The United States and the United Nations in the Persian Gulf War: New Order or Disorder

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Introduction

The 1991 war waged against Iraq by a U.S.-led coalition of states met with general approval in the United States. Despite early reservations, Congress gave its endorsement, and opinion polls showed broad public support. The collective action, taken in response to Iraq's invasion of Kuwait, was hailed as a harbinger of a new international order that would find the major powers united against aggression wherever it might occur. The United Nations Security Council, long handicapped by the Cold War, was seen as fulfilling its designated role of maintaining the peace.

The legality of the action was less clear, however. President George Bush's administration relied on Security Council Resolution 678, which authorized using "all necessary means" to evict Iraq from Kuwait. The administration's justification rested on two premises: (1) that its action was consistent with Resolution 678, and (2) that Resolution 678 was a lawful exercise of power by the Security Council. Neither premise, however, was self-evident. Critics charged that the military action against Iraq did not fall within the scope authorized by Resolution 678 and that the Security Council violated the U.N. Charter by giving Member States overly broad authority.

This Article explores the two premises in order to assess the legality of actions taken by both the United States and the United Nations in the Persian Gulf War. In that context, the Article also reflects on the proper role of the U.N. Security Council in responding to breaches of the peace.

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I. Resolution 678

After a period of negotiation over several contentious issues, Iraq invaded Kuwait on August 2, 1990. Among its contentions, Iraq asserted a longstanding Iraqi claim to sovereignty over Kuwait on the ground that Kuwait had been a part of the province of Basra when the area was under the Ottoman Empire, and Basra wound up as part of Iraq when the area was divided into states. Iraq had not, however, consistently maintained this claim and had, at one point, recognized Kuwait's independence. Even though the Iraqi government asserted that Kuwait was part of Iraq, Kuwait enjoyed sovereignty under accepted international principles, making Iraq's attack an act of aggression.

In response to the Iraqi attack, President Bush sent a military force to Saudi Arabia, saying that the reason was to prevent an Iraqi invasion of Saudi Arabia. At the same time, he took the issue to the U.N. Security Council, which adopted a series of resolutions directed against Iraq. In Resolution 660, the Council condemned Iraq for aggression. It also imposed a trade and financial embargo to force Iraq to withdraw from Kuwait. It declared Iraq's attempted annexation of Kuwait null and void and demanded that Iraq allow the departure of foreign nationals whom it had forbidden to leave Iraq. The Council supported its embargo by calling on U.N. Member States to take naval action blocking Iraqi exports and imports and to deny take-off rights to aircraft carrying goods other than medicine or certain foodstuffs to Iraq.

In November 1990, President Bush doubled the U.S. force in Saudi Arabia, stating that he wanted the capability to drive Iraq out of

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Kuwait. He approached the Security Council for a resolution sanctioning military force against Iraq, and the Council adopted Resolution 678, which read:

The Security Council,


Noting that, despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement resolution 660 (1990) and the above-mentioned subsequent resolutions, in flagrant contempt of the Security Council,

Mindful of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security,

Determined to secure full compliance with its decisions,

Acting under Chapter VII of the Charter,

1. Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;

2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991, fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area;

3. Requests all states to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of the present resolution;

4. Requests the states concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of the present resolution;

5. Decides to remain seized of the matter.12

Resolution 678 was adopted by twelve votes (Canada, Colombia, Ethiopia, Finland, France, Ivory Coast, Malaysia, Romania, USSR, U.K., U.S., Zaire) to two (Cuba, Yemen), with one abstention (China).13 The resolution did not expressly mention military force, but used instead the phrase “all necessary means.” Nevertheless, in statements made during the debate, Security Council representatives indicated that they under-


stood that “necessary” could include military.14

On January 8, 1991, President Bush sent Congress a letter seeking support for military action against Iraq. He wrote, “I therefore request that the House of Representatives and the Senate adopt a Resolution stating that Congress supports the use of all necessary means to implement UN Security Council Resolution 678.”15 Complying with Bush’s request, Congress enacted a joint resolution, stating that “[t]he President is authorized . . . to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.”16

On January 16, 1991, President Bush initiated military action against Iraq by air and informed U.N. Secretary-General Javier Pérez de Cuellar that the United States intended to implement Resolution 678.17 Explaining the action to the public, he said it was “taken in accord with United Nations resolutions.”18 Thus, President Bush rested the legality of the action on Resolution 678.

14. “A Pause of Goodwill” - Security Council Enacts 48-day Waiting Period for Iraqi Compliance with Resolutions, U.N. MONTHLY CHRON., Mar. 1991, at 46 [hereinafter A Pause of Goodwill]; Provisional Verbatim Record, supra note 13, at 32 (statement of Mr. Al-Ashtal, Yemen, referring to Res. 678 as “in effect authorizing States to use force” and calling it a “war resolution”); id. at 58 (statement of Mr. Malmierca Peoli, Cuba, calling the resolution “a virtual declaration of war” and a “deadline for war”); id. at 62 (statement of Mr. Qian Qichen, China, that “all necessary means” is language that “in essence, permits the use of military action”); id. at 67 (statement of Mr. Dumas, France, that Iraq used force and that Council must “resort to this same means”); id. at 71 (statement of Mr. Clark, Canada, that the “means” in Res. 678 “include the use of force”); id. at 74 (statement of Mr. Abu Hassan, Malaysia, referring to the “force authorized by the Council”); id. at 81-82 (statement of Mr. Hurd, U.K., that, according to the resolution, Member States “are authorized to use such force as may be necessary to compel compliance”; also referring to the resolution as “the military option”); id. at 103 (statement of Mr. Baker, U.S., that “[t]oday’s resolution is very clear. The words authorize the use of force.”).


17. Evelyn Leopold, U.N. Chief Expresses Sorrow at Start of War, Talked to Bush, REUTERS AM CYCLE, Jan. 16, 1991 (LEXIS, Nexis Library, Wires File) (quoting a U.N. spokesperson saying, “[t]he secretary-general was informed about 6 p.m. EST by President Bush that the coalition intended to implement Resolution 678.”). See also Hostilities Begin in Gulf Area: Secretary-General Expresses “Deep Sorrow”, U.N. MONTHLY CHRON., Mar. 1991, at 47.

II. United States Compliance with Resolution 678

The Bush administration's reliance on Resolution 678 raises two issues. The first is whether the administration resorted to military force more quickly, or in greater measure, than contemplated by the resolution. The second is whether resolution 678 was valid under the U.N. Charter. This Section addresses the first issue.

A. The Need for Combat

Resolution 678 authorized only the means "necessary" to gain Iraq's compliance with the Security Council's prior resolutions. In the Council debate, U.K. Foreign Minister Douglas Hurd said that under the resolution Member States, "are authorized to use such force as may be necessary to compel compliance." This limitation was consistent with international law strictures against the use of force. Article 33 of the U.N. Charter requires states to settle their differences by peaceful means. Force is permitted only as a grave exception to normal means of interaction (1) in self-defense, (2) through Security Council action, or (3) through the action of a regional security organization. In these three situations, the force is permissible only if necessary to thwart the aggressive acts against which it is directed.

The limitation of means in Resolution 678 to those "necessary" meant that if the Security Council's trade sanctions held a reasonable prospect of gaining Iraq's compliance, military force was not authorized. Similarly, if negotiation of outstanding issues, coupled with the pressure of the trade sanctions, could gain Iraq's compliance, then that avenue would have to be pursued prior to the use of force. Although Chapter VII of the U.N. Charter envisages the use of military force to stop and reverse aggression, "the goal of Chapter VII is action short of force, if possible." By adding Resolution 678 to the arsenal of sanctions already unleashed on Iraq, the Security Council hoped to get Iraq out of Kuwait through negotiation.

A number of Security Council members, even as they voted for Resolution 678, stressed the need for diplomatic efforts prior to the January 15, 1991, deadline established by the resolution, in order to avoid war. The United States was among them. Explaining the U.S. vote in favor of Resolution 678, Secretary of State James Baker said, "We continue to seek a diplomatic solution." The USSR expressed "the confidence that we will be able to overcome this crisis peacefully—I repeat, peacefully, and in a political way. . ." Malaysia, referring approvingly to

19. Provisional Verbatim Record, supra note 13, at 82 (statement of Mr. Hurd, U.K.).
21. Id. arts. 39-50.
22. Id. arts. 52-54.
25. Id. at 96 (statement of Mr. Shevardnadze, USSR).
Colombia’s ongoing efforts to promote negotiations between Iraq and Kuwait, viewed such efforts as “a logical complement to resolution 678,” and said that many U.N. Member States “would like the Security Council seriously to consider such an initiative.”\textsuperscript{26} Finland urged that the coming weeks “be fully utilized in order to achieve a peaceful way out of the crisis,” and stated its hope that Secretary-General Pérez de Cuellar would arrange a settlement.\textsuperscript{27}

Other Council members called on the Secretary-General to intercede. Colombia asked him to use his “good offices with a view to promoting a peaceful settlement of the conflict.”\textsuperscript{28} Romania said, 

\textit{[w]e continue to believe that every effort should be made to ease the existing tension politically and to solve the issues at stake by peaceful means . . . . We are thinking in particular of the capabilities of the Security Council and of the good offices and other initiatives that may be undertaken by the Secretary-General.}\textsuperscript{29}

Secretary-General Pérez de Cuellar, speaking in the Security Council after the vote, said that Resolution 678 “envisages at least 45 days of earnest effort to achieve a peaceful solution of the crisis.”\textsuperscript{30} He said, “the situation requires that diplomatic efforts be made with renewed determination to put the present crisis on the road to a peaceful outcome.”\textsuperscript{31} Thus, the Security Council understood resolution 678 to authorize military force only after other means were exhausted.

Like the Security Council, the U.S. Congress understood Resolution 678 to mandate diplomacy before force. In authorizing action under the joint resolution, it required that the President, before using military force, determine that “the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council resolutions.”\textsuperscript{32}

Immediately after the adoption of Resolution 678, President Bush announced that he would invite Iraq’s foreign minister to Washington and send Secretary of State James Baker to Baghdad. He said his administration would “discuss all aspects of the Gulf crisis” but added that the discussions would proceed only “within the mandate of the United Nations resolutions.”\textsuperscript{33} This caveat suggested that the issues Iraq wanted to raise were beyond the scope of the contemplated talks.

\textsuperscript{26} Id. at 78 (statement of Mr. Abu Hassan, Malaysia). \textit{See also} id. at 52 (statement of Mr. Malmierca Peoli, Cuba, that Malaysia, Yemen, Colombia, and Cuba had been working on ways to promote a peaceful settlement).

\textsuperscript{27} Id. at 84-85 (statement of Mr. Passio, Finland).

\textsuperscript{28} Id. at 42 (statement of Mr. Jaramillo, Colombia).

\textsuperscript{29} Id. at 97 (statement of Mr. Nastase, Romania).

\textsuperscript{30} Id. at 106 (statement of Mr. Pérez de Cuellar, Secretary-General).

\textsuperscript{31} Id.


\textsuperscript{33} Excerpts from President’s News Conference on Crisis in Gulf, N.Y. TIMES, Dec. 1, 1990, at A6.
In the weeks that followed, the administration narrowly construed its commitment to talk to Iraq. Secretary Baker explained that Iraq had a “choice,” namely to decide whether to leave Kuwait. “To ensure that [Iraqi President] Saddam [Hussein] understands this choice,” he said, “the President has invited the Foreign Minister of Iraq to Washington and has directed me to go to Baghdad. . . . [M]y mission to Baghdad will be an attempt to explain to Saddam the choice he faces: comply with the objectives of the Security Council or risk disaster for Iraq. . . .” Thus, the administration did not contemplate any give-and-take with Iraq.

The resolution of existing issues, however, might have defused the crisis. Iraq had raised a number of complaints against Kuwait in the weeks preceding its invasion of Kuwait. Iraq claimed that Kuwait had extracted oil from a pool beneath the Iraq-Kuwait border that belonged to Iraq. Moreover, the border around the oilfield was disputed, and Kuwait had recently set up oil rigs farther north, a move that Iraq considered provocative. Iraq also sought better access to the waters of the Persian Gulf. As a result of the borders drawn by a British official in the 1920s to separate Iraq and Kuwait, only a narrow stretch of Iraq touched the Gulf.

Oil pricing was another contentious matter. During the Iraq-Iran war, due to Iraq's reduced ability to export, Kuwait and other Gulf states had profited by picking up oil sales that had been Iraq's. In 1989-90, Kuwait, instead of cutting production to let Iraq recoup, pumped more oil than its agreed OPEC quota, driving world prices down. This led Iraq to charge Kuwait with economic aggression. Iraq suspected that Kuwait sought to gain concessions on the territorial issues by driving down oil prices. During the spring of 1990, an Iraqi government report

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35. Id. at 116. See also id. at 140 (Secretary Baker characterized any negotiation with Iraq as “walking back from the U.N. Security Council resolutions.”). See also Woodward, supra note 11, at 336-37 (suggesting that the administration offered to talk to Iraq to convince the U.S. public that it was trying to avoid war, but that it was not seriously working towards a peaceful solution).


