Viewing the war against Iraq in the perspective of the postwar occupations of Germany and Japan and the Cuban missile crisis thus suggests a number of options through which the customary law of self-defense—the law enshrined in Article 51 of the Charter—could be adapted to the realities of the age of nuclear weapons and other weapons of mass destruction. As a practical matter, intrusive measures are necessary to cure the numerous breaches of international law by Iraq: its aggression against Kuwait, Saudi Arabia, and Israel; its evident violations of the Non-Proliferation Treaty and the treaties against chemical weapons; its treatment of diplomats and alien residents as hostages; its slaughter of protesting groups of its own citizenry; and its use of terror weapons and terrorism. It may well have been deemed "reasonably necessary" to have allied forces occupy Iraq for a time, and an allied governor supervise the destruction of Iraq's nuclear capacity, its stocks of chemical and biological weapons, and its potential for manufacturing more.

Security Council Resolution 687 rests on the principles of international law briefly recalled above. It breaks new ground in acting on the assumption that the Security Council can disarm an aggressor state and deny it the right to own certain kinds of weapons routinely owned by others.

EUGENE V. ROSTOW*

SECURITY COUNCIL RESOLUTION 678 AND PERSIAN GULF DECISION MAKING: PRECARIOUS LEGITIMACY

In his recent book *The Power of Legitimacy Among Nations,* Thomas Franck defines "legitimacy" as it applies to the rules applicable among states. "*Legitimacy,*" he writes, "*is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.*"[1]

In adopting Resolution 678 of November 29, 1990, implicitly authorizing the use of force against Iraq in response to Iraq's August 2, 1990 invasion and subsequent occupation of Kuwait,[2] the United Nations Security Council made light of fundamental UN Charter precepts and thereby flirted precariously with "gener-

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[1] T. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990). This definition appears to be close to, if not identical with, the meaning of "authority" as defined by Professors McDougal and Lasswell: "Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures." McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order,* 53 AJIL 1, 9 (1959).

[2] SC Res. 678 (Nov. 29, 1990), *reproduced in* 29 ILM 1565 (1990), and, in operative part, 85 AJIL 74 (1991). It was adopted by a 12-2-1 vote, with Cuba and Yemen opposed and China abstaining. The text of Resolution 678 shows that the Security Council did not authorize the use of force in so many words. It authorized, instead, the use of "all necessary means," understood to include the use of force if necessary.

ally accepted principles of right process." It eschewed direct UN responsibility *and* accountability for the military force that ultimately was deployed, favoring, instead, a delegated, essentially unilateralist determination and orchestration of world policy, coordinated and controlled almost exclusively by the United States. And, in so doing, it encouraged a too-hasty retreat from the preeminently peaceful and humanitarian purposes and principles of the United Nations. As a consequence, it set a dubious precedent, both for the United Nations as it stands today and for the "new world order" that is claimed for tomorrow.

This is not to say that Iraq did not deserve to be called to legal account. Nor that the Security Council lacked the legal competence to delegate the use of force in this instance. Nor even that its decision to so delegate was rendered juridically illegitimate by the historical anachronisms that mark its composition. On the contrary, Iraq committed crimes of a Nuremberg sort, and then some.[3] The Security Council is, at least in practice, the final arbiter of its own authority[4] (the International Court of Justice notwithstanding). And, though much in need of restructur-

[3] Most conspicuous in this regard, of course, was Iraq's military assault upon Kuwait and Scud missile attacks against Israel, contravening Article 2(4) of the UN Charter, and, in the case of Kuwait and Saudi Arabia in addition, Article 5 of the Pact of the League of Arab States, Mar. 22, 1945, 70 UNTS 237, *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 13 (B. Weston, R. Falk & A. D'Amato 2d ed. 1990) [hereinafter BASIC DOCUMENTS].

Other undeniable Iraqi violations of conventional and customary international law, documentation for which is too extensive to detail here, included the intimidation and bullying of foreign diplomats and legations, patently violating the core privileges and immunities of civilized diplomatic intercourse; the multiple violation of the international law of human rights via the rape and pillage of the occupied people of Kuwait, the terrorization of innocent civilians as political hostages and tactical shields, and the apparent torture and other inhumane treatment of captured prisoners of war; and the spoliation of the Kuwaiti and wider Persian Gulf natural environment via deliberate oil spills and "torching" of oil wells (*see especially* Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1977, 31 UST 333, TIAS No. 9614, 1976 UN JURID. Y.B. 125, *reprinted in* BASIC DOCUMENTS, *supra*, at 227).

