

9. *De Jure Belli ac Pacis*, 1625, Lib. III, cap. XXI, s. 1: "*Inter bellum et pacem nihil est medium*," Eng. tr., 1733, 715; Carnegie tr., 1925, 832.

10. *Philippica*, VIII.

11. *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S. Co.* [1939] 2 K.B. 544.

12. See, e.g., G. Schwarzenberger, who, in his 'Jus Pacis Ac Belli? Prologomena to a Sociology of International Law', 37 *Am. J. Int'l Law*, 1943, 460, spoke of a '*status mixtus*' between war and peace.

that the rules relating to humanitarian law in armed conflict apply whenever a conflict occurs even if one of the belligerents does not recognize the existence of a state of war, and also in the event of the occupation of a party's territory even if that occupation has not been met with armed resistance.<sup>14</sup> Even though Hague Convention III of 1907<sup>15</sup> requires a declaration for war to exist in the legal sense, modern practice shows that this is no longer the case, hence the nature of the provision in the 1949 Conventions. The conflict between Iran and Iraq subsisted for eight years before there was any declaration or even a breach of diplomatic relations. In the current situation in the Gulf we find that diplomatic relations are continuing among the various disputants, while many of the modalities of the law of armed conflict are in operation, even though none of the parties - other than Kuwait - maintains that a war exists.

Before dealing with the legal issues arising from the Gulf situation, some reference must be made to the background of the Iraq-Kuwait confrontation. Prior to the Arab conquest of the seventh century, Iraq had been the site of a number of civilizations, including the Sumerian, Babylonian and Assyrian, with Baghdad the capital and centre of arts and learning and among its greatest rulers was Harun al-Rashid of *Arabian Nights* fame. Iraq, together with the whole of Mesopotamia, came under Ottoman rule during the sixteenth century and direct Turkish administration in the nineteenth. During World War I Iraq was invaded by the British who undertook to free it from Ottoman rule and by the Treaty of Sevres, 1920,<sup>16</sup> between the Allies and Turkey, Mesopotamia was to "be provisionally recognized as [an] independent State subject to the rendering of administrative advice and assistance by a Mandatory until such time as [it is] able to stand alone." Although this treaty was never ratified, the Turkish surrender of sovereignty over the area was confirmed in the Treaty of Lausanne, 1923.<sup>17</sup> In the meantime, the United Kingdom entered into a Treaty of Alliance with the King of Iraq,<sup>18</sup> followed by a Protocol thereto<sup>19</sup> terminating the alliance "upon Iraq becoming a member of the League of Nations and in any case not later than four years after the ratification of peace with Turkey." In 1924 the League adopted the Mandate Agreement whereby, recognizing the provisions of the Treaty of Alliance, the United Kingdom became the mandatory over Iraq.<sup>20</sup> The Mandate subsisted until 1932 when Iraq was admitted to League membership, a further Treaty of Alliance having been signed in 1930<sup>21</sup> for a term of 25 years, granting Britain certain military bases in the country enabling the latter to lead Iraq into World War II as an enemy of the Axis, entitling that country to become an original

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<sup>13.</sup> I, Wounded and Sick in the Field; II, Wounded Sick and Shipwrecked; III, Prisoners of War; IV, Civilians, D. Schindler & J. Toman, *The Laws of Armed Conflicts* (Dordrecht: Martinus Nijhoff, 1988) at 373 *et seqq.*

<sup>14.</sup> Art. 2 common to the four Conventions.

<sup>15.</sup> Schindler and Toman, *supra*, note 13 at 57.

<sup>16.</sup> 3 F.L. Israel, *Major Peace Treaties of Modern History, 1648-1967*, (N.Y.: McGraw-Hill, 1967) at 2055, Art. 94.

<sup>17.</sup> 4 *ibid.* at 2301; 28 L.N.T.S. 11, art. 16.

<sup>18.</sup> 1922, 23 L.N.T.S. at 13.

<sup>19.</sup> 1923, *ibid.* at 18.

<sup>20.</sup> 1 M.O. Hudson, *International Legislation* (Washington: Carnegie Endowment for International Peace, 1931) at 122.

<sup>21.</sup> Br. Tr. Ser. 1931, No. 15.

member of the United Nations.<sup>22</sup> Like Iraq, Kuwait was originally part of the Ottoman Empire, ruled by the Sabah family since the middle of the eighteenth century. In 1899, fearing that the Ottoman authorities would make their nominal authority really effective, the Sheikh entered into an agreement with Great Britain whereby Kuwait became a British protectorate.<sup>23</sup> This status continued until 1961 when Kuwait became independent.<sup>24</sup> Immediately Iraq declared<sup>25</sup> that "Kuwait is an integral part of Iraq.... No individual, in or outside Kuwait, whatever his position, has the right to dominate the Kuwaiti people who are among the people of Iraq. The Republic of Iraq, which has decided to protect the Iraqi people in Kuwait and to claim all territory falling within the borders of the Vilayet of Basrah,<sup>26</sup> refuses to relinquish any part of this territory. We have the power to make our deeds match our words." Kuwait, although not a member,<sup>27</sup> appealed to the United Nations and called upon the United Kingdom and Saudi Arabia to defend it against any attack by Iraq,<sup>28</sup> both of which sent troops. Iraq's attempt to deny competence to the United Nations on the ground that Kuwait was not a 'state' failed, but while a majority of the Security Council condemned Iraq's threats no effective resolution was carried because of a Soviet veto.<sup>29</sup> Kuwait applied for membership of the Arab League and complained of the Iraqi threats, and the League instructed its Secretary-General to visit Kuwait, Iraq and Saudi Arabia to seek a way for the withdrawal of British troops. On receiving a pledge from Kuwait that it would request such withdrawal, the League, Iraq having withdrawn from the meeting, confirmed Kuwaiti sovereignty and independence and admitted Kuwait to the League, a decision that Iraq described as 'null and void' since all admissions had to be by unanimity. The League, however, decided that since Iraq was absent, the vote was unanimous.<sup>30</sup> In accordance with Arab League decisions an Arab League Security Force proceeded to Kuwait to protect its independence and the British withdrew. Kuwait applied for membership of the United Nations in 1961 only to have the application vetoed by the Soviet Union, an attitude which changed in 1963 and the General Assembly approved Kuwait's membership by 'acclamation', not even Iraq casting a negative vote.<sup>31</sup> Once admitted to the United Nations Kuwait's status as an independent state could not be questioned,<sup>32</sup> and it became protected by all the provisions of the Charter.

During the Iranian-Iraqi conflict, 1980-1988, Kuwait supported Iraq and provided it with oil and extensive credits. However, in 1990 Iraq strongly objected to the Kuwaiti

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22. Charter, Art. 3.

23. 11 C.U. Aitchison, *A Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries*, (Calcutta: Government of India, 1933) at 262.

24. Exchange of Notes, 19 June, 1961, Royal Institute of International Affairs, *Documents on International Affairs 1961* (London: Oxford University Press, 1965) at 771.

25. *Ibid.* at 772.

26. Under the Ottoman Empire Kuwait was considered part of the province of Basrah.

27. See U.N. Charter, Art. 35(2).

28. H.A. Hassouna, *The League of Arab States and Regional Disputes* (Dobbs Ferry: Oceana, 1975) at 94. Ch. VI is devoted to the Kuwait-Iraq dispute.

29. *Ibid.* at 95-97.

30. *Ibid.* at 101.

31. *Ibid.* at 109-110.