37. See G. Henry M. Schuler, Congress Must Take a Hard Look at Iraq’s Charges against Kuwait, L.A. TIMES, Dec. 2, 1990, at M4. Thomas C. Hayes, Big Oilfield Is at the Heart of Iraq-Kuwait Dispute, N.Y. TIMES, Sept. 3, 1990, at A7. See also U.S. Policy in the Persian Gulf, supra note 34, at 149 (When Senator Frank Murkowski suggested giving Iraq an assurance that the oilfield issue would be discussed if it withdrew from Kuwait, Secretary Baker rejected the idea, saying, “we do not lend credence to the suggestion that somehow an aggressor can be rewarded for his aggression. We are talking about a New World Order that would operate on a different principle entirely.”).

38. See Shaw J. Dallal, Has the United States Overreacted?, MIDDLE EAST INTERNATIONAL, Oct. 12, 1990, at 20; Khadduri, supra note 2, at 26-28. Iraq also claimed two offshore islands, which would give it additional access to Gulf waters and allow it to better protect its short shoreline and port facilities. Id. at 33.
alleged Kuwait refused to make concessions on these issues, telling King Hussein of Jordan at the time that it had assurances of U.S. intervention in case of trouble with Iraq. Several political figures proposed binding arbitration, or some similar process, to resolve these differences between Iraq and Kuwait.

Iraq expressed interest in negotiating a solution to these differences during the fall of 1990, but the Bush administration showed no interest in establishing a mechanism to resolve these issues. Following the adoption of Resolution 678, Iraq continued to send signals that it was willing to begin a dialogue that might lead to its withdrawal from Kuwait. On December 6, 1990, Iraq met one of the Security Council’s demands when it announced that it would permit the departure from Iraq of all foreign nationals. In early January, Iraq offered to leave Kuwait if the U.S. did not attack during the withdrawal, if foreign troops left the region, if an agreement were reached to hold a Palestinian-Israeli conference, and if weapons of mass destruction were banned from the region. The Bush administration did not follow up on this proposal.

The Bush administration made no effort to seek a negotiated settlement leading to Iraq’s withdrawal from Kuwait, despite requests from

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40. See John F. Burns, “Iraqis Threaten to Attack Saudis and Israelis if Nation is “Strangled” by Embargo,” N.Y. Times, Sept. 24, 1990, at A1 (efforts at a settlement by King Hussein of Jordan); U.S. Policy in the Persian Gulf, supra note 34, at 164, 176 (suggestion by Zbigniew Brzezinski of binding arbitration between Iraq and Kuwait on territorial and financial issues, or submission of these issues to International Court of Justice). When Senator Paul Simon suggested that the administration promote an agreement between Iraq and Kuwait to submit their territorial dispute to the International Court of Justice as part of a plan whereby Iraq would withdraw from Kuwait, Secretary Baker rejected this approach. Id. at 152-53.


44. The Supreme Soviet of the USSR, in a resolution adopted Jan. 12, called on “all parties” to “continue efforts towards a political resolution of the crisis” and “not to allow a military confrontation, which would have catastrophic consequences for the Middle East and the entire world.” In a statement designed to keep the USSR from becoming involved militarily, the Supreme Soviet “underscore[d] that decisions requiring, under the USSR Constitution, the approval of the highest legislative authority may be taken only with the concurrence of the Supreme Soviet of the USSR.” Vedomosti s’ezda narodnykh deputatov SSSR i verkhovnogo soveta
other states. Before attacking, the administration met only once with Iraq, and in that meeting refused to discuss the issues Iraq deemed relevant. Yet when the administration launched massive air strikes against Iraq on January 16, 1991, President Bush said the attack followed "months of constant and virtually endless diplomatic activity." In response to Congress's requirement that he exhaust diplomatic means, President Bush informed Congress that diplomatic and other peaceful means would not compel Iraq to withdraw from Kuwait. However, he had not attempted serious diplomacy to resolve the situation.

The embargo, moreover, was the most extensive in the history of the Security Council. Most states were honoring the sanctions against Iraq. Cuba, objecting to Resolution 678, said that the embargo meant that "Iraq cannot receive by air, land or sea goods which, in addition to food and medicine, are essential to the life of a nation. It is obvious that no State could long withstand the political and economic isolation imposed on that country." Iraq was an ideal target for a trade embargo. Since its national income depended on oil exports, and since it did not have a fully industrialized economy, it relied heavily on imports. At the time of the inva-

SSSR [Gazette of the Congress of People's Deputies of the USSR and of the Supreme Soviet of the USSR], no. 3, item 61 (1991). See Burns Weston, "Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy," 85 AM. J. INT'L L. 516, 530 (1991) (criticizing Bush for viewing Resolution 678 as "an unconditional warrant to go to war come January 15" rather than "a license to use force only as a last resort"). See also Woodward, supra note 11, at 345 (quoting national security advisor Brent Scowcroft saying that the diplomatic efforts with Iraq during December were "all exercises," and that Bush had made up his mind to attack Iraq after January 15).


46. See Excerpts from Bush's Remarks on Baker's Mission and Diplomacy's Fate, N.Y. TIMES, Jan. 10, 1991, at A16; There Is a Chance - or There Was a Chance, GUARDIAN (London), Jan. 10, 1991, at 2 (Baker: "The message I conveyed ... is that Iraq must either comply with the will of the international community or be expelled by force from Kuwait.").


48. Letter to Congressional Leaders on the Persian Gulf Conflict, 27 WEEKLY COMP. PRES. DOC. 59, (Jan. 21, 1991) (referring to a determination of Jan. 16, 1991, stating, "I concluded ... that only the use of armed force would achieve an Iraqi withdrawal.").

49. Provisional Verbatim Record, supra note 13, at 58-60 (statement of Mr. Malmierca Peoli, Cuba).

50. See id. at 34-35 (statement of Mr. Al-Ashtal, Yemen). See also U.S. Policy in the Persian Gulf, supra note 34, at 121 (statement of Sen. Joseph Biden: "The world embargo against Kuwait is the most comprehensive in history."). Id. at 124 (statement of Secretary Baker: "We have 4 months of the best sanctions enforcement that has ever probably existed.").
sion, many observers thought that the sanctions were already taking a toll on Iraq.\textsuperscript{51} Economic sanctions, as analysts noted, require time before they hurt the target state, and thus the full impact on Iraq had yet to be experienced.\textsuperscript{52} Several former U.S. military leaders pressed President Bush to give the sanctions more time to take effect.\textsuperscript{53} President Bush did not have a strong basis for concluding that economic sanctions had failed.

B. Palestinian-Israeli Peace as an Issue

The Bush administration assiduously avoided one major diplomatic issue which, if resolved, might have led Iraq to withdraw from Kuwait. Iraq argued that its occupation of Kuwait should be dealt with along with other foreign occupations in the region, including Syria's occupation of Lebanon and Israel's occupation of southern Lebanon, the Golan Heights, the Gaza Strip, and the West Bank of the Jordan River.\textsuperscript{54} But when President Bush, following Resolution 678, announced he would talk with the Iraqi government, he refused to participate in an international conference on the Israeli occupations.\textsuperscript{55} Secretary Baker explicitly indicated what the administration would and would not discuss with Iraq: "Nor is this the beginning of a negotiation on subjects unrelated to Iraq's brutal occupation of Kuwait. I will not be negotiating the Palestinian question or the civil war in Lebanon.”\textsuperscript{56}

Strong sentiment in the U.N., however, favored dealing with the Palestinian-Israeli question. The General Assembly adopted a resolution on December 6, 1990, asking the Security Council “to convene the International Peace Conference on the Middle East.”\textsuperscript{57} The Security Council discussed the issue, and most members wanted to set a date for a conference. The Bush administration, however, said the two issues


\textsuperscript{52} Hufbauer & Elliot, supra note 51, at A17; \textit{U.S. Policy in the Persian Gulf}, supra note 34, at 165 (statement of former National Security Advisor Zbigniew Brzezinski).


\textsuperscript{56} \textit{U.S. Policy in the Persian Gulf}, supra note 34, at 107 (statement of Secretary Baker).

could not be linked and threatened to veto any resolution that set a date for a conference. As a result, when it passed a resolution on the Palestinian-Israeli issue, the Council did not call for an international conference.\textsuperscript{58} Had this effort succeeded, a negotiated Iraqi withdrawal from Kuwait might have been achieved.

The Bush administration argued that to link Iraqi withdrawal with resolution of the Palestinian-Israeli issue would reward Iraq for its invasion, that Iraq did not invade Kuwait to gain a settlement for the Palestinians, and that Israel's occupation of Arab territories was not the result of aggression. Other Council members agreed that Iraq did not invade Kuwait to get Israel to withdraw from Arab territories, but they found the point irrelevant. For them the Palestinian-Israeli question needed to be resolved in any event, and they thought that moving towards a settlement might get Iraq to leave Kuwait. To them, it was good diplomacy—doing something that needed to be done anyway as a means of avoiding a war.

Soviet Foreign Minister Edward Shevardnadze reflected this view when he said that the Security Council had long sought a settlement of the Palestinian-Israeli conflict. He asked,

Why should we stop all this now? Are we in some strange way intimidated by the word "linkage?"\textsuperscript{59} We believe that we should continue what we have been doing and what we ought to be doing now: seeking a path towards a comprehensive settlement of the whole complex of Middle East problems that existed prior to 2 August. That is not rewarding anyone; it is just sound policy and common sense.\textsuperscript{60}

Many Council members were not persuaded that Israel's occupation of foreign territory differed from Iraq's. The Council and General Assembly had repeatedly called on Israel to withdraw from the Arab territories.\textsuperscript{61} The Bush administration's view that Israel acted defensively in occupying the Gaza Strip and the West Bank in the 1967 war was considered irrelevant by most other states, because even a state that takes territory defensively does not acquire sovereign rights.\textsuperscript{62} Moreover, although neither the Council nor the Assembly ever made a find-


\textsuperscript{59} "Linkage" was the term the Bush administration used with respect to the connection between Iraq's occupation of Kuwait and Israel's occupation of Arab territories.

\textsuperscript{60} Provisional Verbatim Record, supra note 13, at 93 (statement of Mr. Shevardnadze, USSR).


\textsuperscript{62} \textit{See} R. Y. Jennings, \textit{The Acquisition of Territory in International Law} 55-56 (1963); W. Thomas Mallison & Sally V. Mallison, \textit{The Palestine Problem in International Law and World Order} 259 (1986).
ing on the issue, the evidence pointed to aggression by Israel in 1967.63

The Bush administration's rejection of negotiations on the differences between Iraq and Kuwait and its refusal to consent to a Palestinian-Israeli conference enabled the administration to avoid all issues that held any promise of achieving a negotiated Iraqi withdrawal from Kuwait. Since Resolution 678 contemplated such efforts as a precondition for any military action against Iraq, the administration's attack on Iraq, without any attempt at diplomacy, violated the authorization given by the resolution.

C. The Need for the Ground War against Iraq

Even if the initiation of hostilities was found to conform to Resolution 678, the Bush administration's subsequent military action still had to be "necessary" to gain Iraq's compliance. If not, it was unauthorized by Resolution 678.

The course of hostilities, however, suggested that the Bush administration was not limiting itself to "necessary" force. On February 22, it demanded that Iraq leave Kuwait within one week.64 Iraq requested a ceasefire first, so that it could withdraw in the assurance that its forces would not be attacked while in a vulnerable position, but Iraq said it would begin withdrawing the day after a ceasefire, and would complete the withdrawal within twenty-one days.65 A three-week withdrawal would also give Iraq time to take its weaponry. The administration said it could not wait, however, because Iraq was following a "scorched-earth" policy in Kuwait and was killing Kuwaiti civilians.66 The administration refused to cease fire and gave Iraq an ultimatum to begin withdrawal from Kuwait the next day and to complete it within seven days.67

Iraq did not comply, and on February 23, 1991, the Bush administration began a ground assault into southern Iraq, and an air and ground assault against Iraq's forces in Kuwait. President Bush said that the objective was "to eject the Iraqi Army from Kuwait."68 The administration's rejection of a three-week withdrawal suggested, however, that Iraqi withdrawal was not its only objective. Even if Iraq was causing damage in Kuwait, a ground offensive by allied forces would do so as well.69

65. Id.
69. See Eric Hooglund, The Other Face of War, MIDDLE EAST REPORT, July-Aug. 1991, at 3, 4 (reporting twenty-eight civilian deaths in Kuwait from allied bombing).
As the ground war began, the Soviet foreign ministry expressed "regret that a most real chance for a peaceful outcome to the conflict and for the attainment of the aims stipulated in the U.N. Security Council resolutions, without further human casualties and material destruction, has been missed." This was a clear, if polite, criticism of the administration for starting the ground war needlessly, in violation of the necessity criterion of Resolution 678. Since Iraq had already agreed to withdraw, and there was a reasonable prospect it would withdraw, further force was not a "necessary means" for getting Iraq out of Kuwait.