Not to be overlooked, either, was the consistent refusal of Iraq to comply with Security Council Resolution 660 and subsequent resolutions calling for, inter alia, its immediate and unconditional withdrawal from Kuwait. Iraq thus failed to abide by its obligations under Article 25 of the UN Charter "to accept and carry out the decisions of the Security Council," in particular the following 12 resolutions: SC Res. 660 (Aug. 2, 1990) (14-0, Yemen abstaining) (condemnation of invasion); SC Res. 661 (Aug. 6, 1990) (13-0, Cuba and Yemen abstaining) (trade embargo); SC Res. 662 (Aug. 9, 1990) (15-0) (nullification of annexation); SC Res. 664 (Aug. 18, 1990) (15-0) (protection of foreign hostages and diplomatic immunity); SC Res. 665 (Aug. 25, 1990) (13-0, Cuba and Yemen abstaining) (enforcement of trade sanctions); SC Res. 666 (Sept. 14, 1990) (13-2, Cuba and Yemen opposed) (humanitarian provision of foodstuffs); SC Res. 667 (Sept. 16, 1990) (15-0) (condemnation of aggression against diplomatic premises and personnel); SC Res. 669 (Sept. 24, 1990) (15-0) (UN examination of economic problems arising from sanctions); SC Res. 670 (Sept. 25, 1990) (14-1, Cuba opposed) (air embargo); SC Res. 674 (Oct. 29, 1990) (13-0, Cuba and Yemen abstaining) (Iraqi obligations toward foreign nationals and diplomatic missions); SC Res. 677 (Nov. 28, 1990) (15-0) (condemnation of alteration of population composition and register of Kuwait); and SC Res. 678, *supra* note 2. These resolutions are all conveniently reproduced in 29 ILM at 1323–36, 1560–65.

[4] Consider, for example, the Council's response to North Korea's attack on South Korea in June 1950 or, for another, to Southern Rhodesia's white supremacy policies in 1966 and 1968. Regarding Korea, see the authorities cited in notes 29 and 40 *infra*. *See also* text at notes 29–34 *infra*. Regarding Southern Rhodesia, see SC Res. 232, 21 UN SCOR (Res. & Dec.) at 7, UN Doc. S/INF/21/Rev.1 (1966); and SC Res. 253, 23 UN SCOR (Res. & Dec.) at 5, UN Doc. S/INF/23/Rev.1 (1968), *reprinted in* BASIC DOCUMENTS, *supra* note 3, at 369, 394, respectively. *See also* McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AJIL 1 (1968); Acheson, *The Arrogance of International Lawyers*, 2 INT'L LAW. 591 (1968).

ing, especially relative to UN operations in the Third World, the Council's "primary responsibility for the maintenance of international peace and security"[5] does not abate until such time as the UN membership is able to effectuate needed Charter reform.

It is to say, however, that the overall process of decision that marked the Security Council's authorization to go to war, involving a discernible thirst for confrontation and therefore raising exceedingly troublesome questions about the extent to which the United Nations was true to its originally intended Charter, fell alarmingly short of what minimally should be required when human life and other fundamental community values are critically at stake, as indeed they were in the Persian Gulf. Contrary to the popular wisdom that has prevailed at least in the United States, especially during the period of self-congratulatory euphoria that immediately followed the cessation of hostilities, the Resolution 678 decision process was not legitimate in any rigorous or thoroughgoing sense and therefore not comforting as a preview, if it may be called that, of the "new world order" that we are told lies in store. This lack of legitimacy is seen in four distinct, but interconnected, ways: in the indeterminacy of the legal authority of Resolution 678; in the great-power pressure diplomacy that marked its adoption; in its wholly unrestricted character; and, finally, in the Council's hasty retreat from nonviolent sanctioning alternatives permissible under it. In each of these respects, the Security Council, though clearly mindful of its duty to suppress acts of aggression and other breaches of the peace,[6] paid insufficient heed to the most overriding of UN Charter purposes and principles: the pacific settlement of international disputes and, failing that, a genuinely collective assertion of authority and control dedicated to the restoration of international peace and security.[7] The Resolution 678 decision process was one of borderline legitimacy at best.[8]

THE INDETERMINATE LEGAL AUTHORITY FOR RESOLUTION 678

When, immediately following Iraq's invasion of Kuwait, the Security Council condemned Iraq for its aggression and demanded its immediate withdrawal, it reported the authoritative basis for its action straightforwardly. In Resolution 660 of August 2, 1990,[9] it stated explicitly and unambiguously that it was "*[a]cting* under Articles 39 and 40 of the Charter of the United Nations."

Such precision did not distinguish Resolution 678,[10] at least not regarding the use of force.[11] Instead, the Security Council chose merely to say that it was

[5] UN CHARTER Art. 24, para. 1.

[6] *See id.*, Art. 1, para. 1.