32. See Charter, Art. 4.

request for repayment on the ground that in confronting Iran, Iraq represented the entire Arab Islamic world and Kuwait should cancel all outstanding liabilities. Kuwait's refusal to comply with this demand was regarded by Iraq as unfriendly, if not hostile. Iraq also maintained that Kuwait was damaging her economic well-being in that it disregarded OPEC's oil quotas, and further accused Kuwait of encroaching upon Iraq's sovereignty by 'milking' oilfields that straddled the Iraq-Kuwait border. Finally, in the light of its experience during its war with Iran when it was effectively cut off from access to the Gulf, it demanded the transfer of the two islands of Bubiyan and Warba an unfriendly possession of which would prevent Iraqi egress into the Gulf. At the same time Iraq assured Kuwait and other members of the Arab League<sup>33</sup> that it had no predatory designs on Kuwait and would not resort to military force in seeking to settle their differences. Nevertheless in August 1990 Iraqi troops invaded and rapidly overcame such resistance as was offered by the local forces.

Virtually immediately after the invasion of Kuwait the Security Council of the United Nations met, largely at the prompting of the United States, and acting under Articles 39 and 40,<sup>34</sup> adopted Resolution 660,<sup>35</sup> condemning the invasion, demanding Iraq's immediate withdrawal and calling upon both Kuwait and Iraq to enter into intensive negotiations to resolve their differences. The Council also resolved to consider such further steps as might become necessary to ensure compliance with the Resolution. Although this Resolution was not unanimous, since it had the requisite nine votes including those of the five permanent members,<sup>36</sup> it was an effective decision which the members of the United Nations — in this instance Kuwait and Iraq — were obliged to obey.<sup>37</sup> This Resolution is similar in its general character to those normally adopted by the Council when one member of the United Nations has become involved in conflict with another.

Only four days later, since Iraq had ignored the Resolution and Kuwait was suffering casualties and material destruction, the Council passed a further Resolution — 661<sup>38</sup> expressing its determination "to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity<sup>39</sup> of Kuwait" having noted Kuwait's readiness to comply with Resolution 660, the Council "mindful of its responsibilities under the Charter for the maintenance of international peace and

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<sup>33.</sup> *The Times* (6 Sept. 1990), reporting statement by Kuwait's Crown Prince and Prime Minister; *ibid.* (28 Nov. 1990), for [Saudi Arabia] King Fahd's comments re "Saddam's treachery."

<sup>34.</sup> "The S.C. 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 [relating to measures to be taken, including armed force] to maintain or restore international peace and security. In order to prevent an aggravation of the situation, the S.C. may ... call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable...."

<sup>35.</sup> 2 Aug. 1990 - the day of the invasion, 29 I.L.M. 1323.

<sup>36.</sup> Charter, Art. 27(3).

<sup>37.</sup> Art. 25.

<sup>38.</sup> 6 Aug. 1990, 29 I.L.M. 1323.

<sup>39.</sup> By Art. 2(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...."

security. Affirming the inherent right of individual or collective self-defence in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter.<sup>40</sup> Acting under Chapter VII of the Charter of the United Nations<sup>41</sup>... Decides ... to take the following measures to secure compliance of Iraq ... and to restore the authority of the legitimate Government of Kuwait. Decides that all states shall prevent" import into their territories of any commodities and products of Iraq or Kuwait and exported therefrom. It further called upon states to forbid their nationals to assist such export or to transfer funds, as well as "the sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs to any person or body" in either country. It also called upon all states, including non-members of the United Nations, to act strictly in accordance with this resolution and to cooperate fully with a Security Council committee set up to watch and report upon the implementation of the Resolution. Finally, the Council "decides that ... nothing in this resolution shall prohibit assistance to the legitimate Government of Kuwait, and calls upon all states to take appropriate measures to protect [Kuwaiti assets] and not to recognize any regime set up by the occupying power."

It should be noted that while the Resolution calls upon all states to take measures to prevent their nationals from breaching the Resolution, it contains nothing that would authorise any state to take action against the nationals of a third state who might be in breach, nor did the Resolution indicate any manner in which it might be enforced. It was not left open for any state to decide upon enforcement measures directed against non-nationals, not even against Iraqis.

It is far from clear why the Council, while acting under Chapter VII which envisages the possibility of enforcement measures, both of an economic and a military character, found it necessary to refer to Article 51. This provision of the Charter is concerned with action taken by members by way of "their inherent right of individual or collective self-defence until the Security Council has taken measures necessary to maintain international peace and security." In view of the fact that the Security Council had taken or authorized such measures by way of Resolutions 660 and 661 it would seem that there was no longer scope for recourse to Article 51. This is particularly so since these Resolutions related to the invasion of Kuwait and none mentioned any potential threat to Saudi Arabia or any other Gulf state. As independent sovereign states any of these is, of course, entitled to call upon any friendly state to assist it in frustrating an Iraqi attack should one occur and Article 51 would be relevant if the countries which have sent forces to Saudi Arabia or its neighbours decided to launch a preventive attack on Iraq in the

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<sup>40</sup>. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the U.N., until the S.C. has taken measures necessary to maintain international peace and security. Measures taken by Members in exercise of this right of self-defence shall be immediately reported to the S.C. and shall not in any way affect the authority and responsibility of the S.C. ... to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>41</sup>. "Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression."

name of collective self-defence, and any such action would have to be reported to the Security Council, which would not be inhibited in any way from taking such action as it might consider necessary, including an order to cease the action already undertaken by individual members. One of the reasons for including Article 51 in the Charter was the knowledge that the Council might not be able to meet sufficiently early or reach a decision in sufficient time to assist a victim of aggression. Further, it could not be expected that a victim of aggression would stand idly under such an attack while awaiting Council action. However, it has generally been accepted that individual or collective action under Article 51 would cease when the Security Council decided to act in the matter, although it must be recognized that, in view of the involvement of some of the permanent members of the Council in the anti-Iraq confrontation, any attempt by the Council to terminate such preventive action would almost certainly be vetoed in accordance with Article 27 of the Charter. In this connection reference might be made to testimony by Secretary of State Dulles before the Committee on Foreign Relations of the United States Senate on the Mutual Defense Treaty with Korea. When asked who would decide when the Council had taken the 'necessary measures', he said "the determination as to that adequacy ... would be ours to make." As to this a leading commentary on the Charter states, "It is not clear whether he meant that every nation had that right, or that as a practical matter, the veto power would not permit the Security Council to take a decision with which the United States disagreed."<sup>42</sup> On the other hand, Kelsen, one of the earliest interpreters of the text of the Charter, was of opinion, that although the issue was ambiguous, "It was probably not the intention of the legislator to confer upon the attacked state the power to decide whether the measures taken by the Security Council are adequate. His idea was probably that a state is allowed to exercise its right of self-defence until the Security Council has taken the measures which the Security Council deems necessary to restore peace."<sup>43</sup>

A more recent commentator has suggested that action taken by way of self-defence may continue until the Security Council orders it to cease, but he points out that while, "short of such a measure, the Member State engaged in self-defence is not obligated to desist from the use of force ... [it] still acts at its own risk.... Continued hostilities may precipitate a decision by the Council that a breach of international peace has been committed, thus laying the ground for the introduction of enforcement action."<sup>44</sup> As has been pointed out, however, this is not likely in the instant case.

It is interesting to note that when adopting its measures against economic relations with Iraq the Council did not make use of the term 'blockade'. This is primarily a concept connected with naval warfare envisaging the control of an adverse party's ports by the use of warships.<sup>45</sup> A blockade would have enabled the enforcing parties to stop, seize and

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<sup>42.</sup> L.M. Goodrich, E. Hambro & A.P. Simons, *Charter of the United Nations* (N.Y.: Columbia Univ. Press, 1969) at 352.

<sup>43.</sup> H. Kelsen, *The Law of the United Nations* (London: Stevens, 1951) at 803.

<sup>44.</sup> Y. Dinstein *War, Aggression and Self-Defence* (Cambridge: Grotius Publications, 1988) at 197.