In starting the ground war, the Bush administration apparently held objectives other than getting Iraq out of Kuwait, and hence beyond the scope of Resolution 678. In the midst of the ground war, National Security Advisor Brent Scowcroft explained that the administration hoped to damage the Iraqi forces sufficiently that Iraq would be left with "no offensive capability." General Thomas Kelly, director of operations for the Joint Chiefs of Staff, said that President Bush had asked the Joint Chiefs early on both to get the Iraqis out of Kuwait and to "destroy their ability to conduct offensive operations" outside Iraq. A New York Times writer noted that, while the U.N. only authorized driving Iraq out of Kuwait, the United States and its allies fought on "despite a series of frantic peace bids until they were confident that they had shattered Mr. Hussein's best divisions."

In a Senate hearing in December 1990, Secretary Baker indicated that destroying a large part of Iraq's army might be a war objective. He said that even if Iraq were ejected from Kuwait "we will still have to address this problem that is presented by the disproportionate military power of this country." The problem of the size of Iraq's military, he said,

does not happen to be standing alone, a specific subject of the U.N. Security Council resolution. So, when you talk about full implementation of the U.N. Security Council Resolutions, the case can be made I think that you could have full implementation without addressing that continuing problem. But I am not sure you could and see yourself obtaining the four goals the President articulated.

Thus, the administration had an aim distinct from Iraqi withdrawal from Kuwait, namely a diminution of Iraq's future military capacity, and Secretary Baker acknowledged that this aim fell outside the "full implementation" of Resolution 678.

Speculation swirled around another possible U.S. objective, that of killing the top Iraqi leadership. The U.S. Air Force's bombing during

74. U.S. Policy in the Persian Gulf, supra note 34, at 127 (statement of Secretary Baker).
75. Id. at 138 (statement of Secretary Baker).
the air war of a bomb shelter in Baghdad that housed high Iraqi officials and their families suggested that the administration might be targeting President Saddam Hussein, and that one of its objectives might be to remove him from office. 66 Secretary Baker argued that removing President Hussein might fall within the authorization of Resolution 678, since a different Iraqi leadership might withdraw from Kuwait. 67 The Council, however, never discussed a forced change of power in Iraq, and nothing in its resolutions suggested this approach. Thus, if the administration sought to bring down the Iraqi government by killing Iraq's top officials, this aim was outside Resolution 678.

D. The Need for Combat During Iraq's Withdrawal from Kuwait

On February 26, under the pressure of the ground war, Iraqi forces began to withdraw from Kuwait. Iraq asked that it be allowed to pull out without being attacked; in the Security Council, the USSR supported this request, 68 but the Bush administration refused. President Bush said of the Iraqi withdrawal, "This changes nothing. The allied assault will continue with undiminished intensity." 79 Even as Iraqi troops left Kuwait, the administration continued the ground war.

At this juncture, President Bush raised a number of collateral issues as preconditions for stopping his attack on Iraqi forces. He said that Iraq must comply not only with the Security Council resolution calling on it to leave Kuwait but with the other eleven Security Council resolutions regarding the situation. 80 Although the other resolutions were mentioned in Resolution 678, they were aimed at ending Iraq's occupation of Kuwait. Iraq had already complied with one resolution that demanded that Iraq allow foreign nationals to leave Iraq. 81 Another held Iraq responsible for financial loss resulting from the invasion, but

66. Alessandra Stanley, Iraq Says U.S. Killed Hundreds of Civilians at Shelter, but Allies Call It a Military Post, N.Y. TIMES, Feb. 14, 1991, at A1, col. 6 (U.S. officials said the Amiriya shelter was a command post; reporters who visited could not find evidence of such use). Robert Fisk, Air Officers in Dispute over Baghdad Raids, INDEPENDENT (London), Feb. 15, 1991, at 1 (quoting unnamed "senior US military source" saying that among top U.S. military officials, "there's not a soul who believes that it was a command and control bunker," but rather that they "thought it was a military personnel bunker"). See also Nightline (ABC television broadcast, Jan. 10, 1992) (LEXIS, Nexis Library, Current File) (Ted Koppel stating "From the very first night of the air war, ... every command bunker in Baghdad was targeted, with the expectation that Saddam Hussein would be operating out of one of them."); and The Last-Gasp Effort to Get Saddam, U.S. NEWS & WORLD RPT., Jan. 20, 1992, at 42 (stating that U.S. Air Force bombed hardened bunker at al-Taji air base Feb. 27, 1991, with bunker-penetrating bombs because it thought Pres. Hussein was there).

67. Interview, This Week (ABC television broadcast, Feb. 24, 1991).


that was not an issue that could be resolved quickly.\textsuperscript{82} The administration apparently raised Iraq's compliance with the other resolutions to give it time to destroy more of Iraq's military capacity.

As Iraqi troops fled north on the highway leading out of Kuwait, the U.S. forces bombed and fired on them in what was described by eyewitnesses as a "turkey shoot."\textsuperscript{83} The Iraqi forces did not return the U.S. fire. As a result of this bombing, a massive convoy of Iraqi vehicles was left in ruins and thousands of fleeing Iraqis died. U.S. commanders justified the slaughter on the grounds that the Iraqi forces were taking their equipment and arms with them and were therefore not hors de combat.\textsuperscript{84} The Iraqi forces were, however, leaving the scene of battle as fast as they could, apparently simply trying to save themselves.\textsuperscript{85} A senior Air Force analyst called the bombing "an outrage" because the fleeing Iraqis "were whipped."\textsuperscript{86} If the U.S. purpose was to get Iraqi forces out of Kuwait, there was no need to bomb.

Air Force Chief of Staff Gen. Merrill McPeak explained why his planes bombed the Iraqis: "When enemy armies are defeated, they retreat, often in disorder, and we have what is known in the business as the exploitation phase."\textsuperscript{87} Gen. McPeak said, "It's during this phase that the true fruits of victory are achieved from combat."\textsuperscript{88} If the bombing of the fleeing Iraqis was aimed at reaping the rewards of victory, it exceeded the authorization of Resolution 678. Once Iraqi troops were retreating from Kuwait, killing them was not necessary to make them leave. The states acting under Resolution 678 were not authorized to reap the "fruits of victory" by inflicting gratuitous damage and loss of life.

The Bush administration argued, however, that Resolution 678 allowed military action to diminish Iraq's military capacity. In addition to authorizing Member States to use "all necessary means" to ensure Iraqi withdrawal, Resolution 678 authorized them to use "all necessary means" to "restore international peace and security in the area."\textsuperscript{89} The Bush administration relied on this language to justify military action unrelated to forcing Iraq out of Kuwait. It said that reducing Iraq's offensive capability would ensure peace and security in the region by making Iraq less able to strike other neighboring states.\textsuperscript{90}

\textsuperscript{83} Christopher Hitchens, Minority Report, NATION, Mar. 25, 1991, at 366.
\textsuperscript{84} Knut Royce & Timothy M. Phelps, Rout of Iraqis Became Savage "Turkey Shoot," NEWSDAY, Mar. 31, 1991, at 7.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{88} Id.
\textsuperscript{89} S.C. Res. 678, supra note 12.
Article 42 of the Charter, however, only allows the Security Council to take military action to deal with an act of aggression. It may not take military action for the broader purpose of ensuring future peace. The language in Resolution 678 about restoring international peace and security was not original but came verbatim from Article 39 of the Charter. To “restore international peace and security” is, according to Article 39, the goal of Security Council action taken under Chapter VII. Article 39 provides: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

Restoring the peace is thus the end result when the Security Council stops aggression. To “restore international peace and security” means to counteract aggression. It imports nothing broader, such as changing a government in the hope that a government less inclined to aggression will take its place, or reducing a state’s capacity to wage war in the future.

Oscar Schachter and Eugene Rostow argued that this Article 39 language, as repeated in Resolution 678, justified the effort, as Rostow put it, “to make it impossible for Iraq to continue the extraordinary career of conquest it has pursued since 1979.” In support, Rostow cited a statement by Emmerich von Vattel that it is permissible to disable an aggressor from doing further injury. But Vattel’s view does not comport with twentieth-century notions of necessity and proportionality in the use of defensive force. As Schachter has written elsewhere, a state acting in defense “generally limits itself to force proportionate to the attack; it does not bomb cities or launch an invasion.”

Commenting on Article 39 of the U.N. Charter, Goodrich, Hambro, and Simons did not discuss the phrase “restore international peace and security” and apparently did not con-

91. U.N. CHARTER art. 39.
93. Rostow, supra note 92, at 514.
94. Id. (quoting Emmerich de Vattel, The Law of Nations; Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, bk. II, ch. IV, § 51 (Joseph Chitty trans., 1852 (1758)).
96. Schachter, supra note 95, at 1637.
sider it to give the Security Council any additional powers.\textsuperscript{98} There is no indication from the drafting history that the language sanctions the use of force for any purpose other than counteracting aggression.

In the Security Council debate on Resolution 678, the phrase "restore international peace and security" received little attention. Only Yemen mentioned it, expressing concern that states might read it broadly. "[I]t will be up to those states with military forces in the area to decide on the prerequisites for the restoration of international peace and security in the region, which might well lead to a military confrontation on a larger scale."\textsuperscript{99} This statement has proven quite prescient. The Bush administration used the phrase for just that purpose. Administration supporters took the phrase "restore international peace and security" out of context and gave it a life of its own.\textsuperscript{100}

E. Amount of Force

Another factor in determining whether the force used against Iraq was "necessary," as required by Resolution 678, is its magnitude. By way of "all necessary means," the Security Council did not contemplate a high level of destruction of Iraq. Explaining its vote on Resolution 678, Malaysia said that the resolution "does not provide a blank check for excessive and indiscriminate use of force," and cautioned "against any action purportedly taken under this resolution that would lead to the virtual destruction of Iraq."\textsuperscript{101} The term "necessary" in Resolution 678 imported a notion of proportionality into the action being authorized. It must be assumed as well that the Security Council contemplated only use of force that is lawful under the humanitarian law norms that regulate the conduct of warfare.

The Bush administration, however, did not limit itself to attacking the Iraqi army in and around Kuwait. It took the war into the heart of Iraq, arguing that the air attacks were necessary to destroy the back-up support that allowed the Iraqi forces in and around Kuwait to function. The aerial bombardment of Iraq was intense. The United States ran 92,000 air sorties, dropping 88,500 tons of bombs.\textsuperscript{102} In attacking Iraqi troop emplacements in and around Kuwait, the U.S. forces used napalm, cluster bombs, and "daisy cutter" bombs of near-nuclear intensity. Although the Pentagon claimed that its bombing was very accurate, Air Force Chief of Staff Gen. McPeak admitted that 70 percent of the bombs

\textsuperscript{98} Leland Goodrich et al., Charter of the United Nations: Commentary and Documents 293-302 (1969).

\textsuperscript{99} Provisional Verbatim Record, supra note 13, at 33 (statement of Mr. Al-Ashtal, Yemen).

\textsuperscript{100} Ethan Bronner, International Experts Defend U.S. Demands of Iraqis, Boston Globe, Feb. 27, 1991, at A3 (quoting experts as saying that "restore international peace" could mean to disarm the Iraqi military).

\textsuperscript{101} Provisional Verbatim Record, supra note 13, at 76-77 (statement of Mr. Abu Has-

\textsuperscript{102} Kaplan, supra note 87, at A1.
the Air Force dropped on Iraq missed their targets.\(^{103}\) Since much of the bombing was conducted in urban areas, many of the errant bombs fell on civilians. As the air war continued, Secretary-General Pérez de Cuellar called it "disturbing" that "civilian casualties are mounting and that damage to residential areas throughout Iraq has been widespread."\(^{104}\)

A U.N. team investigated the damage and concluded that the bombing left Iraq unable to produce industrial goods to any significant degree. The team called the bombing "near apocalyptic" and said it reduced life in Iraq to a "pre-industrial stage."\(^{105}\) The team found that the bombing destroyed major economic sites, such as sewage and water treatment facilities, and electrical generating plants.\(^{106}\) Physicians who inspected Iraq reported that all seven of Baghdad's water purification plants were non-functional, and that vibrations and shock waves from bombs cracked water and sewer mains throughout the city.\(^{107}\) As a result of the destruction of the electrical generating capacity of Baghdad, water could not be pumped through the distribution system.\(^{108}\) The lack of electricity and water led to infantile diarrhea and other disease caused by untreated sewage and by the drinking of unsanitary water.\(^{109}\)

The Bush administration used massive force against Iraq not to force Iraq out of Kuwait, but to ensure low U.S. casualties and to leave Iraq without offensive military capability. The high level of force took the action outside Resolution 678.\(^{110}\) The bombing did not meet the Resolution 678 standard of "necessary" means.\(^{111}\)

The bombing of Iraq also violated humanitarian law. Under that law, military objectives may be targeted, but U.S. commanders apparently construed "military objective" broadly, to include infrastructure


\(^{107}\) Health Crisis in Baghdad, 4 RECORD (Physicians for Human Rights) 1, 16 (1991).

\(^{108}\) Id.

\(^{109}\) Id.