[7] *See id.*, Preamble and ch. I. Curiously, in their contributions to this issue, Eugene Rostow and Oscar Schachter pay little to no attention to the central principle of peaceful settlement or war *prevention. See* Rostow, *Until What? Enforcement Action or Collective Self-Defense*, *supra* p. 506; and Schachter, *United Nations Law in the Gulf Conflict*, *supra* p. 452.

[8] The Security Council may be its own court of last resort when it comes to defining the scope of its legal competence. But when it comes to core Charter principles that delimit how this competence may be exercised, surely it is bound by the Charter requirement that any alteration of the Charter shall not take place except by a "General Conference of the Members of the United Nations." *See* UN CHARTER, ch. XVIII.

[9] *Supra* note 3.

[10] Thus Professors Rostow and Schachter, *supra* note 7, devote substantial space to finding a chapter VII home for Resolution 678.

[11] However, Resolution 678 did retain Resolution 660's precision insofar as it incorporated Resolution 660 by reference and, as well, the remaining ten resolutions that followed Resolution 660, *supra* note 3.

"[*a*]*cting* under Chapter VII of the Charter" generally. Not that this imprecision is of itself necessarily bad. Typically, the Council does not identify precisely the authority under which it is acting.[12] But when, after parsing chapter VII and reviewing its pre- and postsignature history, no explicit or plainly implicit authorization is revealed, and when requested clarifications from the Department of State's Office of the Legal Adviser (which had a major hand in drafting Resolution 678) prove similarly unavailing,[13] one is given pause—especially when, as here, the stakes were quite literally a matter of life and death, and potentially on a grand scale.

Article 42

Resolution 678 was adopted, reportedly, because the majority of the Security Council had determined that the economic sanctions already imposed against Iraq would be inadequate or had proven to be inadequate to achieve the removal of Iraq from Kuwait.[14] Yet Article 42, which authorizes the Security Council to take military action when economic sanctions "would be inadequate or have proved to be inadequate," was not, it appears, the legal basis for the resolution.[15] Why? Because of the article's dependent relationship with Article 43, pursuant to which the UN membership consents to provide the Security Council, "on its call and in accordance with a special agreement or agreements," with armed forces, assistance, and facilities to effectuate Article 42.[16] The members having failed in this respect, mainly because of the Cold War, Article 42 had become, it is widely agreed, a dead letter.[17] Whatever military action the Security Council might take to ensure international peace and security, it had to be premised otherwise.[18]

[12] *Cf.* L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 204–07, 291–92, 300–01, 314–17 (1969).

[13] *E.g.*, telephone interviews with Mr. Bruce Rashkow, Assistant Legal Adviser for United Nations Affairs, Office of the Legal Adviser, Department of State (Feb. 17 and 20, 1991).

[14] *See generally* UN Doc. S/PV.2963 (Nov. 29, 1990).

[15] The point is confirmed in Goshko, *UN Vote Authorizes Use of Force Against Iraq*, Wash. Post, Nov. 30, 1990, at A1, col. 1.

[16] Article 42's dependent relationship with Article 43 is explicitly acknowledged in Article 106 of the UN Charter, delineating post–World War II transitional security arrangements "[p]ending 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 . . . ." For authoritative textual and historical explanation, see L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 12, at 629–32; J.-P. COT & A. PELLET, LA CHARTE DES NATIONS UNIES 1399–1407 (1985). *But see* Schachter, *supra* note 7, at 463–64, who, while agreeing that Article 106 "clearly suggests" this dependent relationship, nevertheless correctly observes that "no explicit language in Article 42 or in Articles 43, 44, and 45 . . . precludes states from voluntarily making armed forces available to carry out the resolutions of the Council adopted under chapter VII." For related comment, see *infra* note 18 and accompanying text.

[17] *See* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 12, at 314–17; J.-P. COT & A. PELLET, *supra* note 16, at 703–16. But see Schachter's helpful observation quoted in note 16 *supra*.

[18] If Resolution 678 had not been explicitly premised on chapter VII, it would be reasonable to conclude that it was premised on the "transitional security arrangements" of Article 106 of chapter XVII. Pending the coming into force of Article 43 agreements (*see supra* note 16 and accompanying text), Article 106 authorizes China, France, the Soviet Union, the United Kingdom, and the United States to "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."