<sup>45.</sup> See, e.g., H. Lauterpacht, *Oppenheim's International Law* (London: Longmans, 7th ed., 1952) vol. II at 768: "Blockade is the blocking by means of men-of-war of the approach to the enemy coast, or a port of it, for the purpose of preventing ingress and egress of vessels or aircraft of all nations...."

even condemn as prize shipping, disregarding the Resolution, and might have led to condemnation of some of the flag-states involved as being in breach of neutrality. It would also have enabled Iraq to present itself, at least before the Islamic and Arab world, as a victim of warlike measures, rather than as the aggressor against whom punitive action was being taken.

Within three days of the adoption of Resolution 661, Iraq, claiming to base itself on historic grounds — thus emulating Mussolini who often declared himself to be the heir of the Roman Empire — announced a "comprehensive and eternal merger" with Kuwait, proclaiming the latter a province of Iraq. In adopting Resolution 662<sup>46</sup> unanimously, the Security Council condemned the annexation as null and void, called upon all states and international organizations not to recognize it and to refrain from any action that might impliedly suggest such recognition. It also demanded that Iraq rescind the annexation. Far from complying, Iraq announced the closure of all foreign embassies and consulates in Kuwait and terminated the immunity of their personnel with immediate effect. At the same time, Iraq imposed restrictions on the movement of aliens in Kuwait denying them the right to depart. It also imposed similar restrictions on the alien residents of Iraq itself and indicated its intention to house them in the vicinity of strategic places. This produced yet further condemnation by the Security Council in the form of Resolution 664<sup>47</sup> demanding that "Iraq permit and facilitate the immediate departure" of foreign nationals and that it take no action to endanger their health or security. It further demanded that, since the annexation of Kuwait was void, "Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel." Iraq's answer was to deny access to embassies and consulates virtually preventing them from securing supplies.

Since Iraq continued to ignore the various Resolutions adopted by the Security Council, a number of western states led by the United States, decided to take steps to secure observance of the economic interdiction and sent warships to the area with instructions to stop and search vessels suspected of travelling to Iraq or Kuwait and to ensure that their cargoes in no way breached Security Council Resolution 661. It should be noted that the Security Council had at no time indicated the manner in which this Resolution or any of the others adopted in relation to the Gulf situation was to be enforced, nor had it indicated what further sanctions, if any, would be taken by the Security Council to secure compliance with its Resolutions. Since the various Resolutions, with the exception of the first, 660, made no reference to Article 51 relating to self defence, and since all decisions were now being taken by the Council presumably under Chapter VII, it is difficult to ascertain the legal basis for action by any member of the United Nations, including members of the Security Council, against any shipping, Iraqi or 'neutral', plying its trade in the Gulf. Nevertheless, the 'enforcing' countries declared their intention to act in this way, using force, including gunfire, to stop any vessel that appeared unwilling

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[It] is a means of warfare against the enemy"; see, also, Declaration of Paris, 1856, Schindler/Toman, *supra*, note 13, at 787, and Declaration of London, 1909, *ibid.* at 843.

<sup>46.</sup> 29 I.L.M. 1327.

<sup>47.</sup> *Ibid.* at 1328.



to comply with a demand to stop. The fact that some states<sup>48</sup> and commentators<sup>49</sup> have suggested that such action was compatible with the right of collective self-defence as regards Kuwait must be dismissed as political self-serving. Such action would only be legal if authorised by the Security Council exercising its powers under Articles 41 and 42 of the Charter.<sup>50</sup> In fact, the enforcing powers, apparently concerned at criticisms of their actions, secured passage of Security Council Resolution 665.<sup>51</sup> Expressing their determination "to bring an end to the occupation of Kuwait by Iraq which imperils the existence of a member state and to restore the legitimate authority, and the sovereignty, independence and territorial integrity of Kuwait ... deploring the loss of innocent life stemming from the Iraqi invasion of Kuwait and determined to prevent further such losses.... Calls upon those member states cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary *under the authority of the Security Council*<sup>52</sup> to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions relating to such shipping laid down in Resolution 661," which permitted Iraq's import of necessary medical and food supplies. The Resolution also "invites" the states concerned to cooperate "as may be necessary" to give effect to this Resolution. As a result the naval forces deployed in the area, while remaining under their individual commands, coordinated their efforts, primarily by dividing the area to be controlled, in accordance with the 'advice' of the United States fleet commander. This Resolution also 'requested' the states concerned "to coordinate their actions ... using as appropriate mechanisms of the Military Staff Committee" established in accordance with Article 47 of the Charter and which had been moribund for some years, although with the end of the cold war and the aggression by Iraq the Soviet Union had expressed a desire to see the Committee resuscitated and all enforcement action taken under its authority and auspices. The powers involved, however, were unwilling to surrender their individual right of action in this way.

Although Resolution 661 allowed entry on humanitarian grounds of medical and food supplies, problems arose with regard to the manner in which these were to be supplied and in regard to the decision as to whether the effect of the interdiction was such as to justify the argument that humanitarian considerations were sufficient to permit the import of food. Thus, an Indian ship carrying medical supplies and food purportedly for detainees in Iraq and seeking to bring out Indian personnel on its outward journey was delayed, the supervisory committee established under Resolution 661 not being at first satisfied that the Indian Red Cross was sufficiently expert in deciding whether the materials involved were really required on humanitarian grounds.<sup>53</sup> In fact, in the middle of August the White House spokesman had stated that "it appears far too early to consider

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48. See, e.g., President Bush, 18 Aug. 1990.

49. See, e.g., Wm. Waldegrave, Minister of State, U.K. Foreign Office, *The Times* (14 Aug.), and E. McEwen and J. Bone (Diplomatic Editor and N.Y. correspondent, resp.), *ibid.* (14 Aug. 1990).

50. See C. Greenwood, 'How Legitimate is Force against Iraq?', *ibid.* 10 Aug. 1990.

51. 29 I.L.M., 1329.

52. Italics added.

53. *The Times* (13, 15 Sept. 1990).

any foodstuffs as being in the humanitarian need category."<sup>54</sup> Similar problems arose in connection with other proposals by unofficial organizations, including some which were church-sponsored. In all cases the Security Council maintained that it was for that body to determine whether a particular cargo was innocent in the sense of Resolution 661, although it conceded that the needs of children, expectant mothers, maternity cases, the sick and elderly should be given priority.<sup>55</sup> By the end of 1990 Iraq was claiming that the manner in which humanitarian considerations was being defined in so far as food and medical supplies were concerned was resulting in the deaths of babies and the chronically ill, although there were contradictory statements by Iraqi medical sources in this matter.<sup>56</sup> As a result of the interdiction some measures of food rationing had been introduced, and Iraq had stated that foreign detainees, described by Saddam Hussein as 'guests' — not called 'hostages' by the enforcing countries until November — would be the last in the queue for rationed foods. The issue of allowing such supplies was complicated further by Iraq's indication that food and medicines could be exchanged for detainees, and even for a British aircraft that had landed at Kuwait on a scheduled flight and had been detained by the Iraqi forces at the beginning of the invasion — a suggestion bluntly rejected by the airline.<sup>57</sup> Nevertheless, at the end of November Japan lifted "a ban on the export to Iraq of medical supplies reported to be worth £65,000, the supplies to be strictly monitored to ensure they are not diverted to military use."<sup>58</sup>

While the maritime interdiction of Iraq appeared to be working fairly effectively, various countries were continuing to trade with Iraq by air, thus creating a major loophole in the effort to force Iraq by economic pressure to comply with the resolutions of the Security Council. This resulted in the Security Council adopting Resolution 670,<sup>59</sup> declaring that Resolution 661 "applies to all means of transport including aircraft." This resolution called on states to forbid overflight to any aircraft destined for Iraq or Kuwait unless it landed and submitted to inspection to indicate that the flight in no way infringed Resolution 661 or was permitted by the Security Council committee. It further required all states to ensure that all nationally registered aircraft or operated by a local operator complied with that Resolution. In this Resolution the Security Council affirmed the Council's intention to consider the action it should take against any state failing to prevent evasion of the requirements in this Resolution or Resolution 661. Perhaps more important, however, was the provision confirming that in giving effect to this aerial ban, the states concerned were to ensure that the measures taken should be "consistent with international law, including the Chicago Convention on International Civil Aviation of 1944."<sup>60</sup> This regulates international flights by civil aircraft and the transport of goods to Kuwait or Iraq would be by means or such aircraft. If by government-owned planes, there would be a clear breach of the Resolutions by the state concerned. The significance of this reference to the Chicago Convention arises from the amendment to the Convention consequent upon

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<sup>54.</sup> *Ibid.* (14 Aug. 1990).