\(^{111}\) See Thalif Deen, Third World Charges Security Council Meeting Blocked, INTER PRESS SERVICE, Feb. 4, 1991 (LEXIS, Nexis Library, Wires File) (Malaysia prime minister Mahathir Mohammed expressed concern that the rapid escalation of the war would take it beyond the objectives of res. 678).
installations, such as electrical or water-purification installations, that might support military activity. Moreover, even when strictly military objectives were targeted, damage to nearby civilian locations was a virtual certainty and therefore such action would violate Protocol I of the Geneva convention.\textsuperscript{112} The damage to civilian objectives as assessed by the U.N. team was too extensive to be excused as inevitable damage incident to lawful targeting. The administration's bombing of Iraq violated the rules of warfare by inflicting significant, predictable damage on civilian populations.\textsuperscript{113}

F. Compliance with Resolution 678

The Bush administration's contention that its military action against Iraq conformed to Resolution 678 was weak. The administration eschewed diplomacy in favor of delivering Iraq an ultimatum to leave Kuwait. When Iraq signaled its willingness to talk, the administration did not respond. By refusing to address the Palestinian-Israeli question, the administration missed an opportunity to resolve the crisis peacefully. Ignoring the pleas of other states, it insisted that "linkage" was inappropriate and thus set the course of events firmly in the direction of war.

After the air war devastated Iraq, the administration began a ground war, even though Iraq had conditionally agreed to withdraw from Kuwait. Even as Iraq withdrew, the administration maintained its attack. Moreover, the level of military force the administration brought to bear both on Iraqi cities and on the Iraqi troops in and around Kuwait exceeded what was "necessary" to gain Iraq's compliance with Security Council resolutions.

By exceeding the strictures of Resolution 678, the administration lost any legal basis for its military action against Iraq. The action therefore constituted aggression.

III. The Legality of Resolution 678

Even if the Bush administration complied with Resolution 678, its action would not be lawful if the resolution were inconsistent with the U.N. Charter. Certain aspects of Resolution 678 put its conformity to the Charter in doubt. Chapter VII of the Charter requires that prior to initiating military force, the Security Council must first try less drastic meas-

\textsuperscript{112} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3, art. 51(5) [hereinafter Protocol Additional] (prohibiting "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"). See Woodward, supra note 11, at 341 (Air Force Chief of Staff Gen. McPeak predicted in December 1990 that the bombing of Iraq would kill 2000 civilians.).

\textsuperscript{113} Protocol Additional, supra note 112, at arts. 48-58.
ures, or determine that the measures would be fruitless.\textsuperscript{114} If it begins military action, the Council must decide the specific parameters and must retain control over the action taken.\textsuperscript{115} It may not give states a blank check to take military action. Finally, a resolution to initiate military action must conform with Charter-mandated voting procedures, which require the affirmative vote of all five of the Council's permanent members.\textsuperscript{116}

A. Military Force as a Measure of Last Resort

In Resolution 678, the Security Council purported to act under Chapter VII, Articles 39-51, of the U.N. Charter,\textsuperscript{117} which imposes strict requirements for a Council decision to use military force. Chapter VII permits the Council to make a finding of a threat to the peace, breach of the peace, or aggression, and then to act to deal with it. Article 39 states that the "Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."\textsuperscript{118} Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.\textsuperscript{119}

Article 42 provides:

Should the Security Council decide 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 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.\textsuperscript{120}

Thus, the Chapter VII scheme requires that the Security Council must first determine whether a breach of the peace has occurred under Article 39, then either take measures not involving the use of force under Article 41 or decide that such measures would be inadequate, and then, if necessary, take military action under Article 42. If, however, the Security Council has taken measures not using force, it may proceed to military action only after deciding that those measures have proven inadequate.

\textsuperscript{114} U.N. CHARTER arts. 39-42.
\textsuperscript{115} Id. arts. 42-49.
\textsuperscript{116} Id. art. 27.
\textsuperscript{117} S.C. Res. 678, supra note 12, preambular para. 4.
\textsuperscript{118} U.N. CHARTER art. 39.
\textsuperscript{119} Id. art. 41.
\textsuperscript{120} Id. art. 42.
Some analysts claim that Resolution 678 was a lawful invocation of Article 42.\textsuperscript{121} However, that conclusion is not obvious, because the Security Council is obliged to restore international peace by the least destructive means. The presence of aggression does not always enable the Council to use military force to oppose it. To the contrary, the Council may use military force only if other means will not succeed.

Under Article 39, if the situation can be resolved between the parties directly involved, the Council is obliged to suggest avenues to a peaceful resolution. In keeping with this obligation, the Council, in its first resolution on the situation, called on Iraq and Kuwait "to begin immediately intensive negotiations for the resolution of their differences."\textsuperscript{122} This was an apparent reference to their dispute over oil prices, to Iraq's claim that Kuwait was taking oil from beneath Iraqi territory, and to its claim for better access to the Gulf.\textsuperscript{123} After making this initial invitation to Iraq and Kuwait, however, the Council did not return to the subject in later resolutions and did nothing to bring about such negotiations. The Council could, in theory, determine that promoting such negotiations would prove fruitless, but there is nothing in the record to suggest that it did so. Moreover, there was reason to believe that negotiations might work.\textsuperscript{124} Since it was not clear that negotiations between the parties would serve no purpose, the Council was on weak grounds in proceeding to sanctions.

The Security Council then proceeded to measures not involving the use of force, under Article 41. If the Council determines that Article 41 measures will not suffice, it may dispense with them and move immediately to military measures.\textsuperscript{125} However, when, as with Iraq, the Council uses Article 41 measures, it must, according to Article 42, determine that the Article 41 measures "have proved to be inadequate" before it moves to military measures.\textsuperscript{126}

The Council did not do this in Resolution 678, because it made no determination about the inadequacy of the trade sanctions. As of

\textsuperscript{121} See L. C. Green, \textit{Iraq, the U.N. and the Law}, 29 \textit{ALBERTA L. REV.} 560, 575 (1991). Green, however, clouds this analysis by stating as well that Resolution 678 contemplated "measures of peacekeeping as understood by the United Nations." \textit{Id.} at 576. It is unclear how they could be deemed peacekeeping, since they were to be taken against the consent of Iraq. "Peacekeeping" is understood, as with UNEF in Egypt, or UNOC in the Congo, to involve a force inserted with the consent of the host state. \textit{See also} Erik Suy, \textit{Peace-Keeping Operations in HANDBOOK ON INTERNATIONAL ORGANIZATIONS} 379, 387-89 (René-Jean Dupuy ed. 1988).

\textsuperscript{122} S.C. Res. 660, \textit{supra} note 5.

\textsuperscript{123} \textit{See supra} text accompanying notes 36-39.

\textsuperscript{124} \textit{See supra} note 40.

\textsuperscript{125} \textit{See, e.g., Documents of the United Nations Conference on International Organization, San Francisco}, Doc. 881, III/3/46, 12 U.N.C.I.O. Docs. 502, 508 (1945) (report of Rapporteur Mr. Paul-Bancour stating that the drafting committee adopted proposed language "which gives to the Council the power, when diplomatic, economic, or other measures are considered by the Council to be inadequate, to undertake such aerial, naval, or other operations as may be necessary to maintain or restore international peace and security").

\textsuperscript{126} \textit{See} O'Connell, \textit{supra} note 90, at 479.
November 29, 1990, it was not clear that the sanctions would fail. More importantly, it was not clear whether they would succeed by January 15, 1991, the date after which the Council implicitly authorized military action. As of November 29, 1990, the Security Council had no way of knowing whether the sanctions would, by January 15, 1991, convince Iraq to leave Kuwait. Since the Council did not wait to see whether economic sanctions would work, military force was not a "necessary" measure.

Schachter has argued that Resolution 678 implicitly determined that the economic sanctions had failed, and therefore that the Council did, in a rough sense, make a finding to that effect. Finland apparently believed that the Council had made a determination that Article 41 measures had failed. Explaining its vote on Resolution 678, Finland stated:

According to the Charter, should the Security Council consider that the economic and diplomatic measures have proved to be inadequate it may take further action as may be necessary to restore international peace and security. Acting under these provisions, the Council is simply giving effect to what is the core of the United Nations system of collective security.

Yemen chided the Security Council for its impatience with sanctions.

It is a little surprising that those who used to lecture us on the need to be patient for sanctions to work when they had to do with Rhodesia or South Africa are today in such a hurry to declare that those comprehensive and enforceable sanctions imposed on Iraq are simply not working.

Thus, Yemen too thought the Council was repudiating the sanctions route, although it did not say that the Council had made a finding that the sanctions had failed.

127. Schachter noted that as of November 29, 1990, it was "a matter of speculation" whether the trade sanctions would succeed by January 15, 1991. Schachter, supra note 92, at 456.
128. Richard Falk, Questioning the U.N. Mandate in the Gulf, IFDA DOSSIER 81, Apr.-June 1991, 81, 82 ("War should not have been authorized, or even threatened by way of the 15 January deadline. . . .").
129. Schachter, supra note 92, at 462 ("[I]t is not unreasonable to infer that the Council decision authorizing the cooperating states to use force ('all necessary means') impliedly recognized that sanctions would not prove adequate to compel Iraqi withdrawal."). See also Adam Roberts, Proper Steps to War, INDEPENDENT (London), Dec. 19, 1990, at 18 ("[T]he Council's members had reason to think that, in the words of Article 42 of the Charter, non-military measures alone 'would be inadequate or have proved to be inadequate.'"); Christopher John Sabec, Note, The Security Council Comes of Age: An Analysis of the International Legal Response to the Iraqi Invasion of Kuwait, 21 GA. J. INT'L & COMP. L. 63, 99 (1991) (stating that the call in res. 678 for action after Jan. 15, 1991 "appears to be a statement that the council considered non-military measures to have proved inadequate.").
130. Provisional Verbatim Record, supra note 13, at 84-85 (statement of Mr. Passio, Finland).
131. Id. at 36 (statement of Mr. Al-Ashtal, Yemen).
Clearly the Security Council had not made a finding that the sanctions failed as no language appears in Resolution 678 about the Article 41 measures. The Council would, in fact, have been hard pressed to make such a finding in Resolution 678. Since the Council was implicitly authorizing military action only after January 15, 1991, it would have had to say that the Article 41 measures would not succeed by then, and that, obviously, it could not know.

Council members expressed hope, however, that the threat of military action would convince Iraq to comply voluntarily.\(^{132}\) They viewed the threat of military force as an additional form of pressure that would supplement those already in place. Thus, it did not appear that the Council was declaring the sanctions a failure. The Council’s failure to base military action on a determination that Article 41 measures had failed violated the Chapter VII procedures and rendered its implicit call for military measures unlawful.\(^{133}\)

B. The Delegation of Decision-Making Power in Resolution 678

The most serious decision the Security Council can make is to authorize the use of military force. The Council must clearly determine the need for force, and clearly decide to use it. Yet Resolution 678 called for unspecified “necessary” action at a date six weeks hence, leading Yemen to call it “broad and vague.”\(^{134}\) Yemen’s representative said, “it’s just a blanket authorization, and is one of the most dangerous resolutions that the U.N. Security Council has adopted in its history.”\(^{135}\)

Even though the understanding in the Security Council was that Resolution 678 authorized military force,\(^{136}\) the resolution did not expressly say so. In failing to call for military force in explicit terms, the Council played loose with the Article 42 requirement of an express finding of the need for military force.\(^{137}\) Article 42 states that the Security Council may take action by air, sea, or land forces. For the state that is the object of such action, the consequences can obviously be devastating. If the Council is to take such action, it must address it directly and decide explicitly that it is necessary. It may not conceal such a momen-

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132. Id. at 74 (statement of Mr. Clark, Canada); Id. at 82 (statement of Mr. Hurd, U.K.).
134. Provisional Verbatim Record, supra note 13, at 33 (statement of Mr. Al-Ashtal, Yemen).
135. Eventually There Can Only Be an Arab Solution, MIDDLE EAST REPORT, Mar.-Apr. 1991, at 8, 9 (interview with Amb. Al-Ashtal).
136. See supra note 14.
tous decision in metaphorical language. Stipulating that states might take “all necessary means” is too imprecise an authorization for war.

By stating that the Security Council “may take such action,” Article 42 implies that the Council is to organize the action. Resolution 678 did not do that, but authorized any of the Member States to act. The Council let each Member State decide whether to initiate military force against Iraq. By allowing any Member State to decide whether force was necessary on a date six weeks hence, the Council failed to follow Chapter VII procedures. The basic postulate of Chapter VII is that the Council, and not individual states, decides when to use military force. This, indeed, distinguished the U.N. Charter from the Covenant of the League of Nations. Under the Covenant, the League Council could only recommend what force to use in case of aggression. If the League Council recommended and a state acted on the recommendation, the decision was that of the state, not of the League Council.

The U.N. Charter deprived states of the power to determine when to use force and gave that power to the Security Council. By permitting each state to make that determination, Resolution 678 turned the Charter system on its head. Cuba objected, with good reason, that Resolution 678 “violates the Charter of the United Nations by authorizing some states to use military force in total disregard of the procedures established by the Charter.”