Article 51

An Article 51 justification, too, seems elusive.[19] First, while Resolution 678 embraced Article 51 by "[*r*]*ecalling and reaffirming*" Resolution 661, in which the Security Council stated that it was "[*a*]*ffirming* the inherent right of individual or collective self-defence . . . in accordance with Article 51 of the Charter,"[20] it did so, as seen, only indirectly and then merely by "recalling and reaffirming" Article 51, rather than by citing it explicitly (per "acting under" language) as the true warrant for its action. The oblique and unexacting character of this reference seems not inadvertent in light of Resolution 661.[21]

Second, even if Resolution 678 can be said to have been rooted in Article 51 and thus to have constituted a delegation of authority relative to the forceful exercise of collective self-defense,[22] the adoption of Resolution 678 on these grounds would have represented an unprecedented interpretation of chapter VII.[23] It would appear unsupported by what the Charter drafters had principally in mind for Article 51, which was to safeguard mutual defense and collective security pacts and arrangements,[24] none of which were present in the instant case.[25]

Finally, even if Article 51 might be so interpreted, delegated collective self-defense actions involving the use of force still would be justified only on the basis of overwhelming necessity, *including the absence of other means and time for deliberation,* as reflected in both traditional international law[26] and post-Charter theory and

[19] Professors Rostow and Schachter, *supra* note 7, plainly disagree with this view. Their disagreement does not diminish my overall point, however, which is that Resolution 678 is not self-evidently rooted in Article 51 or that, if it were, this fact should have been expressly indicated. For explanation, see text following note 34 *infra.*

[20] SC Res. 661, *supra* note 3.

[21] The oblique and unexacting character of the Article 51 reference appears not to bother either Rostow or Schachter, *supra* note 7. I fail to see why not, particularly in the face of unmistakable disagreement within the Security Council prior to Resolution 678's adoption (acknowledged explicitly by Schachter, implicitly by Rostow) as to the precise scope of the right of collective self-defense in light of the controversial "until clause" of Article 51. It is one thing to affirm the right of collective self-defense to signal, in a resolution devoted to economic sanctions (Resolution 661), the *possible* consequences of failing to comply with Security Council demands, quite another to say that this signal constituted, from the outset, the *certain* authority for a subsequent resolve to license all-out war against Iraq (Resolution 678), unqualified by the success or failure of the economic sanctions previously imposed. In any event, even if the Rostow-Schachter interpretation is correct, it is not self-evidently correct.

[22] Rosalyn Higgins observes that the term "collective self-defence" is something of a misnomer ("Defence of the self cannot be collective; though there may exist collective security or mutual aid") and commonly is confused with the concepts of defense, collective security, and community sanctions. R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 208–09 (1963).

[23] Writes Schachter, *supra* note 7, at 457: "This was the first time the Council recognized in a resolution that the right of collective self-defense applied in a particular situation."

[24] *See* R. HIGGINS, *supra* note 22, at 209–10. *See also* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 12, at 349–51; J.-P. COT & A. PELLET, *supra* note 16, at 784–86.

[25] My point here is not to plead some "original intent" interpretation of Article 51 or even to deny that the genuine shared expectations of at least the key Security Council players may have embraced an Article 51 authorization for Resolution 678, along the lines articulated by Professors Rostow and Schachter, *supra* note 7. It is simply to observe the unprecedented nature of an Article 51 justification and thereby to underscore the indeterminacy of Resolution 678's Charter authority.

[26] It has long been accepted under traditional international law that self-defense is justified only when the necessity for action is "instant, overwhelming, and leaving no choice of means, and no

practice.[27] Other means and time for deliberation arguably being present both on November 29, 1990, when Resolution 678 was adopted and, more importantly, on January 16, 1991, when it was acted upon (a situation of relative stasis having developed after August 7, 1990, when the United States began to deploy "wholly defensive" forces "to deter further Iraqi aggression"[28]), it is by no means clear that a Security Council intent upon uncompromised freedom of action would be wise to cite Article 51 as authority for its delegation of war-making powers against Iraq.

Article 39

There remains for us to consider Article 39, permitting the Security Council to make "recommendations" to maintain or restore international peace and security after it has determined the existence of a threat to the peace, a breach of the peace, or an act of aggression. Even though there is no evidence that Article 39 has been claimed by anyone as the basis for Resolution 678, it was the basis for the Council's response to North Korea's attack on South Korea in June 1950.[29] Then, the Council *recommended* that the member states make their "military forces and other assistance . . . available to a unified command under the United States."[30]

Yet this was scarcely the kind of recommendation the Charter drafters had in mind when they adopted Article 39. Article 39 *recommendations* were understood to refer to chapter VI provisions calling for the *pacific* settlement of international disputes, to be pursued either alone or in tandem with economic and/or military *decisions* taken in accordance with Articles 41 and 42.[31]

In any event, as if to reject the Korean comparison expressly, the Security Council, in Resolution 678, made an *authorization* (or *decision*), not a *recommendation.* Also, at the behest of the United States and to assure exclusive U.S. command