<sup>55.</sup> Res. 666, 29 I.L.M. 1330.

<sup>56.</sup> *The Globe and Mail* (Toronto) (5 Dec. 1990).

<sup>57.</sup> *The Times* (30 Oct. 1990).

<sup>58.</sup> *Ibid.* (27 Nov. 1990).

<sup>59.</sup> 56 I.L.M. 1334.

<sup>60.</sup> 15 U.N.T.S. 295.

the destruction of a Korean aircraft by the Soviet Union in 1983. By the 1984 Montreal Protocol<sup>61</sup> amending the Convention "the Contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered...." In view of this it is difficult to determine how Resolution 670 could be enforced against an aircraft ignoring an order to land to be inspected.

Finally, Resolution 670 reaffirmed condemnation of Kuwait's annexation by stating that "the Fourth Geneva [Civilians] Convention<sup>62</sup> applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order<sup>63</sup> the commission of grave breaches." This paragraph was necessary in view of Iraq's claims that Kuwait was part of Iraq and not occupied territory when the Convention would have clearly been applicable. Perhaps more important is the reference to grave breaches. Increasing evidence was becoming available that atrocities were being committed by Iraqi military personnel against the Kuwaiti civil population as well as against the nationals of third states<sup>64</sup> and here, for the first time, is the clear indication that those responsible for such actions were liable to face trial if captured or identified.

In addition to the deployment of maritime or aerial forces to give effect to Resolutions 661 and 667, a number of states, western, Arab and others, deployed land and air personnel in Saudi Arabia and some of the neighbouring Gulf states, originally as a defensive shield for Saudi Arabia and should that country be attacked.<sup>65</sup> Later, it became clear that these forces might be employed in seeking to expel Iraq from Kuwait in furtherance of the Resolutions committed to re-establishing Kuwait's independence and restoring the *status quo ante*.

Insofar as the invasion of Kuwait is concerned, regardless of any legitimate claims that Iraq might have against that state, there is no question that as a member of the United Nations Iraq is committed by Article 2(4) of the Charter "to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state," whether a member of the United Nations or not. By Chapter VI it is required, "in relation to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, [to] first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements [— in this case the Arab League which condemned Iraq's actions —], or other peaceful means."

Iraq made no attempt to make use of any of these processes and, in fact, as with the Japanese assault on Pearl Harbour in 1941, had led Kuwait to understand that its

61. 23 I.L.M. 705, Art. 3 *bis*.

62. 75 U.N.T.S. 287, Schindler/Toman, *supra*, at 495, Arts. 146, 147.

63. See, e.g., Green, "Superior Orders and Command Responsibility" (1989) 27 Can. Y.B. Int'l Law 167.

64. *The Times*, (11 Sept. 1990) see, also, *ibid.* (28 Nov. 1990).

65. Gen. Schwarzkopf, U.S.C. in C. in the Gulf, *ibid.* 1 Sept. 1990.

complaints could be settled without any recourse to arms.<sup>66</sup> Had Kuwait wished, it could immediately have called upon its friends in the region or outside to come to its assistance in accordance with Article 51, but events moved so quickly and the logistic complications were so involved and Kuwait's military resistance so soon overcome, that the Security Council took the actions outlined above, rendering the question one of United Nations concern, rather than that of individual states. Moreover, the actions outlined here do not appear to fall within the generally accepted view as to what constitutes self-defence, but are rather actions of a non-warlike character aimed at the economy of Iraq and of states trading with her. Such action clearly affects the civilian population of Iraq, which is the reason for the exception in favour of medical and humanitarian food supplies, together with the special provision in Resolution 666 in favour of specific groups most likely to be at risk. To ensure proper observance of the distribution of such supplies, the Resolution had provided that they should be processed "through the United Nations in cooperation with the International Committee of the Red Cross or other appropriate humanitarian agencies," which would include religious and similar relief agencies. The Red Cross had increased the number of its representatives in the area and sought an agreement with Iraq to enable it to visit the hostages, but was prevented from carrying out its normal activities on behalf of detained civilians because Iraq ultimately refused to sign the agreement, contending that Kuwait was not occupied, but was an integral part of Iraq.<sup>67</sup>

In addition to its clear breaches of the Charter, Iraq's invasion of Kuwait is a violation of the Kellogg-Briand Pact, the Pact of Paris, of 1928.<sup>68</sup> As a party, Iraq "condemned recourse to war for the solution of international controversies, and renounced it as an instrument of national policy." Iraq is thus guilty not merely of a breach of treaty, but of the crime of aggression as defined by the International Military Tribunal at Nuremberg<sup>69</sup> and by the General Assembly in its Resolution affirming the principles of International Law recognized by the Charter of the Nuremberg Tribunal.<sup>70</sup> Iraq had voted in favour of this, as it had of the 1975 Resolution<sup>71</sup> defining aggression as a crime against international peace giving rise to international responsibility. Aggression is defined in this Resolution as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations ... [and] the first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression."

As has already been pointed out, in Resolution 669 the Security Council confirmed Iraqi liability for grave breaches in respect of the Civilians Convention. However, within a month of this Resolution being adopted President Bush made it clear that "Iraqi

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<sup>66.</sup> See statement by Sheikh Saad al-Abdullah al-Sabah, prime minister of Kuwait, *The Times* (6 Sept. 1990).

<sup>67.</sup> I.C.R.C., *Red Cross, Red Crescent*, Sept.-Dec. 1990, at 4; *The Times* (18 Aug. 1990).

<sup>68.</sup> 94 L.N.T.S. 57.

<sup>69.</sup> H.M.S.O., Cmd. 6964 (1946), p. 38; (1947) 41 Am. J. Int'l Law 172 at 216.

<sup>70.</sup> G.A. Res. 95-I; Schindler/Toman, *supra*, at 921.

<sup>71.</sup> G.A. Res. 3314 (XXIX), 13 I.L.M. 710.

atrocities in Kuwait could lead to trials similar to those at Nuremberg,<sup>72</sup> and in Resolution 674<sup>73</sup> the Security Council condemned Iraq for its war crimes, for "taking foreigners hostage and mistreating people in Kuwait ... [and for] the destruction of Kuwaiti demographic records, forced deportation of Kuwaitis, and relocation of population in Kuwait, and the unlawful destruction and seizure of public and private property in Kuwait, including hospital supplies and equipment." It went on to "remind Baghdad it is liable too for loss caused by invading and occupying Kuwait [and] invite[d] States to collect relevant information regarding their claims and those of their nationals and corporations, for restitution or financial compensation by Iraq with a view to such arrangements as may be established in accordance with international law." It also called upon states to collate information relating to the commission of war crimes, including those against civilians in occupied territory. While it did not expressly mention them, this would also include Kuwaiti and other civilians held illegally in Iraq. Finally, the Resolution warned Iraq that continued defiance of Security Council decisions could lead to "further enforcement measures" being taken.