The Security Council, moreover, did not establish a mechanism to ensure that Member States acting under Resolution 678 would coordinate strategy among themselves. The resolution thus left open the possibility that different states might act at cross-purposes. The only wording that served to ensure uniformity of action identified the states authorized to use force as the “Member States cooperating with the Government of Kuwait.” Perhaps all those states would follow a common plan, but perhaps they would not. Although the Security Council could have reconvened to settle such problems, in a fast-moving situation there was no assurance it would have the opportunity.

Explaining its vote for Resolution 678, Malaysia referred to the danger in the Council’s failure to clarify how a final decision to use force against Iraq would be made. The Malaysian representative stated that “[a]ny proposed use of force must be brought before the Council for its prior approval, in accordance with the specific provisions of Chapter VII

138. Woodward, supra note 11, at 334 (stating that the U.S. wanted an explicit call for use of force, but that when it tried to convince the USSR to approve such a resolution, the USSR objected to including language about use of force, and the phrase “all necessary means” was devised as a compromise).


140. League of Nations Covenant art. 16, para. 2. See also Goodrich et al., supra note 98, at 315; Cavare, supra note 139, at 650.


142. Provisional Verbatim Record, supra note 13, at 58 (statement of Mr. Malmierca Peoli, Cuba). See also A Pause of Goodwill, supra note 14, at 49.
of the Charter. We regret that this point is not clearly reflected in this resolution, a precedent that may not bode well for the future."\textsuperscript{143} Thus, Malaysia did not believe that Resolution 678 alone constituted an authorization to use military force. In its view, another Security Council vote was required, because only the Council may decide to initiate military force.

Malaysia was correct. Chapter VII requires that the Security Council make the determination to use military force. However, no other state that voted in the majority on Resolution 678 supported Malaysia on this point, and as a result the decision to use military force was left to each Member State.

There is only one situation when the Security Council may send a military force outside Article 42, namely, when it sends a military force into a state with that state's consent, as it did in the Congo in 1960. In such a situation the Council is not directing force against any state and thus is not undertaking enforcement action.\textsuperscript{144} Although the Charter basis for peace-keeping operations is unclear,\textsuperscript{145} they violate the rights of no state since they are taken with the consent of the host state and are directed against no state.\textsuperscript{146} The action taken against Iraq was, however, without Iraq's consent, and thus can be justified only under Article 42.

C. Security Council Control

Resolution 678 was also legally suspect because it did not establish Security Council control over actions. Chapter VII contemplates that enforcement action will occur at the direction of the Security Council. By stating that the Council "may take such action," Article 42 requires that the Council direct the action, define military objectives, and decide when to terminate hostilities.\textsuperscript{147} Resolution 678, however, did not envisage Security Council control; it only required states to "keep the Council regularly informed on the progress of actions" they might take. The Council retained control over neither the initiation of hostilities nor over their subsequent course.\textsuperscript{148}

Yemen objected to the lack of control mechanisms, stating that the resolution

is not related to a specific Article of Chapter VII of the Charter; hence the Security Council will have no control over those forces, which will fly their

\textsuperscript{143} Provisional Verbatim Record, supra note 13, at 76 (statement of Mr. Abu Hassan, Malaysia).

\textsuperscript{144} See Certain Expenses of the United Nations, 1962 I.C.J. 151, 175 (Jul. 20); Schachter, supra note 92, at 461; Suy, supra note 121, at 380-83.

\textsuperscript{145} Suy, supra note 121, at 380-83.

\textsuperscript{146} Id. at 387-89.

\textsuperscript{147} O'Connell, supra note 90, at 465 ("The Charter calls for the U.N. itself, not a small group of members, to do the countering.").

\textsuperscript{148} Falk, supra note 128, at 82 ("[T]he U.N. had an obligation to control the definition of war goals, the means chosen to achieve them and to use its authority to impose a ceasefire.").
own national flags. Further, the command of those forces will have nothing to do with the United Nations, although their actions will have been authorized by the Security Council.\textsuperscript{149}

Malaysia voted for Resolution 678, but was concerned that the resolution did not establish the accountability demanded by Chapter VII. "When the United Nations Security Council provides the authorization for countries to use force, these countries are fully accountable for their actions to the Council through a clear system of reporting and accountability, which is not adequately covered in Resolution 678."\textsuperscript{150}

The requirement of Security Council control in Article 42 becomes even clearer when Article 42 is contrasted to Article 41. The Article 42 language ("may take such action") stands in sharp contrast to the language of Article 41, which deals with economic and diplomatic sanctions. Article 41 provides that the Council "may call upon the Members of the United Nations to apply such measures." Thus, Article 41 contemplates that the Council set the economic or diplomatic sanctions and then ask Member States to comply. No such proviso was written into Article 42, meaning that the Council was not simply to decide that military measures were appropriate and then ask Member States to take such measures. Rather, Article 42 requires the Council itself to direct the action.

With Korea in 1950, the Council came closer to complying with this requirement than it did with Iraq. There it decided that the United Nations should take military action and set up a command under the U.N. flag. By delegating the command, as it did to the United States, the Council relinquished much of its control,\textsuperscript{151} but in Resolution 678 the Council made not the slightest effort to exert any control.

The need for Security Council control is also apparent in Articles 46 and 47 of the Charter. Article 46 provides: "Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee."\textsuperscript{152} The committee, according to Article 47, is composed of the chiefs of staff of the five permanent members of the Security Council.\textsuperscript{153}

Although the Military Staff Committee lay dormant during the Cold War years, after Iraq’s invasion of Kuwait Soviet President Mikhail Gorbachev suggested that the Committee manage any Council action.\textsuperscript{154} Following the Security Council’s call for a trade embargo

\textsuperscript{149} Provisional Verbatim Record, supra note 13, at 33 (statement of Mr. Al-Ashtal, Yemen).
\textsuperscript{150} Id. at 76 (statement of Mr. Abu Hassan, Malaysia).
\textsuperscript{152} U.N. CHARTER art. 46.
\textsuperscript{153} Id. art. 47.
against Iraq, the Bush administration met with the other permanent members of the Council to explore whether the Military Staff Committee could coordinate state-initiated blockade activities to enforce the embargo.\textsuperscript{155}

These meetings produced no positive results, however, and the Military Staff Committee played no role in coordinating the eventual blockade.\textsuperscript{156} Resolution 678 likewise made no mention of a role for the Military Staff Committee. The Iraqi representative, speaking in the Security Council during the debate on Resolution 678, objected that "only collective action under the command and control of the Security Council, in coordination with the Military Staff Committee, can lead to the use of force against any country, and no individual Member State may be authorized to lynch a particular country for any reason." Iraq accused the Council of ignoring the Charter. "Regrettably," it said, "the Council apparently thought that in this case the legal requirements were disposable niceties."\textsuperscript{157}

The reason Resolution 678 provided for no control was that the Bush administration, which drafted the resolution, did not want to be constrained. When Senator Daniel Patrick Moynihan suggested that troops for the Iraq action be placed under the Military Staff Committee, Secretary Baker objected that then "you begin getting into questions of whether or not there should be a U.N. command of forces, whether or not the Military Staff Committee should give directions to the multinational force, and questions of that kind, which we do not think, under these circumstances, are things that we ought to invite."\textsuperscript{158}

Like Senator Moynihan, former U.N. Undersecretary-General Brian Urquhart criticized Resolution 678 for disregarding the Military Staff Committee and wrote that "Articles 46 and 47 clearly imply that enforcement measures under chapter VII would be under the control of the Council and its Military Staff Committee . . . , but no such control was provided for."\textsuperscript{159}

The danger in the Council's failure to establish control became evident immediately after Resolution 678 was adopted. The Council had no control over whether the Bush administration would negotiate with Iraq before launching a military invasion; once the administration attacked, it, rather than the Council, made all tactical decisions, includ-

\textsuperscript{155} Staff Demanded by U.S., N.Y. Times, June 4, 1988, at A1 (proposal by Gorbachev to revive Military Staff Committee).
\textsuperscript{157} S.C. Res. 665, supra note 9.
\textsuperscript{158} Provisional Verbatim Record, supra note 13, at 21 (statement of Mr. Al-Anbari, Iraq).
\textsuperscript{159} U.S. Policy in the Persian Gulf, supra note 34, at 157 (statements of Sen. Moynihan and Secretary Baker).
\textsuperscript{159} Urquhart, supra note 23, at 34. Contra Sabec, supra note 129, at 100 ("[T]here is little basis for the position that the Military Staff committee must direct military operations conducted in the name of the Security Council.").
ing the decision to begin a ground war. Further, once Iraq stated it would withdraw from Kuwait, the administration decided to continue fighting.\textsuperscript{160} If the Military Staff Committee had controlled the action, it might well have decided to desist at that point.

As the fighting continued, Secretary-General Pérez de Cuellar complained that "what we know about the war" is

what we hear from the three members of the Security Council which are involved—Britain, France and the United States—which every two or three days report to the Council, after the actions have taken place.

The Council, which has authorised all this, is informed only after the military actions have taken place. As I am not a military expert I cannot evaluate how necessary are the military actions taking place now.\textsuperscript{161}

The Secretary-General's complaint stemmed from the failure of the Council to have the Military Staff Committee direct the action. Military officers on the Committee could have informed the Council whether the actions being taken were "necessary," as required by Resolution 678. As matters stood, the Council could only sit back and hope the states taking action were not doing more than was needed. This absence of Security Council control violated the requirements of Chapter VII.\textsuperscript{162}

D. China's Abstention

A final problem with Resolution 678 was that China, a permanent member of the Security Council, abstained from the vote.\textsuperscript{163} Article 27 of the Charter specifies that in votes on non-procedural issues, Security Council decisions must be taken "by an affirmative vote of nine members including the concurring votes of the permanent members."\textsuperscript{164} With China abstaining, it is not clear that this requirement was satisfied.

The reference in Article 27 to the votes of "the permanent members" could be read to refer either to those permanent members who are present, or to those that cast a vote, as opposed to abstaining. This phrase appears in the four official Charter languages other than English, however, as "all the permanent members."\textsuperscript{165} Thus, the Charter appears to require the concurring votes of all five permanent members.

The phrase "concurring votes" has been a source of confusion because some read it to include an abstention, in addition to an affirmative vote. The phrase "concurring votes" is not used in all five official

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\footnotetext[160]{160. Falk, supra note 133, at 17-18 (referring to "the duck shoot" against Iraqi troops withdrawing from Kuwait, and saying that this shows that the Security Council did not properly limit and minimize the use of force).}


\footnotetext[162]{162. See Weston, supra note 44, at 527 (stating that the lack of Security Council control under Resolution 678 was "not what the U.N. founders and Charter drafters had in mind").}

\footnotetext[163]{163. \textit{Provisional Verbatim Record}, supra note 13, at 65-66.}

\footnotetext[164]{164. U.N. \textit{CHARTER} art. 27, ¶ 3 (emphasis supplied).}

\footnotetext[165]{165. \textit{Id.}}
\end{footnotesize}
texts of the Charter. It appears only in the Russian and English texts. The Chinese text uses "agreement" of all the permanent members, without specifically mentioning a vote. The French text omits "concurring" and requires the affirmative votes to constitute a majority, including "the votes" of all the permanent members. The Spanish text also omits "concurring" and similarly requires the affirmative votes to constitute a majority, but then states that these must include the "affirmative votes" of all the permanent members.

Thus, in the five official texts there are four different formulations: concurring votes (English and Russian), agreement (Chinese), votes—with an implication that this means affirmative (French), and affirmative votes (Spanish). According to the Charter, all five texts are equally authentic, and when texts vary in official languages they must, under the Vienna Convention on the Law of Treaties, be reconciled. While the English, Russian, and Chinese texts are ambiguous on the effect of an abstention by a permanent member, the French text implies, and the Spanish text clearly implies that an abstention is to be deemed a veto. The English, Russian, and Chinese texts could be read to include an abstention as satisfying the requirement, but the implication is to the contrary, namely, that the permanent member must express approval of the resolution, which can be done only by voting affirmatively. Since the French and Spanish texts are clearer, the others must be read to conform to them. Thus, a textual analysis of Article 27 leads to the conclusion that an abstention by a permanent member on a non-procedural issue constitutes a veto.


167. The Chinese text reads "An Quan Li Shi Hui dui yu qi ta yi qie xiang zhi jue yi, ying yi ... zhi ke jue piao bao ku quan ti chang ren li shi guo zhi tong yi piao biao jue zhi ..." U.N. CHARTER art. 27, ¶ 3 (Chinese text available in 59 Stat. 1097, 1103).

168. The French text reads, "Les décisions du Conseil de Sécurité sur toutes autres questions sont prises par un vote affirmatif ... dans lequel sont comprises les voix de tous les membres permanents ..." U.N. CHARTER art. 27, ¶ 3 (French text available in 59 Stat. 1065, 1072).

169. The Spanish text reads, "Las decisiones del Consejo de Seguridad sobre todas las demás cuestiones serán tomadas por el voto afirmativo ... incluso los votos afirmativos de todos los miembros permanentes ..." U.N. CHARTER art. 27, ¶ 3 (Spanish text available in 59 Stat. 1157, 1164).