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moment for deliberation." Letter from Mr. Webster, Secretary of State, to Lord Ashburton (Aug. 6, 1842), *reprinted in* 2 J. B. MOORE, A DIGEST OF INTERNATIONAL LAW 409, 412 (1906). While Secretary Webster was addressing an incident of claimed anticipatory self-defense (the *Caroline* affair of 1837), the quoted test reflects the customary law of self-defense generally both at the time of the incident and since that time. *See, e.g.,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §905 comment *c* and Reporters' Note 3 (1987). *Cf.* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 217–58 (1961). Indeed, in the context of modern collective self-defense, the quoted test may not be as strict as it should be. Write McDougal and Feliciano:

> [I]n assessing the conditions under which collective self-defense is asserted, it may be appropriate to require . . . more exacting evidence of compelling necessity for coercive response by the group as such than would be reasonably demanded if the responding participant were a single state. The larger "self" of a group-participant ordinarily means greater bases of power at its disposal and, vis-à-vis a single opponent state, a substantial preponderance of force.

Id. at 251.

[27] *See, e.g.,* R. HIGGINS, *supra* note 22, at 197–210.

[28] *Excerpts from Bush's Statement on U.S. Defense of Saudis,* N.Y. Times, Aug. 9, 1990, at A15, col. 1.

[29] *See* R. HIGGINS, *supra* note 22, at 224, and authorities cited therein. *See also* Pollack, *Self-Doubts on Approaching Forty: The United Nations' Oldest and Only Collective Security Enforcement Army, The United Nations Command in Korea,* 6 DICKINSON J. INT'L L. 1 (1987).

[30] SC Res. 84, 5 UN SCOR (Res. & Dec.) at 5, 6, UN Doc. S/INF/5/Rev.1 (1950).

[31] *See* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 12, at 300–02; J.-P. COT & A. PELLET, *supra* note 16, at 661–65.

and control over Persian Gulf operations, it turned down a Soviet proposal to activate the Military Staff Committee (MSC) provided for in Charter Articles 45–47 to unify the strategic direction of Security Council police actions.[32] In the case of Korea, the Security Council attempted at least the pretense of fielding a unified command under the UN flag.[33]

Moreover, even if factually familiar, the improvised Korean exception is a shaky precedent at best. By virtue of President Truman's deployment of air and sea forces *before* military sanctions had been authorized by the Security Council, the Council had to vote sanctions or put itself in the position of opposing action taken by the United States. For governments independently and collectively dependent on American largesse, an American *fait accompli* strategy assured quick and essentially quiet acquiescence by the United Nations and its Security Council, and accordingly so-called United Nations forces were made subject to General MacArthur without General MacArthur being made subject to the United Nations. From the standpoint of a United States Government eager, in the Persian Gulf, to optimize its chances for multilateral cooperation, this would seem an unlikely precedent, especially when, three weeks earlier, on November 8, 1990, it had already begun *unilaterally* to amass an "offensive" force of an ultimate half-million military personnel.[34]

Thus, with Resolution 678 evidencing no explicit or clearly implicit authorization in the text of chapter VII, its *travaux préparatoires* or pertinent state practice, one is left to conclude that the Security Council created an entirely new precedent, seemingly on the basis of some assumed penumbra of powers available to the Council under chapter VII—an "Article 42½" authorization, as some UN watchers have called it. Not that there is anything inherently wrong about such a development. It is analogous to the judicially developed penumbra of powers available to the President of the United States in the conduct of foreign relations under the U.S. Constitution. Indeed, from a perspective that welcomes strengthened UN policing opportunities and capabilities, including a Security Council positioned to act quickly and effectively,[35] it may, if wisely fine tuned, prove salutary over the long run. However, when human life (especially innocent human life) and other fundamental values are being put greatly and severely at risk, as surely they were when Resolution 678 was adopted, it seems not inappropriate to insist upon unambiguously articulated war-making authority as a *de minimis* requirement of "right process." That the Security Council did not choose such a course bespeaks, in my view, either extreme laxity or, more likely, a Council majority motivated more by the special political and geostrategic interests of the principal drafters of Resolution 678 (the United Kingdom and the United States) than it was by a world constitutive instrument created in important part "to establish conditions under which justice and respect for obligations arising from treaties [e.g., the UN Charter] and other sources of international law [e.g., Security Council resolutions] can be maintained."[36] A "new world order" deserves better.

[32] *See* Goshko, *supra* note 15.

[33] *See* text at note 30 *supra; see also* authorities cited in note 40 *infra.*

[34] *See* Gordon, *Mideast Tensions: Bush Sends New Units to Gulf to Provide "Offensive Option": U.S. Force Could Reach 380,000,* N.Y. Times, Nov. 9, 1990, at A1, col. 6.