The Resolution did not specifically say that trials would be held if the offenders became available, although both the United Kingdom and the United States had previously declared this to be among their aims.<sup>74</sup> In fact, as originally stated there was the implication that the charges would extend to the crime of using poison gas against Iraqi Kurds or other Iraqi dissidents.<sup>75</sup> But such acts would not, however, amount to a war crime, although they might constitute crimes against humanity as defined by the various national statutory measures, such as the amendments to the Canadian Criminal Code,<sup>76</sup> enabling a state's judicial authorities to exercise jurisdiction over aliens for acts of this grave character committed against aliens abroad. It was also suggested that Iraq would be held liable for its use of chemical weapons against Iran during the earlier Gulf confrontation. Such usage would constitute a war crime regardless of the attitude of Iran, especially as both Iran and Iraq are parties to the Geneva Protocol for the Prohibition of Use in War of Asphyxiating, Poisonous or Other Gases, and Bacteriological Methods of Warfare, 1925,<sup>77</sup> but it is significant that none of the countries taking action against Iraq was prepared to make similar statements concerning Iraq's criminal liability during the conflict with Iran or immediately thereafter. In the absence of any international criminal tribunal, any Iraqi charged with war crimes would have to appear before a military or other tribunal of one of the countries opposing Iraq or, as happened with the Major War Criminals of the European Axis and of Japan after World War II, before an *ad hoc* international tribunal specially established by those countries or under the auspices of the United Nations.

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<sup>72.</sup> *The Globe and Mail*, (16 Oct. 1990).

<sup>73.</sup> *The Times*, (30 Oct. 1990).

<sup>74.</sup> *Ibid.* 3 Sept. 1990.

<sup>75.</sup> See, *ibid.*, 4 Aug. 1990.

<sup>76.</sup> See, e.g., L.C. Green "Canadian Law, War Crimes and Crimes against Humanity", (1988) 59 *Brit. Y.B. Int'l Law*, 217; W.J. Fenrick, "The Prosecution of War Criminals in Canada", (1989) 12 *Dal. L.J.*

<sup>77.</sup> 94 *L.N.T.S.* 65.

The allegation that Iraq is transplanting or expelling the Kuwaiti population — some of those who have been allowed to leave have had their passports confiscated making their return impossible<sup>78</sup> — replacing it with Iraqis or Palestinians and destroying Kuwaiti population records,<sup>79</sup> suggests, particularly in the light of the assertion that Kuwait no longer exists, that Iraq is undertaking a conscious exercise in genocide contrary to the Genocide Convention.<sup>80</sup> However, it should be noted that under the Convention, until such time as an international criminal tribunal is established, this crime can only be tried in the courts of the country in which it has been committed, namely Kuwait. If any country would seek to prosecute those committing genocide, the charge would have to be labelled a crime against humanity. On the other hand, it would be possible to proceed by way of a grave breach charge under the 1949 Civilians Convention as amended by Protocol I, 1977, forbidding the transfer or replacement of the civilian population of occupied territory,<sup>81</sup> though while Kuwait has ratified the Protocol, Iraq has not.

Closely connected with the issue of war crimes is the threat by Iraq that, in the event of the outbreak of hostilities, the oilfields in the Gulf would be destroyed regardless of the effect on the environment, while terrorist attacks would be launched against the interests, property and nationals of the countries opposing Iraq wherever they might appear. Any activist, not in Iraqi uniform, indulging in such activities would be liable to trial wherever captured, unless he could prove, despite his civilian garb, that he was in fact a member of the Iraqi forces engaged in proper military activities.<sup>82</sup>

A further breach of the law of armed conflict arises from the removal by Iraq of cultural and other treasures from Kuwait<sup>83</sup> contrary to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954,<sup>84</sup> to which both Iraq and Kuwait are parties. Cynically, in accordance with its rights under the Convention Iraq has requested UNESCO "to register its archaeological sites as among those endangered by war, notably because of the U.S. military presence in the Gulf."<sup>85</sup>

Apart from problems relating to breaches of the United Nations Charter and of the law of armed conflict, other problems of a legal nature have resulted from the Iraqi invasion. From an early date it became common to describe the forces arrayed against Iraq in the Gulf as a 'multinational' force. This is in fact not a correct appellation. It is true that the forces in question have come from a variety of nations, but a multinational force is strictly one made up of different national contingents under a unified command, as was the case with the allied forces in Europe and the Pacific theatre during World War II or under United Nations command in Korea. In the Gulf, the various naval forces that have been deployed are all under their individual commands, although the areas each patrols

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78. *The Times* (17 Sept. 1990).

79. *Ibid.* (16 Nov. 1990).

80. 78 U.N.T.S., 277.

81. Arts. 49, 85(4), resp. - Pr. I is reproduced in Schindler/Toman, *supra*, note 13 at 621.

82. See, e.g., *Public Prosecutor v. Koi* [1968] A.C. 829; *Osman b. Haji Mohd. Ali v. Public Prosecutor* [1969] 1 A.C. 430.

83. *The Times* (6 Sept. 1990).

84. Schindler/Toman, *supra*, note 13 at 745.

85. *The Times* (17 Sept. 1990); *The Globe and Mail* (8 Dec. 1990).

have been distributed by agreement, with the United States naval commander playing the major role in their allotment.<sup>86</sup> The forces involved have agreed to pool intelligence, logistical support and protection against air attack, as well as, to the extent that national law permitted, to harmonize their rules of engagement,<sup>87</sup> thus making joint or back-up operations much easier. As to the land forces, they too remained under their own commands<sup>88</sup> and it was frequently pointed out that none of them would be able to operate from Saudi Arabian territory without the permission of the Saudi authorities,<sup>89</sup> thus acknowledging Saudi sovereignty and preserving the contention that they were there at the invitation of Saudi Arabia and could be asked to leave whenever the Saudi government so decided. It was agreed, however, that if military action became necessary, United Kingdom forces, at least, "would be placed under the tactical control of an American commander for specific actions where this makes military sense,"<sup>90</sup> and this seems to have been generally understood for all the land forces that might be engaged, and the Saudis agreed to a joint command in such a case, although there was some doubt whether the French government, while acknowledging the need for coordination,<sup>91</sup> would agree to this and "some Muslim units are not prepared to work with each other."<sup>92</sup> Some of these problems would perhaps not be so important if the forces were, in accordance with a Security Council resolution under Chapter VII, placed under United Nations command as had been the case in Korea. The Soviet Union had in fact indicated that it might be prepared to participate in such circumstances, but the United States in particular showed intense resistance to any such proposal.

Originally the United States and the United Kingdom, the two countries with the largest military contribution in the area, had contended that Resolutions already adopted by the Security Council, together with the right of self-defence recognized in Article 51 of the Charter, were sufficient authority to resort to military force to expel Iraq from Kuwait or to defend Saudi Arabia or any other country threatened by Iraq. Insofar as the former is concerned, there had been no suggestion in the Resolutions that force was to be employed to give effect to them and, as has been indicated, the continued validity of the right of self-defence once the Security Council had assumed authority became doubtful. The Article could, however, be invoked to counter an anticipated attack against Saudi Arabia or some other country threatened by Iraq, although there is controversy among writers as to the right to resort to anticipatory or preventive defensive action.<sup>93</sup>

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<sup>86.</sup> *The Times* (12 Sept. 1990).

<sup>87.</sup> *Ibid.* 22 Aug. 1990.

<sup>88.</sup> France, *ibid.* (21 Sept. 1990); U.K., (2 Oct. 1990).

<sup>89.</sup> *Ibid.*, 21 Sept., 2 Oct. 1990.

<sup>90.</sup> *The Globe and Mail* (21 Sept. 1990), *The Times*, (2 Oct. 1990).

<sup>91.</sup> *The Times* (2 Sept. 1990).

<sup>92.</sup> *Ibid.* (28 Sept. 1990).

<sup>93.</sup> See, e.g., Green, 'Armed Conflict, War and Self-Defence', 6 *Archiv des Völkerrechts*, 1957, p. 387; D. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958) at 184 *et seqq*; M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961) at 232 *et seqq*; I. Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963) at 275 *et seqq*; Dinstein, *supra*, note 44 at 168 *et seqq*; D.P. Forsythe, *The Politics of International Law* (Boulder: Lynne Rienner, 1990) at 75-77.