170. U.N. CHARTER art. 111.


By abstaining, a state does not convey the opposition that would be communicated by a veto. Similarly, an abstention does not affirmatively express agreement. Explaining its abstention on Resolution 678, China said it could not vote in favor because it construed Resolution 678 as authorizing military force; China opposed that approach and preferred a peaceful solution. China said that it abstained, instead of voting in the negative, because it supported the resolution's call on Iraq to comply with prior Council resolutions. This explanation indicated that China disagreed with the essence of Resolution 678, as construed by the members, namely, that it opposed the use of military force against Iraq. Since China stated its opposition to the essence of Resolution 678, it is difficult to construe its abstention as an "affirmative vote."

The drafting history of Article 27 relevant to the question of abstentions by permanent members is not extensive, but the five permanent members of the Security Council all thought that a voluntary abstention by a permanent member would constitute a veto, and early commentary construed Article 27 to that effect. The approval of the permanent members was deemed a prerequisite to the success of military action, because opposition by a major power would detract from the moral force of the Security Council decision to act, as well as from the practical possibility of implementing the decision.

On the occasions when the issue has arisen, the Security Council has not considered an abstention by a permanent member a veto. Even when permanent members have abstained on votes, the Council has nonetheless considered the resolution adopted if it gained the requisite

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173. Provisional Verbatim Record, supra note 13, at 62-63 (statement of Mr. Qian Qichen, China). See also A Pause of Goodwill, supra note 14, at 49.

In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred. Therefore, if a majority voting in the Security Council is to be made possible, the only practicable method is to provide, in respect of non-procedural decisions, for unanimity of the permanent members plus the concurring votes of at least two of the non-permanent members.

Id. See also Minutes of the Nineteenth Five-Power Informal Consultative Meeting on Proposed Amendments, Held at San Francisco, June 11, 1945, 3 p.m., 1 FOR. REL. U.S. 1256, 1258-60 (1945) (USSR, U.K., U.S., China, France say that voluntary abstention is a veto).
176. See Hans Kelsen, Organization and Procedure of the Security Council of the United Nations, 59 HARV. L. REV. 1087, 1098 (1946) ("The wording of Article 27, paragraph 3, hardly allows an interpretation other than that, if one or more of the representatives of the five permanent members are not present or abstain from voting, no valid non-procedural decision can be taken."); Goodrich & Hambro, supra note 172, at 133.
majority. Under the rules of treaty interpretation, one should take into account any practice of the party states "which establishes the agreement of the parties regarding its interpretation." Most such instances of the adoption of non-procedural resolutions on which a permanent member has abstained, however, have involved decisions of considerably less moment than Resolution 678.

The Security Council makes decisions under a number of Charter chapters, and few of the abstentions by permanent members in the Security Council's history have come on votes under Chapter VII. Further, when a permanent member has abstained on a Chapter VII matter, it has typically expressed a reason that did not go to the heart of the action contemplated. For example, in 1948 when the USSR abstained from a resolution finding a threat to the peace and ordering ceasefire in Palestine, it did not object to the finding of a threat to the peace or to the ceasefire call, but it had views about an appropriate settlement that were not addressed by the Council. In 1966 France and the USSR abstained on a resolution declaring a threat to the peace in Rhodesia and calling on the United Kingdom to prevent, by force if necessary, the arrival at the port of Beira of vessels believed to be carrying oil to Rhodesia; France and the USSR also abstained on a resolution finding a threat to the peace and imposing Article 41 sanctions against Rhodesia. But in both cases, they did not object to the essence of the resolutions. France did not consider the Rhodesian situation to be an international matter, but rather a domestic matter for the United Kingdom, and therefore did not find it a threat to the peace. However, France did not object to Britain taking action to put down the minority regime in Rhodesia. The USSR abstained because it advocated stronger action against the minority regime in Rhodesia, but did not oppose the action contemplated in the resolution.

Some of the most serious decisions that may be made under Chapter VII are those calling for military enforcement action. Leo Gross, after reciting instances of abstention during the Security Council's first few years, wrote in 1951:

It should be noted at this point, however, that the usefulness of agreement by sufferance has its limits. There is no case on record where the

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183. Provisional Verbatim Record, supra note 181, at 20-21.
184. Id., at 24.
Security Council has adopted a resolution under Article 39 or otherwise recommending or deciding the use of armed force, and where a permanent member agreed by abstaining. This is as might be expected. It seems inconceivable that a permanent member would abstain from voting if a resolution looking to the use of force were put to the vote.185

What Gross thought inconceivable, the Security Council did in Resolution 678. Never before in Council practice had that been done on a resolution contemplating the use of armed force.186

An abstention by a permanent member on an Article 42 decision is inconsistent with Chapter VII procedures for the additional reason that the five permanent members are to direct the military action through the Military Staff Committee, which includes a chief of staff from each of the five members.187 If a permanent member objects to the military action, as China did, it can hardly fulfill its role of directing the action. One must conclude, therefore, that the Charter procedure for use of force by the Security Council assumes the approval of the permanent members.

China, to be sure, did not consider its abstention on Resolution 678 to constitute a veto, nor did the other Council members. That, however, does not resolve the matter, because Member States not represented on the Security Council, particularly Iraq, have a right to expect the Council to follow proper procedures when making important decisions.188 China's abstention, particularly in light of its objection to military action against Iraq, cast serious doubt on the conformity of Resolution 678 to the Charter.

E. Conformity of Resolution 678 to the U.N. Charter

In summary, Resolution 678 violated the U.N. Charter in several significant ways. It was not based upon the required determination that the Article 41 measures that had been taken were inadequate and thus authorized military force where it might not have been necessary. It did not clearly determine when to use military force but left that determination to whichever Member States might choose to act. It established no mechanism of control over the military action taken by Member States and thereby abdicated its responsibility to direct action taken under its authority.189 Finally, China’s disagreement with the use of military action against Iraq deprived the action of the required support and threatened the directional role of the permanent members.

185. Gross, supra note 172, at 228.
186. On the resolution calling for military action in Korea, however, the USSR was absent, and its absence was not deemed by the Council to constitute a veto. S.C. Res. 84, supra note 151.
187. U.N. CHARTER art. 47.
188. Falk, supra note 133, at 10.
189. See Weston, supra note 44, at 518, 522 (finding Resolution 678 deficient for its ambiguity and for lack of Council control, finding no basis for Resolution 678 in any Article of Chapter VII and concluding that the resolution was technically lawful as an appropriate Council-initiated expansion of Council powers, but lacking in legitimacy because of its deficiencies).
The Charter provisions permitting the U.N. to impose military sanctions represented an important advance over prior law and opened the possibility of effective measures to stop aggression. However, the Charter's drafters established procedures that would ensure that the action be that of the U.N. and not individual states. By circumventing the Chapter VII procedures, the Security Council did something not only quite different from what the drafters envisaged, but at odds with their conception of international enforcement.

IV. Possible Security Council Power under Article 39

Two arguments have been made to justify the military action in the Persian Gulf; both seek to avoid the strictures of Article 42 of the Charter. The first argument attempts to locate in Article 39 a Security Council power to initiate enforcement action. The second attempts to locate in Article 51 a right to act in the defense of Kuwait.

As indicated above, Article 39 states that if the Council finds aggression it may "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." 190

An argument has been made that the Security Council may, in addition to organizing military action under Article 42, recommend to states under Article 39 that they take action. 191 The argument relies on the precedent of Security Council Resolution 84, which called for military action in Korea in 1950. 192 In that resolution, the Council "recommended that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." 193 Under Article 42, however, the Council decides. It does not recommend. The only Article in Chapter VII that mentions recommendations is Article 39. Thus, some analysts have concluded that the Security Council intended to base the Korean resolution on Article 39 alone. 194

Hans Kelsen, who shared this analysis of the Security Council's intent, criticized the Korea resolution as an improper recommendation not authorized by Chapter VII. Kelsen wrote that the Article 39 power

190. U.N. CHARTER art. 39.
191. Frederic L. Kirgis, Jr., The United States Commitment to the Norms of the United Nations and Its Related Agencies, 1 TRANSNAT'L L. & CONTEMP. PROBS. 125, 131 n.17 (1991) ("[S]ince the military action that began after January 15, 1991, was not under the control of the Security Council and was not taken pursuant to Article 43 agreements, it may be viewed as Chapter VII enforcement action without necessarily falling under Article 42.").
192. See Charles Chaumont, L'Equilibre des organes politiques des Nations Unies et la crise de l'organisation, 11 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 428, 436-37 (1965); Rostow, supra note 92, at 521-22 (Rostow, however, rejected the analogy); see also infra note 194 and accompanying text.
194. GOODRICH ET AL., supra note 98, at 315.
to make recommendations does not include the power to recommend an enforcement action. He wrote:

It is doubtful whether a recommendation of an enforcement action corresponds to the intention of those who framed the Charter . . . . If the Security Council, after having determined under Article 39 the existence of a threat to, or breach of, the peace, is of the opinion that enforcement measures are necessary to maintain or restore international peace, the Council must take these measures itself by acting under Article 41 or 42 . . . .

Rostow says that in Resolution 678 the Security Council did not rely on Article 39 alone, as evidenced by the fact that it “authorized” state action, instead of “recommending” action. If the Security Council in the Korean situation acted under Article 39 alone, however, it was on thin legal ice, because when Article 39 referred to recommendations, it did not mean recommendations that Member States take military action against an aggressor. The reference was rather to recommendations designed to counsel the parties to the conflict regarding ways to achieve resolution. The import of Article 39 is that when the Council finds aggression, it may move in either of two directions, or both. First, it may propose to the aggressor and the victim a plan that might lead to a resolution of the conflict. That is what is meant by “recommendation” in Article 39. Second, it may call for enforcement action under Articles 41 or 42. The Council’s inappropriate use of the word “recommend” in the Korean situation does not legalize an Article 39 route to military action as an alternative to Article 42. If the Council in the Korea resolution attempted to base its action on Article 39 alone, it acted contrary to the Charter.

Article 39 must be read in conjunction with Article 36 of Chapter VI of the Charter. Chapter VI deals with disputes that do not involve a threat to the peace, breach of the peace, or aggression. In dealing with such disputes, Article 36 empowers the Security Council to “recommend appropriate procedures or methods of adjustment” to the parties to the dispute. Article 39’s “recommendation” language is an analogue for the situation involving a threat to the peace, breach of the peace, or aggression. It allows the Security Council to devise a “recommendation” to the parties for a peaceful settlement of their conflict.

The committee that drafted Article 39 explained that by using the word “recommendations” it intended

196. Rostow, supra note 92, at 521.
197. Suy, supra note 121, at 381 (Regarding the Security Council action on Korea, “[t]he Organization endeavoured in this case to preserve its military enforcement capability by means which were not strictly in accordance with the explicit provisions for that purpose in the Charter. The highly sensitive issues raised by this venture caused this type of experiment not to be repeated, however.").
199. Weston, supra note 44, at 521. (Article 39 recommendations involve recommendations under Chapter VI for peaceful resolution).
to show that the action of the Council so far as it relates to the peaceful settlement of a dispute or to situations giving rise to a threat of war, a breach of the peace, or aggression, should be considered as governed by the provisions contained in Section A.200

What at that time was "Section A" became Chapter VI in the final text of the Charter.201 Chapter VI provides Security Council procedures for handling disputes that do not amount to a threat to the peace, breach of the peace, or aggression. The idea thus was that whenever the Council makes recommendations to the parties—whether or not their situation amounts to a threat to the peace, breach of the peace, or aggression—Chapter VI should apply.

Further, if the Security Council could lawfully recommend under Article 39 that states take military action against an aggressor, this would defeat the Charter concept that the Council must either utilize or rule out economic and diplomatic sanctions first. Thus, the drafters did not view Article 39 as an alternative route to military action.

One feature of Chapter VII, however, has been invoked to cast doubt on this analysis. The Charter drafters contemplated that when the Security Council decided on Article 42 sanctions, it would use military forces provided by Member States under Article 43. Article 43 calls on Member States to contribute standing forces for the use of the Council should Article 42 sanctions be imposed.202 States have not contributed such forces, however. This failure has led to a view that Article 42 is inoperative, because the Council lacks the standing forces necessary to carry out Article 42 enforcement action. This view finds some support in Article 106 of the Charter, which provides for transitional measures pending the conclusion of Article 43 agreements. Article 106 reads:

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, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.203

This language suggests that Article 42 action should be taken with Article 43 troops.204 Nothing in Chapter VII, however, precludes the Council from calling on Member States to contribute forces for a partic-

201. Id.
202. U.N. CHARTER art. 43.
203. Id. art. 106.
204. This was the view taken by Iraq in the Security Council discussion leading to the adoption of Resolution 678. Provisional Verbatim Record, supra note 13, at 21 (Mr. Al-Albari, Iraq). After referring to Article 106 Iraq’s representative stated,
ular operation. Such a route is more difficult for the Council than if it had the Article 43 troops, but Chapter VII does not explicitly make the use of Article 42 dependent on the availability of Article 43 troops.\footnote{GOODRICH ET AL., supra note 98, at 631.} While Article 106 can be read to mean that Article 42 action may only be taken by Article 43 troops, Article 106 contemplates flexibility to ensure that peace may be maintained pending the availability of Article 43 troops.