[35] Such was the intent of the drafters of chapter VII of the UN Charter. *See* Doc. 881, III/3/46, 12 UNCIO Docs. 502, 503 (1945); Doc. 943, III/5, 11 *id.* at 12, 13.

[36] UN CHARTER, Preamble.

THE GREAT-POWER PRESSURE DIPLOMACY BEHIND RESOLUTION 678

In a televised announcement two days after Resolution 678 was adopted, the Government of Iraq denounced the resolution on the grounds that the United States had succeeded in turning the Security Council into "a tool of American hegemony" and "a theatre for dirty deals,"[37] a reference to the resolution's having been drafted in large part by U.S. personnel and, as well, to the not inconsiderable bargaining that characterized the intense and successful U.S. effort to ensure a favorable vote. Considering the source of these allegations, one might understandably be disinclined to take them very seriously and, instead, to endorse the viewpoint expressed in a *Washington Post* editorial the day after Resolution 678 was adopted, to wit, that "the bilateral [*sic*] bargaining fell well within accepted norms and . . . the objective gained was special."[38]

Maybe so. Similar self-interested tactics characterized the U.S. effort to obtain multilateral support for Security Council Resolution 84 of July 7, 1950,[39] recommending unified military action against North Korea.[40] However, if Washington is serious about a "new world order" that shows a decent respect for *all* the purposes and principles for which the United Nations stands, it should have thought further about the tactics it employed. To ensure the votes of the Latin American and African delegations (Colombia, the Côte d'Ivoire, Ethiopia, Zaire), the United States is said to have promised long-sought financial help and attention.[41] To win reliable Soviet support, the United States, according to news accounts, agreed to help keep Estonia, Latvia, and Lithuania out of the November 1990 Paris summit conference;[42] and it additionally pledged to persuade Kuwait and Saudi Arabia to provide Moscow, as they ultimately did, with the hard currency that Moscow desperately needs to catch up on overdue payments to commercial creditors.[43] And, it is reported, to secure a "voluntary" Chinese abstention in lieu of a threatened Chinese veto,[44] the United States, disregarding a then-current crackdown on political dissidents, consented to lift trade sanctions in place since the Tiananmen Square massacre of pro-democracy protesters;[45] to

[37] *Quoted in* Beeston, *Iraqis Say Bribes Won Resolution,* The Times (London), Dec. 1, 1990, at 11, col. 1. For similar criticism, see the remarks of the Permanent Representative of Iraq to the United Nations, Mr. al-Anbari, on the occasion of Resolution 678's adoption. UN Doc. S/PV.2963 at 19–30 (Nov. 29, 1990).

[38] *Resolution 678, 1990,* Wash. Post, Nov. 30, 1990, at A28, col. 1.

[39] *Supra* note 30.

[40] *See, e.g.*, B. CUMINGS, THE ORIGINS OF THE KOREAN WAR 209–13 (1981); *see also* I. STONE, THE HIDDEN HISTORY OF THE KOREAN WAR, ch. 12 (1952).

[41] *See* John McWethy, reporting, ABC's "World News Tonight" (Nov. 29, 1990) (LEXIS/NEXIS). *See also* ABC's "Nightline" (Nov. 29, 1990) (LEXIS/NEXIS).

[42] *See* Apple, *Summit in Europe: East and West Sign Pact to Shed Arms in Europe,* N.Y. Times, Nov. 20, 1990, at A1, col. 1; Schmemann, *Summit in Europe: Reporter's Notebook; At the Summit, A Glance Homeward, id.* at A15, col. 1. *See also Questions and Answers on the Gulf War,* FRIENDS COMMITTEE ON NATIONAL LEGISLATION, WASH. NEWSLETTER, No. 541, Feb./Mar. 1991, at 5, 6.

[43] *See* T. Friedman, *Mideast Tensions: How U.S. Won Support to Use Mideast Forces. The Iraq Resolution: A U.S.-Soviet Collaboration—A Special Report,* N.Y. Times, Dec. 2, 1990, at A1, col. 5.

[44] In UN practice, despite the "concurring votes" language of Article 27(3) of the Charter, a voluntary abstention on a nonprocedural issue, as here, does not count as a veto. *See* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 12, at 229–31; J.-P. COT & A. PELLET, *supra* note 16, at 505–11. For related comment, see *infra* note 50.