Because of policy statements by a variety of states that they had doubts as to the legality of the use of force without Security Council authorization, the Security Council, at the urging of the United States, at the end of November, adopted Resolution 678.<sup>94</sup> This was the first of the Gulf resolutions that did not receive the unanimous support of the permanent members of the Council. China abstained. Prima facie and in accordance with the precise wording of Article 27(3)<sup>95</sup> of the Charter, this should have meant that the Resolution failed to be adopted. However, in the practice of the United Nations developed over some 40 years it has become clear that a permanent member is presumed to have 'concurred' in a resolution unless it positively votes in a negative manner. By this Resolution, the Council called upon Iraq to evacuate Kuwait and give effect to all its previous Resolutions by 15 January 1991. Failing such compliance, the members of the United Nations were authorised to take "all necessary measures to uphold and implement" these Resolutions, and report back on the action taken. While it did not specifically refer to the use of force, it was clear that any of the nations confronting Iraq would now have the umbrella of a Security Council resolution should it decide to resort to force. The period between the adoption of the Resolution and January 15th has been described as a last opportunity for Iraq to see reason and not as an ultimatum, but the Resolution is uncommonly like Hague Convention III, 1907, relative to the Opening of Hostilities.<sup>96</sup> Iraq condemned this Resolution as contrary to international law<sup>97</sup> contending that the Security Council could only authorize joint action under its direct auspices. This, however, is to ignore that Article 42 of the Charter authorises the Council to "take such action as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other *operations by air, sea, or land forces of Members of the United Nations*."<sup>98</sup> The Article does not demand coordinated action nor a United Nations force as such. It clearly envisages the possibility that named or unnamed states may be called upon or authorised to take such action.

It has been suggested<sup>99</sup> that Canada, for example, by supporting this Resolution in the Security Council and indicating its willingness to cooperate in enforcing it should this prove necessary, is abandoning its 'traditional peace-keeping' role. This is to ignore the fact that Canada provided armed forces to the United Nations command in Korea. Moreover, it suffices to point out that as a member of the United Nations Canada has agreed "to accept and carry out the decisions of the Security Council in accordance with the present Charter,"<sup>100</sup> and this would include those Resolutions calling upon members to secure compliance with the demand that Iraq leave Kuwait. Moreover, Resolution 678 is not a 'call to war'. It is rather a measure to restore or frustrate aggression, even by

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<sup>94.</sup> *New York Times* (30 Nov., 1990).

<sup>95.</sup> "Decisions of the S.C. on all other matters [than procedural] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members ..."

<sup>96.</sup> Schindler/Toman, *supra*, note 13 at 57, Art. 1: "The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war."

<sup>97.</sup> *The Times* (29 Nov. 1990).

<sup>98.</sup> Italics added.

<sup>99.</sup> Svend Robinson, M.P., *The Globe and Mail* (24 Nov., 1990).

<sup>100.</sup> Art. 25.



way of force, as a way of giving effect to Article 39 of the Charter by which the Council is empowered to "make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security." The measures permitted under Resolution 678 are in fact measures of peacekeeping as understood by the United Nations. To have set a date far beyond 15 January might well have meant that there would be little left of Kuwait to liberate.

In accordance with the 'last chance' nature of Resolution 678, President Bush invited the Foreign Minister of Iraq to Washington and offered to send Secretary of State Baker to Iraq. Although this offer was made with the prior knowledge of the United Kingdom,<sup>101</sup> it was a unilateral decision by the United States. If the intent is to repeat the warnings to Iraq that failure to withdraw from Kuwait would mean military action, it is beyond criticism. If, however, it was intended, as has been constantly denied by the United States,<sup>102</sup> to find a formula by which Iraq could withdraw without losing prestige — and there have been reports that some sort of concession might be made by Kuwait — it would constitute a clear departure from what has taken place since the invasion of Kuwait, and be contrary to all the Security Council resolutions which have demanded unconditional withdrawal by Iraq, compensation where necessary and restoration of the *status quo ante*. A resolution accepting something less than this would amount to a loss of prestige and authority by the Security Council. On the other hand, since Resolution 678 is not self-executing, Iraq's compliance with Security Council demands would annul that Resolution.

If armed force were undertaken in accordance with this Resolution, the hostilities ensuing would be subject to the traditional laws of war so that Iraq as an aggressor remains protected by them and the members of its armed forces enjoy the same rights and protection as any lawful combatants,<sup>103</sup> and this remains true whether the operations are taken under the auspices of the United Nations or not. In any war the principle of proportionality must be observed and a distinction drawn between actions which are lawful because directed against combatants or military objectives, and those which are illegal because directed against civilians or civilian objects, or because the damage inflicted upon civilians would be disproportionate to the military advantage to be achieved. It is for this reason that the Resolutions interdicting economic relations with Iraq do not include medicines or, for humanitarian reasons, foodstuffs, for any attempt to reduce the population to starvation would be illegal. While the Lieber Code of 1863,<sup>104</sup> the first codification of the rules of war for American forces in the field, considered starvation of the armed or unarmed population as a legitimate means of shortening hostilities, Protocol I, 1977, specifically states<sup>105</sup> that "starvation of civilians as a method of warfare is prohibited." It is also forbidden to assassinate specified members of the

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<sup>101.</sup> *The Times* (1 Dec. 1990).

<sup>102.</sup> *Ibid.* (3 Dec. 1990), *per* Secretary of State Baker.

<sup>103.</sup> See, e.g., H. Lauterpacht, "Rules of Warfare in an Unlawful War", in G.A. Lipsky, *Law and Politics in the World Community* (Berkeley, University of California Press, 1953) at 89.

<sup>104.</sup> Schindler/Toman, *supra*, note 13, p. 3, Art. 17.

<sup>105.</sup> Art. 54(1).

enemy force.<sup>106</sup> When the United States Air Force Chief of Staff in the Gulf indicated that the death of Saddam Hussein, his family and his mistress had become prime targets, and went on to state that the principal targets in the event of hostilities were no longer conventional military objectives, but that "the cutting edge would be in downtown Baghdad,"<sup>107</sup> suggesting that the United States would in fact be attacking concentrations of civilians, regardless of the military advantage to be gained, he was removed from his post within twenty-four hours. However, "officials made clear that the issue was not the correctness of what was said but lack of authority to say it,"<sup>108</sup> leaving the impression that if hostilities commenced the United States would in fact attack civilians and civilian objects. Such statements would appear to give some justification to the Iraqi use of civilian detainees as 'human shields' at least to the extent that they were held in the vicinity of civilian objects or major civilian conurbations. By way of contrast, the C. in C. of the British forces in the Gulf made it clear that British policy was "not to smash Iraq, but to force compliance with the United Nations resolution .... We shall take as much military action as is necessary to secure that objective [including if essential to that end] attacks against Iraqi chemical and other weapon facilities."<sup>109</sup>

In addition to actions against Kuwait as a state, its citizens and their property which may amount to war crimes or crimes against humanity, Iraq has breached a number of other rules of international law, particularly those concerning the status and treatment of diplomats and the rights of both enemy and neutral civilians in occupied territory.

If there is any principle of international law which is well established it is that regarding the immunity and protection of diplomats. In its judgment relating to the detention of United States diplomats in Tehran, the International Court of Justice stated:<sup>110</sup> "... the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective cooperation in the international community ... the unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important ... in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States.... [T]he principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long established regime [now codified in the Vienna Convention on Diplomatic Relations, 1961,<sup>111</sup> and to which all the states involved in the Gulf confrontation are parties], to the evolution of which the traditions of Islam made a substantial contribution." But when Iraq occupied and then annexed Kuwait, it announced that foreign missions were to close and that their personnel would no longer be treated as entitled to diplomatic status, an action that was

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106. Hague Regulations, 1907, Schindler/Toman, *op. cit.*, p. 75, Art. 23(b).

107. *The Times* 17 Sept. 1990.