In the Certain Expenses\footnote{Certain Expenses of the United Nations, 1962 I.C.J. 151 (Advisory Opinion of July 20).} case, the International Court of Justice found such flexibility in Chapter VII. Some states had refused to pay expenses for the U.N. military operation in the Congo on the grounds that the participating national military contingents were not organized under Article 43. The Court replied:

[An argument which insists that all measures taken for the maintenance of international peace and security must be financed through agreements concluded under Article 43, would seem to exclude the possibility that the Security Council might act under some other Article of the Charter. The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.\footnote{Certain Expenses, 1962 I.C.J. at 298 (dissenting opinion of Judge Bustamante).}]

In Certain Expenses, Judge Bustamante wrote in his dissenting opinion that the unavailability of Article 43 forces should not frustrate the Council in acting to maintain or restore the peace. "In that event, the Security Council must fill the gap by means of direct measures . . . . No other means would appear to be available to the Organization but the formation of a special Force for the operations."\footnote{See also Chaumont, supra note 192, at 436-37 (stating that since Article 43 troops do not exist, the Council may itself form a troop force for a particular operation).} This is the most logical reading of Chapter VII. The fact that no Article 43 agreements were made, as two analysts have written, "does not signify a lapse in the
Organization's general police power, set out in Article 42."

Thus, the only means, consistent with the Charter, for the Security Council to organize an enforcement action is first to make an Article 39 finding of a threat to the peace, breach of the peace, or aggression, then to try non-military sanctions and find them inadequate (or, alternatively, decide from the start that they would be inadequate), and finally proceed to decide on military action under Article 42.

V. The Military Action Against Iraq as Collective Self-Defense

Several analysts, including Rostow and Schachter, argued, in support of the military action against Iraq, that Resolution 678 contemplated action that was lawful as collective self-defense under Article 51 of the U.N. Charter. They made two distinct but related arguments: (a) that Resolution 678 was valid because the Security Council has power under Article 51 to call for action in collective self-defense, and (b) that the military action against Iraq was lawful as collective self-defense undertaken by the states involved under Article 51, wholly apart from Resolution 678.

The Bush administration did not analyze Resolution 678 along these lines. While it deemed Resolution 678 to be valid under Chapter VII, it did not explain precisely which Articles in Chapter VII apply. As for the possibility that the action might be lawful collective self-defense apart from Resolution 678, the administration had, prior to the adoption of Resolution 678, said it had a right to defend Kuwait with military force even without a Security Council decision.

In August 1990, after the Security Council called for a trade embargo against Iraq, but before it initiated a blockade to enforce the embargo, the United States began blockade activity on its own and contended that the action was lawful under Article 51. During the autumn of 1990, the U.S. argued that it had a right to attack Iraq in the collective self-defense of Kuwait under Article 51. In early November 1990, Secretary-General Pérez de Cuellar dealt the collective self-

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210. Schachter, supra note 92, at 457-62; Rostow, supra note 92, at 508-09.
211. See infra notes 212-13 and accompanying text.
212. U.S. State Dept., Regular Briefing, supra note 155 ("The United States position is that the actions we are taking are clearly legal under international law, Article 51 of the U.N. Charter. The actions we're taking will assist in making the sanctions effective.").
defense theory a blow when he said that, given three months of Security Council activity on the Persian Gulf situation, states could not rely on Article 51. At about that time, the administration shifted to a strategy of securing a Security Council resolution calling for force against Iraq and stopped pushing the collective self-defense theory. After November 29, 1990, the administration did not formally renounce the collective self-defense theory but did not reiterate it. Instead, it took the view that Resolution 678 provided a legal basis for its military action against Iraq.

The collective self-defense theory was weak because Article 51 does not give the Security Council the right to take military action. Article 51, rather, contemplates action by an individual state to defend itself, or by a group of states or by regional security systems to defend a state that has been attacked. Far from giving a right of action to the Security Council, Article 51 preserves a right of action to entities other than the Security Council, by way of exception to the other Articles of Chapter VII. This right of individual or collective action was preserved on the ground that a state should be permitted to act immediately if attacked, and to seek aid from other states. If the Security Council were unable to take action because of a veto, the state attacked, or others at its request, should be permitted to act. Article 51 was inserted as the last Article

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216. Thomas L. Friedman, Moscow Refuses to Rule Out Force, N.Y. TIMES, Nov. 9, 1990, at A13 (stating that at the start of a recent trip abroad, Secretary Baker declared a right under Article 51 to attack Iraq but that after talks with Bahrain, Egypt, China, and Saudi Arabia, he stressed the need to work through the Security Council); Abram Chayes, Bush Will Lose the Legal High Ground if He Attempts to Expand the Aims of the Gulf War, L.A. DAILY J., Feb. 26, 1991, at 6 (stating that the administration abandoned the collective self-defense claim "and began the serious diplomatic process that led to [res. 678]").
217. See David J. Scheffer, Bush Wins the Right to Look for Trouble, L.A. TIMES, Nov. 30, 1990, at B7 ("The White House has not abandoned its longstanding position that regardless of Security Council decisions, the United States can act at any time (even before Jan. 15) to liberate Kuwait on grounds of collective self-defense.").
218. See supra text accompanying notes 17-18.
219. There was some opinion that Article 51 did not permit action by other states to assist a state under attack, absent a pre-existing security arrangement by treaty. See, e.g., Kelsen, supra note 195, at 792. The prevailing view, however, is to the contrary, and the Security Council has never used this theory. Goodrich et al., supra note 98, at 348; Weston, supra note 44, at 520; Schachter, supra note 95, at 1639. Whatever its meaning, "collective self-defense," as others have noted, is a misnomer, since a state coming to the aid of another state is not defending itself. In domestic criminal and tort law, the terminology is neater, with defense of one's own person being termed "self-defense," and defense of someone else being termed "defense of another." Wayne LAFAYE & Austin Scott, Criminal Law 454, 463 (1986).
220. Goodrich et al., supra note 98, at 345.
of Chapter VII, and is an exception to what otherwise would have been the Security Council's monopoly on the lawful use of force. Nothing in the drafting history of Article 51 suggests that it authorizes action by the Security Council.\textsuperscript{221}

The related argument was that Article 51 provided an independent legal basis for the military action against Iraq, apart from Resolution 678. Schachter stated that Resolution 678 was legally unnecessary to the military action against Iraq, but that it "served the political purpose of underlining the general support of the United Nations for the military measures."\textsuperscript{222} In support of this approach, Schachter cited Security Council Resolution 661, which, in a preambular paragraph, "[a]ffirm[ed] the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."\textsuperscript{223} Schachter said that this language "supported the contention that it would be legitimate for the third states to use force, if necessary, against Iraq to compel its withdrawal."\textsuperscript{224}

Schachter further argued that the Security Council did not deem its action regarding Iraq to supersede action against Iraq by individual states. "[T]he resolutions 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 . . . affirming rights of individual and collective self-defense."\textsuperscript{225} Thus, Schachter suggested that the Security Council believed that individual state action could go in tandem with Security Council enforcement action.

The Security Council made no such implication, however, in Resolution 661. It would be strange indeed for the Council to authorize military action in an ambiguous preambular phrase. Although it is unclear why the Council included this language, the Council may have meant to say, as Schachter also indicates, that states might lawfully undertake a blockade to enforce the trade embargo called for in Resolution 661. The resolution called for a trade embargo but did not establish a blockade, and some states, particularly the United States, were anxious to enforce it by means of a blockade.\textsuperscript{226} If the preamble did contemplate preserving a collective self-defense right for a blockade, then, arguably, it might have done the same for a military attack as well. There is no basis, however, for concluding that this preambular language contemplated possible military action by states to drive Iraq out of Kuwait. At the Security Council meeting at which Resolution 661 was adopted, there was no discussion suggesting the propriety of military action by

\textsuperscript{221} GOODRICH & HAMBRO, supra note 172, at 297-308.
\textsuperscript{222} Schachter, supra note 92, at 460. British Prime Minister Margaret Thatcher took this view as well. Warbrick, supra note 213, at 487.
\textsuperscript{223} S.C. Res. 661, supra note 6, preambular para. 6.
\textsuperscript{224} Schachter, supra note 92, at 458.
\textsuperscript{225} Id.
\textsuperscript{226} The Council authorized states to enforce the embargo with a blockade three weeks later. S.C. Res. 665, supra note 9.
the Council, or by Member States, to force Iraq from Kuwait.\textsuperscript{227}

The major obstacle to using Article 51 to justify the action against Iraq was that Article 51 permits force by individual states only "until the Security Council has taken the measures necessary to maintain international peace and security."\textsuperscript{228} By January 16, 1991, the Security Council had adopted a series of resolutions to deal with Iraq's invasion of Kuwait.\textsuperscript{229} The matter is not free of ambiguity, however, because Article 51 does not specify when it should be deemed that the Council has taken "the measures necessary."

Schachter interpreted Article 51 to mean that when the Council acts, individual states may act as well, until such time as the Council adopts a resolution telling them to stop. He pointed out that the Council never told the United States or other states to stop.\textsuperscript{230} This approach is not workable. Since Council decisions are subject to the veto, states could do whatever they liked, if one member of the Council declined to stop them.

Schachter wrote that if the Article 51 exception is taken literally, it would override self-defense and collective self-defense whenever the Council adopted any resolution on a breach of the peace situation, such as a resolution calling on an invader to withdraw.\textsuperscript{231} Schachter contends that this would be an absurd interpretation of Article 51,\textsuperscript{232} and such would seem to be the case. A resolution calling for withdrawal is not a "measure" within the meaning of Article 51, since it calls for no Security Council action.

At the other extreme, one might argue that not only must the Council have acted but must have achieved its aim as well, namely by stopping the unlawful action. British Prime Minister Margaret Thatcher took this position after Iraq invaded Kuwait, saying that the Council would have taken the measures necessary to maintain international peace and security only when it succeeded in expelling Iraq from Kuwait.\textsuperscript{233} This view, however, would deprive the Security Council of any meaningful role, because it would let states operate independently of the Council even as the Council acted. The Charter clearly gives the Council the right to assume control of a situation and to direct all action aimed at confronting the aggression.

The Thatcher view would deprive the Security Council of its Char-
ter role of primary responsibility to deal with breaches of the peace. If any and all states could lawfully strike out on their own, even after the Council had taken measures, the Council's role would be marginalized. Referring to the Council's "primary responsibility for the maintenance of international peace and security," Abram Chayes said that

[t]o carry out that responsibility, the council must have the authority to make the political judgments and to take the measures necessary to deal with the situation. This conception of the Security Council's role reinforces the fundamental aim of the charter to limit unilateral use of force to the narrowest possible range.

The correct approach must lie somewhere between the two extreme positions. It would appear that the Council takes measures in the sense of Article 51 when it commences concrete action to address a breach of peace. The imposition of economic sanctions under Article 41 constitutes such action. Consequently, from August 6, 1990, the date of the trade embargo, individual states were precluded from taking independent military action to defend Kuwait.

Another obstacle to a collective self-defense justification for the action against Iraq is that the action would have to have been "necessary" to secure Iraq's withdrawal from Kuwait, since force may be used in defense only if necessary to thwart aggression. Elsewhere, Schachter asserted, and he would seem to be on solid ground, that where one state has unlawfully taken the territory of another, peaceful settlement must be attempted before force is used to recover the territory. Thus, it would have to appear that the Security Council's sanctions and other possible avenues for peaceful settlement had been exhausted.

Recognizing this obstacle, Schachter argued that, by adopting Resolution 678, the Security Council made an "authoritative determination" of the necessity of the use of military force against Iraq. That proposition might be true if the Council had called for immediate military force against Iraq, but instead it called for force only after January 15, 1991, and, as Schachter elsewhere acknowledged, it was impossible as of November 29, 1990, to know whether there would be a necessity to use force six weeks hence. The Council in Resolution 678 made no finding that measures short of military force would not succeed, and logically could not because it could not know what the situation would be on

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234. U.N. CHARTER art. 24, ¶ 1 (U.N. members "confer on the Security Council primary responsibility for the maintenance of international peace and security ... ").
235. Abram Chayes, Gulf War Isn't Possible Without the U.N.; The Charter Precludes Unilateral Military Action, L.A. TIMES, Nov. 9, 1990, at B7. See also O'Connell, supra note 90, at 477 ("If some states act unilaterally, including the defended state, the Council's efforts could be undermined.").
237. See Schachter, supra note 95, at 1635-37; Weston, supra note 44, at 520-21.
238. Schachter, supra note 95, at 1637 (citing the Malvinas-Falkland case).
239. Schachter, supra note 92, at 460.
240. Id. at 456.
January 15, 1991.241

To support the view that the military action against Iraq could be lawful as Article 51 collective self-defense, apart from any Security Council resolution, Rostow relied on Korea as a precedent. Rostow said that although some considered the Security Council’s action in Korea an enforcement action, it in fact involved only “national forces carrying out a mission of collective self-defense under American direction, not a Security Council enforcement action.”242

If the military action in Korea was collective self-defense, the Security Council was apparently not aware of it at the time, because it adopted resolutions calling for military action under a U.N. command.243 Although, as with the action against Iraq, the Security Council did not clearly define the basis under the Charter during the hostilities in Korea, the Council did not purport to act in collective self-defense.