[45] *See* Editorial, *Choose Peace,* NATION, Dec. 24, 1990, at 789.

support a $114.3 million loan to China from the World Bank;[46] and to grant a long-sought Washington visit by the Chinese Foreign Minister, since realized, and the resumption of normal diplomatic intercourse between the two countries.[47] Not to be overlooked either is the "reward" reportedly communicated to Yemen as a result of its opposition and negative vote: a cutoff of Washington's $70 million in annual aid.[48]

It can be argued, of course, that this kind of bargaining is characteristic of the logrolling that typifies legislative process in the domestic arena. And so some of it was. Promising economic rewards to the Latin American, African, and Soviet delegations, for example, seems of this genre. When, however, the lobbying involves a diminution or repudiation of purposes and principles for which the United Nations stands (e.g., the promotion and protection of human rights), or when it bespeaks punishment for votes conscientiously cast and thereby a conscious subversion of "right process," then, on grounds of *abus de droit* and *excès de pouvoir* (or *ultra vires*), one must demur. The solicitous treatment accorded the Soviet Union relative to the Baltic republics and China relative to its pro-democracy dissidents (like the blind eye cast upon Hafez al-Assad's Syria to ensure its participation in the subsequently organized U.S.-led military coalition[49]) fall into this class, in my judgment, as does also the retribution directed against Yemen.[50] From a perspective that champions a world public order of human dignity, in which values are shaped and shared more by persuasion than by coercion, it is not enough merely to lament "the bitter irony of having to embrace the butchers of Tiananmen and the butcher of Hama [in order to] repel the butcher of Baghdad" and then to resolve that the United States, when using the United Nations as a policy instrument, "will have no choice but to secure the cooperation of others by trading in whatever is the coin of exchange of the moment" (or, alternatively, that "[i]nternational law has no choice but to be realistic").[51] The world community does have a choice, and it had one right up to and beyond January 15: to wage peace before war—exhaustively[52]—and, in any event, to resort ultimately to war only on a genuinely multilateralist basis of collective responsibility and accountability.

[46] *See id.* The loan was approved on December 4, 1990. *See* Labaton, *World Bank Lends China $114 Million,* N.Y. Times, Dec. 5, 1990, at A13, col. 1.

[47] *See* T. Friedman, *Mideast Tensions: Chinese Official Is Invited to Washington in Response to Gulf Stance,* N.Y. Times, Nov. 28, 1990, at A15, col. 3. *See also* T. Friedman, *supra* note 43.

[48] *See* Miller, *Mideast Tensions: Kuwaiti Envoy Says Baker Vowed "No Concessions" to Iraqis,* N.Y. Times, Dec. 5, 1990, at A22, col. 1. For an affirmative Yemeni vote, the United States is said to have promised to support a draft resolution to appoint a Palestinian ombudsman in the occupied territories. *See* S. Friedman, *Let's Make a Deal in UN: US Informally Agrees to Resolution Protecting Palestinians,* Newsday, Nov. 29, 1990, at 7 (city ed.). The appointment of the ombudsman, however, was never approved. *See* Lewis, *Standoff in the Gulf: U.S. Joins U.N. Vote in Rebuking Israel Over Palestinians,* N.Y. Times, Dec. 21, 1990, at A1, col. 2.

[49] *See infra* note 55 and accompanying text.

[50] If, by virtue of the pressure brought to bear upon China, it can be said that China's abstention was *involuntary* and therefore, in keeping with the practice of not treating a *voluntary* abstention as a veto (*see supra* note 44), that the abstention amounted to a veto under Article 27(3) of the Charter, the bargaining could be deemed illegitimate and the resulting Resolution 678 illegal for having violated the "concurring votes" requirement of Article 27(3).

[51] Reisman, *Some Lessons from Iraq: International Law and Democratic Politics,* 16 YALE J. INT'L L. 203, 208 (1991).

[52] *See* text at notes 71–89 *infra.*

Thus, the process by which Security Council Resolution 678 was won, while perhaps legally correct *stricto sensu,* confirms how complete the power of the United States over the UN policing mechanism had become in the absence of Cold War opposition.[53] It was part of the larger imprint of great-power exhortation and cajolery—including the controversial debt forgiveness extended to Egypt for its military participation[54] and the even more controversial deference extended to Syrian political and economic concerns for Syria's military participation[55]—that so indelibly marked what must be described as a relentless drive by the United States, together with Great Britain, to force Saddam Hussein's hand, by armed force if necessary.[56] It was part of the larger context of ferocious self-interest among all the parties that demands to be taken into account when assessing the true legitimacy and precedential virtue, not merely the formal legality, of the U.S.-dominated armada in terms of authentic power sharing in a much-heralded new era of multilateral responsibility and accountability.