108. *Ibid.* (18 Sept. 1990).

109. *Ibid.* (27 Nov. 1990).

110. *Case concerning U.S. Diplomatic and Consular Staff in Tehran - Provisional Measures* [1979] I.C.J. 7; *Judgment*, [1980] I.C.J. 3, at 19-20, 40, resp.

111. 500 U.N.T.S. 595.

vigorously condemned by the Security Council,<sup>112</sup> which demanded "that Iraq immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait and Iraq and take no action to hinder the diplomatic and consular missions in the performance of their functions, including access to their nationals and the protection of their person and interests." Iraq ignored this Resolution and laid siege to those embassies which refused to close, denying them food, electricity and other necessities.

Diplomats are appointed by one sovereign state to another and it is for the receiving state to declare whether embassies are to remain open. It is not for an aggressor to state that embassies accredited to his victim are to close. While they may not be able to function in the normal manner, especially when the annexation is not recognized, the personnel and the establishments are nevertheless entitled to their traditional immunities. These include the right of even enemy diplomats to be protected from harassment and to depart for their home states in peace and with every courtesy.<sup>113</sup> There was no 'enemy' in the instant case, and it follows that 'neutral' diplomats belonging to countries at 'peace' with Iraq should surely have received at least the same treatment as would those of an enemy state. For those countries which refused to close their missions, the Iraqi breach of diplomatic law was compounded, especially as Resolution 667 had reminded states of their obligation to do nothing that might be construed as recognition of the annexation. Iraqi forces entered the residences of the Canadian, Dutch and French ambassadors and the Belgian diplomatic compound, and seized the French military attache, as well as the American, Australian and Canadian consuls, although they were all soon released.<sup>114</sup>

A number of foreign nationals had taken refuge in their embassies and embassy compounds and when Iraq demanded information as to the identity of those in the British compound in Baghdad, reminding the ambassador of a Revolutionary Command Council decree to the effect that "anyone harbouring foreigners in embassy compounds would be considered guilty of a crime equivalent to espionage which is punishable by death, [the British Foreign Office pointed out that] under 'the Vienna Convention on diplomatic relations, our diplomats enjoy total immunity from Iraqi criminal law. Embassy buildings are inviolable. The Iraqi authorities may not enter them without the ambassador's explicit agreement. The Iraqi threat makes it impossible to take seriously any pretensions on its part to be a civilised state'." This led the authorities to state that "there was no intention of hanging any diplomats and a new note was being prepared to reassure the diplomatic community about its safety."<sup>115</sup> A further breach of obligations towards diplomats occurred when Iraq announced that diplomats evacuated from Kuwait to Iraq would not be treated as diplomats entitled to any immunity, but would instead be considered as ordinary private civilians and subject to the same restrictions or employment as 'human shields' as any other foreign nationals. The United Kingdom protested and informed Iraq that the British diplomats concerned would be added to the staff of the British embassy in Baghdad. This was rejected by Iraq, although the individuals concerned did in fact

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<sup>112.</sup> Res. 667, 29 I.L.M. 1332.

<sup>113.</sup> Convention, Arts. 39, 40, 44, 45.

<sup>114.</sup> *The Times* (15 Sept. 1990).

<sup>115.</sup> *Ibid.* (28 Sept. 1990).

continue to work at the embassy, living there with other diplomats.<sup>116</sup> Canadian diplomats treated in this way were allowed to depart when Iraq announced the permitted repatriation of all 'guests' so detained.

At least since the Franco-Prussian War and World War II it has been recognized that prophylactic reprisals<sup>117</sup> against protected personnel are forbidden.<sup>118</sup> Such reprisals would be in the nature, for example, of placing prisoners of war or enemy civilians in the vicinity of military objectives or to stop attacks on particular targets. It is a clear breach of the rights of non-combatants to place them in such dangerous locations, even if hostilities have not yet begun and Article 83 of the Civilians Convention, by which Iraq is bound, expressly states that "the Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war." Moreover, the Convention provides that, so far as possible, civilians in occupied territory should not be interned or detained, nor should they be removed from their normal location, other than in the case of imperative military necessity.<sup>119</sup> At no time may they be used as a 'shield' to prevent attack on what would otherwise be a legitimate military objective. Not only is such action in breach of the Civilians Convention, but to detain civilians as a means of preventing attacks which might take place is to make them hostages in the sense of the Hostages Convention of 1979,<sup>120</sup> signed but not ratified by Iraq, regardless of the nomenclature applied to them by their gaoler or by their own country. Moreover, after World War II the taking of hostages was condemned as a war crime.<sup>121</sup> Any attempt to use such hostages for bargaining purposes would aggravate the situation. Saddam Hussein made it clear that he was holding his 'guests' as a guarantee against attack on the places, most of which were strategic, at which they were detained, and Iraq's foreign minister stated that "Iraq would drop its 'moral commitment' to safeguard the lives of ... Western hostages held in Iraq if America and its allies sustained their threat of military intervention ... [and] 'if the West declares war, then our obligation (towards our former renunciation of terrorism) no longer stands'."<sup>122</sup> The holding of such hostages was condemned by the Security Council,<sup>123</sup> as well as by the European Community which had condemned Iraq's actions and expressed solidarity with the Security Council at an early stage.

As has already been mentioned, the International Committee of the Red Cross, had consistently maintained that the Civilians Convention applied and that it was entitled to act thereunder on behalf of detained civilians,<sup>124</sup> only to be rebuffed by Iraq. As for the governments of the nationals involved, they realized that to negotiate with Iraq on this

<sup>116.</sup> *Ibid.* (18 Oct. 1990).

<sup>117.</sup> See J.M. Spaight, *War Rights on Land* (London: Macmillan, 1911) at 466-470.

<sup>118.</sup> Geneva Convention IV (Civilians) 1949, Art. 28; see, also, M. Greenspan, *The Law of War on Land* (Berkeley: University of California Press, 1959) at 169.

<sup>119.</sup> Art. 49.

<sup>120.</sup> 18 I.L.M. 1460.

<sup>121.</sup> See, e.g., *In re List (Hostages Trial)* 15 Ann. Dig. 632; see, also, G. Schwarzenberger, *International Law*, vol. II, *Armed Conflict*, (London: Stevens, 1968) ch. 17.

<sup>122.</sup> *The Times* (1 Sept. 1990).

<sup>123.</sup> Res. 664, 29 I.L.M. 1328.

<sup>124.</sup> *The Times* (8 Sept. 1990).

matter would tend to acknowledge that the hostages were being held legitimately, whereas they consistently adhered to the contention that the detentions were illegal and had to terminate with the release of all hostages to whom should be restored the right to depart should they so desire. By way of contrast, a number of private individuals, some of whom enjoyed an international stature as former political leaders, visited Iraq on their own initiative and were able to negotiate the freedom of a limited number of the hostages, apparently unconcerned that the majority were still being held illegally. The Secretary-General of the United Nations, the states directly involved with Iraq, and the European Community opposed such adventures, since they provided Saddam Hussein with propaganda opportunities and enabled him, to some extent, to divide those opposing him, while making the civilian population in the various countries involved less willing to support any armed conflict aimed at the liberation of Kuwait. The humanitarian issue of the lives of the hostages seemed more significant than the liberation of a small distant country and the restoration to his throne of a somewhat autocratic monarch. Rather than supporting such individual efforts, the European Community called upon the non-aligned and Islamic nations to bring pressure to bear on Iraq to release all hostages without delay.<sup>125</sup> That Iraq was clearly using the hostages as pawns in his propaganda efforts became clear when he released photographs to the world's media showing the hostages partaking of a 'sumptuous' Thanksgiving dinner on November 2nd, suggesting that the economic sanctions were not proving very effective. He followed this with an undertaking to release all hostages between Christmas 1990 and March 1991, describing this as a great humanitarian gesture. International reaction was cynical, contending that humanitarianism demanded their immediate release. In fact, just after the adoption of Resolution 678 authorising the use of armed force, Iraq announced the immediate release of all hostages. Saddam Hussein maintained that this was not done as a humanitarian gesture, but because Iraqi defensive arrangements were so well advanced that he was now able to dispense with the protection provided by his 'guests' serving as 'human shields'. This decision, while it may have affected public sympathy and strengthened anti-war feelings, had no effect on the overall situation. The original detentions remained illegal and claims for compensation could be lodged as envisaged by Resolution 674.<sup>126</sup> Even in releasing the hostages Iraq was guilty of a further breach of the Civilians Convention. By Article 39, "where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding employment on reasonable conditions, the said Party shall ensure his support and that of his dependents." Iraq, however, demanded that the detainees or the companies employing them be responsible for all expenses arising from their detention.