Thus, the collective self-defense theory provides no legal basis for Resolution 678, because Article 51 gave the Security Council no powers. Nor does the theory justify the military action against Iraq apart from Resolution 678, because the Security Council had taken measures to deal with the situation.

VI. Sanctions or Fig Leaf?

During the Security Council discussion of Resolution 678, Iraq complained that “the United States totally dominates the Security Council and its arbitrary and biased procedures.”244 It said that the United States proposed Resolution 678 “as a cover for its aggressive and imperialist policies in the region.”245 The resolution was drafted by and lobbied for by the United States, which sought its passage only after assembling an invasion force in Saudi Arabia in early November without consulting the Security Council.246 These circumstances suggest that the Bush administration first prepared to invade Iraq and then sought the Council’s approval.247

The deployment of the invasion force implied a decision to use force.248 In a Senate hearing in early December 1990, Senator Paul Sarbanes said that the troop buildup “almost takes you irresistibly down

241. See supra text accompanying note 127.
242. Rostow, supra note 92, at 508.
243. S.C. Res. 84, supra note 151.
244. Provisional Verbatim Record, supra note 13, at 23 (statement of Mr. Al-Anbari, Iraq).
245. Id.
246. See Gordon, supra note 11.
247. See Rostow, supra note 92, at 522 (acknowledging that the U.S. went to the Security Council only after “it had already begun unilaterally to amass an ‘offensive’ force of an ultimate half-million military personnel”).
the path of going to war."\textsuperscript{249} Zbigniew Brzezinski, a former national security advisor, said that "the enormous deployment of American forces, coupled with talk of no compromise," meant that the United States was "pointed toward a war with Iraq."\textsuperscript{250} Senator Nancy Kassebaum pointed out that mobilization of the invasion force in early November created the need to invade Iraq soon. Senator Kassebaum stated:

I do not know if there has been any real exploration of exactly how we will prolong sanctions as well as maintain our large force in the region. Do we start rotations? Do we downsize our force? Those who have asked to extend the time period to let economic sanctions work have to realize that there are significant dislocations that are occurring with the callup of the reservists.\textsuperscript{251}

The administration put what became Resolution 678 onto the table only after gaining assurances of support from the other permanent members,\textsuperscript{252} because it did not want to risk the veto of a resolution for an attack it had already, for all practical purposes, decided to launch. To secure the passage of Resolution 678 by the Security Council, the Bush administration pulled out all the diplomatic stops. It pursued the vote of the USSR by declining to press it over self-determination of the Baltic states. The administration convinced Saudi Arabia to give aid to the USSR, as a further inducement to vote for the resolution, even though it was not contemplated that the USSR would contribute troops.\textsuperscript{253} The administration courted China by keeping silent on the persecution of political dissidents there.\textsuperscript{254} It wooed Third World members of the Security Council by promising financial aid.\textsuperscript{255} After Yemen voted against the resolution, the administration cut off its economic aid.\textsuperscript{256}

\textsuperscript{249} U.S. Policy in the Persian Gulf, supra note 34, at 130 (statement of Sen. Sarbanes).
\textsuperscript{250} Id. at 165 (statement of Zbigniew Brzezinski).
\textsuperscript{251} Id. at 126-27 (statement of Sen. Kassebaum).
\textsuperscript{252} Woodward, supra note 11, at 333-35 (describing efforts of administration, prior to submitting the draft resolution, to gain support of permanent members).
\textsuperscript{254} See Weston, supra note 44, at 523-24; U.S. Policy in the Persian Gulf, supra note 34, at 171 (statement of Zbigniew Brzezinski that "we may be buying support for our military undertaking by sacrificing ...the Baltic peoples for Gorbachev's [cooperation], the Chinese dissidents for Li Peng's"). See also W. Michael Reisman, Some Lessons from Iraq: International Law and Democratic Politics, 16 Yale J. Int'l L. 203, 208-09 (1991) (arguing that these compromises were justified, in the interest of opposing Iraq's invasion of Kuwait); World News Tonight, supra note 253; Nightline, supra note 253.
\textsuperscript{255} World News Tonight, supra note 253.
\textsuperscript{256} See Kirgis, supra note 191, at 141; Judith Miller, Kuwaiti Envoy Says Baker Vowed "No Concessions" to Iraqis, N.Y. Times, Dec. 5, 1990, at A22 (Kuwaiti ambassador to U.S. quoted as saying that Secretary Baker told him U.S. would cut aid to Yemen because of its vote on Resolution 678). Rick Atkinson & Barton Gellman, Iraq Trying
Although the Bush administration portrayed the resolution as the start of a new age of collective international action to oppose aggression, the administration, more than the Council, was orchestrating the action against Iraq.257

The Bush administration’s record of commitment to working through the Security Council was already checkered when Iraq invaded Kuwait. A year earlier, the administration intervened militarily to stop a coup in the Philippines, without consulting the Security Council.258 It invaded Panama without consulting either the United Nations or the Organization of American States, and when that invasion was condemned by both the O.A.S.259 and the U.N.,260 the administration barely took notice.261

Closer to the Persian Gulf, the United States had done little to end Israel’s occupation of the Golan Heights, the Gaza Strip, or the West Bank of the Jordan River, despite repeated calls by the Security Council and General Assembly,262 and despite the United States’ preponderant role in providing financial aid to Israel. Even as the Persian Gulf crisis unfolded, the Bush administration thwarted efforts by other states to convene a conference that might resolve the Palestinian-Israeli conflict.263 A former U.N. official wrote that “ordinary Arabs” were “acutely aware that the United States has never allowed decisive U.N. action on behalf of the Palestinian Arabs” and that they therefore viewed military action against Iraq as motivated by the self-interest of the allied states.264

The Security Council condemned Israel for its 1982 invasion of Lebanon, during which 20,000 Lebanese were killed, and which resulted in Israeli occupation of southern Lebanon. Yet no international coalition was formed to reverse this aggression and occupation; the Bush administration had taken no initiatives on the matter. In 1974 Turkey invaded Cyprus and occupied a section of it, and the Security Council called on Turkey to withdraw, but in 1990 Turkey was still in occupation, and neither the United Nations nor the United States had taken serious action aimed at forcing it out.

If a new world order was emerging, it was a selective order, and states objecting to Resolution 678 were quick to point out the selectivity. Iraq told the Security Council “that small States that do not enjoy veto power in the Security Council and find no one to protect them from the superpower permanent members are the only countries exposed to sanctions under Chapter VII of the Charter.” It alluded to “the fact that the United States is the Power that, over many years, forestalled international unanimity and prevented the imposition of sanctions on the Zionist entity [Israel] for its expansionist and aggressive policies.” Cuba referred to “the contrast between the attitude of the Council towards the Iraqi invasion of Kuwait and, to mention just two examples, towards the United States invasion of Panama not long ago and the situation in Palestine and the Arab territories, under occupation for 23 years now.”

Even if the military action against Iraq had been carried out in accord with Charter procedures, one might have considered it an exception, rather than the start of a new era in international cooperation. But the disregard of Charter procedures in the Iraq action meant that it was simply another unilateral action by the United States, albeit with some international cover.

VII. Consequences

States bear international liability for their unlawful uses of force, as do the individual officials responsible. In the Persian Gulf War, several states and their officials are potentially liable. Iraq’s aggression against Kuwait and its destructive acts during the occupation open it and its

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268. Provisional Verbatim Record, supra note 13, at 23 (statement of Mr. Al-Anbari, Iraq).

269. Id.

270. Id. at 56 (statement of Mr. Malmierca Peoli, Cuba).

The states that attacked Iraq after its invasion of Kuwait also used force unlawfully, although their situation differs from Iraq's in that their use of force was at least putatively defensive. The illegality in their actions is not that they used force when none was warranted, but that they usurped international procedures by refusing to respect the Charter role of the Security Council. The illegality of their actions is thus of a different type than Iraq's.

Under the Charter, no distinction is made, however, between unprovoked aggression and unlawful force putatively, but improperly, used in defense. One might draw analogies from the domestic law of some jurisdictions on self-defense, where a special intermediate category is created for responsive force that fails to satisfy the requirements of lawful defense.

To clarify responsibility for the military action in the Persian Gulf, an opinion by the International Court of Justice would be helpful. As was seen in Nicaragua's case against the United States, the Court has the power to make determinations about the legality of military action. Iraq and the United States could not sue each other in the Court, however, because neither is currently subject to the Court's compulsory jurisdiction, and no treaty confers jurisdiction on this issue.

The Court may also issue advisory opinions, at the request of the Security Council or General Assembly. Since Resolution 678 was a U.N. action, either the Council or the Assembly could ask the Court for an advisory opinion. Such an opinion would not be binding, but it would provide guidance for the future on the scope of the Council's power. This guidance might help avert future abuses of the Council's powers.

The U.N. Charter scheme regarding the use of military force is aimed at minimizing force. One method of minimizing force is to organize against aggression. However, aggression must be met with the least possible counter-force. In the Persian Gulf situation, the United States and its allies used force that was not clearly necessary and thereby failed to abide by the basic norms of the Charter. The United States and its allies exceeded Resolution 678, and the resolution itself did not provide a lawful basis for action.


The United Nations also bears responsibility for authorizing force in violation of the Charter. The United Nations is a legal entity capable of bearing legal rights and obligations. It is responsible for the wrongs it commits and its powers are only those indicated in the Charter. If the United Nations acts to the detriment of a state, outside the powers conferred in the Charter, it violates the rights of that state.

If the United Nations is liable, all of its Member States may be liable as well. There is little solid law on Member State liability in international organizations, and the U.N. Charter is silent on the matter. There is, however, no general rule of customary international law shielding Member States from liability for the acts of an international organization. In any event, the funds for payment of compensation would come from Member States, who are the only source of income for the United Nations.

Persons who plan or wage aggressive war are individually responsible for crimes against peace. Since the action against Iraq was not in lawful defense, the civilian and military leaders of the United States may be guilty of planning and waging aggressive war against Iraq. Leaders of the allied states are responsible either directly or on the basis of complicity or conspiracy. Several of these leaders may also be individually responsible for the bombing of civilians in Iraqi cities.

277. Id. art. 104 ("The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."). See also Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11).


279. See Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (Jul. 20) (stating, with reference to the Council's role in international peace and security, that the Charter alludes to broad purposes: "These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action.").


281. Id. at 279.

282. U.N. CHARTER art. 17, ¶ 2 ("The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.").

283. INTERNATIONAL CRIMINAL LAW: CRIMES, supra note 271, at 137-40; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex: Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279 (defining "crimes against peace" as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, assurance, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing").


285. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, supra note 283, art. 6.
finding would need to be undertaken to determine the role of a particular leader, but, as indicated, the bombing exceeded the limits set by humanitarian law.286

While it is important to hold malefactors to account, it is also important to hold accountable those who act against them. In domestic law, the commission of a crime does not give authorities the right to take any and all action against a perpetrator. That action is circumscribed by rules necessary to prevent over-reaching. Similarly, under the U.N. Charter, the organization is restricted by norms designed to ensure against overreaching. Thus, while it is important to hold Iraq responsible for its aggression, it is also important to respond to violations of the law committed in the course of responding to aggression.

Conclusion

The actions of the United States and allied states against Iraq in 1991 were taken on the basis of Security Council Resolution 678, which exceeded the Council’s powers under Chapter VII of the Charter. Invoking Resolution 678, the United States initiated military activity without a showing of need, employed excessive force against Iraq, and then continued military activity after Iraq indicated a readiness to leave Kuwait, and even after it began to withdraw. Thus, there was illegality both at the stage of authorization and at the stage of execution.

At a point in history when the superpowers have buried the hatchet, it is unfortunate that the United Nations did not follow Charter procedure during Iraq’s invasion of Kuwait. It was vital that the Security Council oppose Iraq’s aggression against Kuwait. The Council’s economic sanctions were an appropriate measure.287 When the Council took the next step, authorizing military action, it did not have the affirmative votes of all five permanent members, and the Council did not find the economic sanctions to have failed before giving Member States an ill-defined authorization to take military action. Finally, it established no Council control over the action. The Security Council, led by the United States, provided a cover for unilateral military action.

The military action against Iraq did, to be sure, result in Iraq’s departure from Kuwait, and thus ended an illegal occupation. To that extent the action served a purpose consonant with the precepts of the Charter. However, this was accomplished at a high cost in human suffering that was not demonstrably necessary. Had the Council followed Charter procedure, it could have avoided these consequences. The experience of the Council’s action in the Persian Gulf situation should warn world leaders in future crises. The establishment of a collective security system does not ensure that the arrangement will be used as

286. See supra text accompanying notes 102-09.
intended. The U.N. Charter provides no guarantee against the abuse of Charter processes.