Most importantly, however the detention of hostages, illegal and immoral though it may have been, was incidental to the aggression and annexation of Kuwait. From the legal point of view, regardless of their release, all the Resolutions of the Security Council

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<sup>125.</sup> *Ibid.* (13 Nov. 1990).

<sup>126.</sup> In its decision on *Military and Para Military Activities in Nicaragua* [1986] I.C.J. 4, the World Court held "the USA is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by [its] breaches of obligations under customary international law," at 142-43, 149.

remain valid, including the authorization to resort to force if Iraq does not evacuate Kuwait by 15 January, 1991.

A further problem under international law relates to the status of the United Nations and the representatives of member states. In accordance with the Headquarters Agreement between the United Nations and the United States,<sup>127</sup> the United States is under an obligation "not [to] impose any impediments to transit to or from the headquarters district of (1) representatives of Members or officials of the United Nations ... [These] provisions shall be applicable irrespective of the relations existing between the Governments of the persons referred to ... and the Government of the United States." Provisions were included to protect the security of the United States. However, when the foreign minister of Iraq sought to attend the 1990 session of the General Assembly travelling to the United States by Air Iraq, the United States refused landing rights and prevented his attendance. It can hardly be said that such a flight would have endangered American security, especially as the aircraft could have been monitored or the movements of the minister restricted to the headquarters district. Nor could it be contended that such a flight would have breached the Security Council restriction on flights embodied in Resolution 670. This action of the United States is the more incomprehensible in light of the incident in 1987 and 1988 when the United States sought to close the mission to the United Nations of the Palestine Liberation Organization and exclude its Chairman from the forthcoming General Assembly session.<sup>128</sup> This resulted in that session being held in Geneva instead of New York, and was criticised in an advisory opinion of the International Court,<sup>129</sup> and held in breach of its obligations to the United Nations by the Southern District Court of New York.<sup>130</sup>

Equally interesting is the attitude of the Saudi government and the military commands of the visiting forces in that country. According to the Hague Regulations, 1907, the Geneva Prisoners of War Convention, 1949, the Civilians Convention, 1949, and Protocol I, 1977,<sup>131</sup> all persons in the hands of an adverse party are entitled to continue to practise their religion, to be visited by chaplains or other ministers and to receive such assistance from the detaining power as may be necessary to facilitate these activities. However, "Saudi Arabia has outlawed the observance of the Christian religion. Western forces now stationed in Saudi Arabia have felt obliged to disguise the ministrations of Christian chaplains, who have had to operate under such euphemisms as 'spiritual advisers'. On Sunday [11 November, 1990] these forces were not allowed the proper religious commemoration of Remembrance Day, ... The British and American commanders in the Gulf have taken the view that Saudi sensitivity should be complied with, at least on the surface, while putting it about that what the eye does not see, the heart does not grieve for. But they would be acting wrongly and illegally in terms of British and American military law, if they prevented members of the forces under their command from obeying the obligations of their religion ... [a]nd they are on doubtful

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<sup>127.</sup> 1947, 11 U.N.T.S. 11, ss. 11, 12.

<sup>128.</sup> 27 I.L.M. 770.

<sup>129.</sup> *Applicability of the Obligation to Arbitrate under s. 21 of the UN HQ Agreement* [1988] I.C.J. 12.

<sup>130.</sup> *United States v. The Palestine Liberation Organization* (1988) 695 F. Supp. 1456.

<sup>131.</sup> Arts. 18, 46; 34, 23, 27, 38, 58, 86, 93; 75, 85, resp.

ground if they are pretending to the Saudis that they are imposing such prohibitions if they are not.<sup>132</sup> At Christmas, religious services could only be conducted openly on ships outside Saudi Arabia's territorial sea. It would appear, therefore, that Saudi Arabia is under an obligation to treat detainees belonging to its enemy better than it is prepared to treat members of the armed forces of its allies.<sup>133</sup>

Finally, reference might be made to some of the legal problems affecting some of the states which have declared their opposition to Iraq's actions. Thus, the Federal Republic of Germany has interpreted Article 24(2) of its Constitution,<sup>134</sup> permitting the Federation to "enter a system of mutual collective security," as restricting its forces to operating in the NATO regional area only. If Turkey, a neighbour of Iraq and a member of NATO became involved in hostilities it would be possible for members of the German forces to be sent to its support. So far, however, the Federal Government contends that it can only offer logistic and other support within the Mediterranean. Japan has been highly criticised, especially by the United States, for failing to provide active support to the military and maritime operations against Iraq, particularly in view of Japan's reliance on oil supplies from the area. However, by virtue of the Japanese Constitution,<sup>135</sup> Article 9, Japan is forbidden from maintaining "land, sea, and air forces, as well as other war potential," although it does maintain forces for internal and homeland security. Even the dispatch of support forces to the Gulf has been held by the Japanese Diet as being contrary to the Constitution. The Constitution was drafted and imposed upon the Japanese by the United States, which is now finding that the restriction intended to prevent a resurgence of Japanese imperialism is working to its own disadvantage. In the case of Canada, problems arose because of the government's decision to dispatch three warships to the Gulf while parliament was in recess. By s. 31(1)(b) of the *National Defence Act*<sup>136</sup> "The Governor in Council may place the Canadian Forces ... on active service anywhere in or beyond Canada ... in consequence of any action undertaken by Canada under the United Nations Charter...." However, if parliament is not in session at the time, it is to be summoned within ten days of the Governor General's order. In the instant case, the government was unwilling to recall parliament and the vessels, therefore, had to interrupt their journey until parliament had been recalled and the requisite ten days became available.

It has been suggested that the United Nations has portrayed a double standard in its insistence upon Iraqi withdrawal from Kuwait and the threat of military action in the event of non-compliance, as compared with its tolerance of Israel's disregard of Security Council Resolution 242 calling for withdrawal from occupied territories, as well as the unwillingness of the western powers to link settlement of the Gulf issue with discussion or settlement of the Israeli-Palestine issue. Regardless of possible wrongs or even

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<sup>132.</sup> *The Times* (13 Nov. 1990).

<sup>133.</sup> See Green "Human Rights and Armed Conflict" in *Essays on the Modern Law of War* (Dobbs Ferry: Transnational, 1985) ch. V, at 101-102.

<sup>134.</sup> 1966, A.J. Peaslee, *Constitutions of Nations* (The Hague: Martinus Nijhoff, 1968) vol. 3 at 361.

<sup>135.</sup> 1946, *ibid.* vol 2 at 517; see also, Green, "Law and Administration in Present-Day Japan" (1948) 1 *Current Legal Problems* 188.

<sup>136.</sup> R.S.C. N-4.

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illegalities on the part of Israel, and ignoring any rights of the Palestinians, there remains one fundamental difference. Israel is in occupation of lands which at the time of their conquest were not legally part of any existing state. Iraq, by invading and annexing Kuwait, destroyed the independence of a state which was a member of the United Nations. If the members of the United Nations have any concern for the rule of law and the rights of members, or for the suppression of aggression, they have no option but to enforce the Charter and carry out the decisions adopted by the Security Council in this matter.