THE UNRESTRICTED CHARACTER OF RESOLUTION 678

To appreciate fully the extent to which, in the Persian Gulf crisis, U.S. influence over UN decision making, however technically lawful, marginalized the United Nations as a meaningful player in international peacemaking, the essentially unrestricted authorization given to the UN members in Resolution 678 must be acknowledged. By authorizing the use of "all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions," Resolution 678 did appear to have restricted the use of force and other necessary means to the liberation of Kuwait. However, the further authorization "to restore international peace and security in the area," in combination with ambiguous language in the cognate resolutions, left obvious room for interpretive and operational maneuver.[57]

[53] For qualifying comment, see text at notes 69 and 70 *infra.*

[54] *Reported in* T. Friedman, *Confrontation in the Gulf: Baker Foresees a Long Stay for U.S. Troops in Mideast; Urges a Regional Alliance,* N.Y. Times, Sept. 5, 1990, at A1, col. 6. *See also* Gauch, *Egyptians Watch Sinking Economy Drop Even Further,* Christian Sci. Monitor, Feb. 12, 1991, at 5; Farnsworth, *Egypt's "Reward": Forgiven Debt,* N.Y. Times, Apr. 10, 1991, at D1, col. 3.

[55] On November 24, 1990, notwithstanding Syria's long tenure on the U.S. Department of State's list of countries promoting international terrorism and Syria's effective occupation of all of northern Lebanon, President Bush met with President Assad, the first such contact by a U.S. President in 11 years, principally to ensure Syria's cooperation in the campaign against Iraq. *See* Kifner, *The World: Assad of Syria, The Smoother of Two Evils,* N.Y. Times, Nov. 25, 1990, at D3, col. 4; Worsnip, *Syria Emerges A Winner From Gulf War* (Mar. 8, 1991) (LEXIS/NEXIS, Reuter library). Further, as a result of Syria's participation in the war, the European Community is reported to have released $200 million in Syrian assets frozen since 1986, and Syrian domestic markets are now reported to be full of imported consumer products that previously were unavailable owing to government hard currency regulations. *Id.*

[56] This drive was especially evident after November 8, when President Bush *unilaterally* ordered the doubling of the U.S. forces in the Persian Gulf region, although the Bush administration is reported as having investigated ways to implement a use-of-force resolution as early as September 1990. *See* T. Friedman, *supra* note 43.

[57] Following Iraq's Scud missile attacks against Israel, whose defense was not the subject of any Security Council action during the crisis, claims to the Article 51 right of collective self-defense—by, for example, the United States in defense of Israel—could have been made inasmuch as the "until clause" of Article 51 would not have been set into motion. The juridical consequence of Iraq's attacks upon Israel, in other words, was to widen the door of discretion of its principal antagonist, the United States, beyond whatever restrictions might have been said to define Resolution 678.

The unrestricted character of Resolution 678 does not stop here. In addition to leaving the precise source of its authority unstated,[58] the resolution neglected to restrict the destructive weaponry and other means of warfare that might have been relied upon, and did not require any meaningful accounting to, or guidance from, the Security Council, the Military Staff Committee, or any other UN institution that might have been appropriate (requiring merely that "the states concerned . . . keep the Council regularly informed"[59]). In addition, it set no time limits on the use of "all necessary means."

In other words, in Resolution 678, the Security Council gave the UN members carte blanche vis-à-vis Iraq after January 15, including the waging of war on whatever terms and in whatever ways they might choose. This license was, of course, precisely what Washington's confrontational politics demanded, making it politically congenial to forgo exclusive reliance on the economic sanctions and to disregard other nonviolent options that could have furthered them. But it was a perverse license, one would think, considering that the United Nations was established preeminently, as proclaimed in the Preamble to its Charter, "to save succeeding generations from the scourge of war."[60] As was keenly observed by the Ambassador of Yemen, whose acuity should not be discounted simply because of his country's pro-Iraqi tendencies, the resolution was "so broad and vague" that it would allow nations to use the UN flag to make war independently, "a classic case," he said, "of authority without accountability."[61]

Was not Ambassador al-Ashtal right? The consequences of the Security Council's abdication of responsibility, as it properly may be called, are there for all to see: the United Nations virtually disappeared from the diplomatic scene and Secretary-General Pérez de Cuéllar was relegated to the role of file clerk and messenger boy, essentially to operate within the Bush administration's guidelines. Indeed, he was given no more than an hour's notice of Washington's decision to go to war, and was informed thereafter of the war's progress only after action occurred.[62] Once the hostilities began, presidential press conferences and military news briefings did not bother to maintain even the pretense of a United Nations presence or involvement. Except in the most peripheral ways, the very words "United Nations" were scarcely heard after January 16, or at least not until after the temporary cease-fire and the discovery of "near-apocalyptic" devastation to Iraq's civilian infrastructure at the hands of the U.S.-led coalition.[63]

[58] *See* text at notes 10–36 *supra*.

[59] For related comment, see text at notes 62 and 96–99 *infra*.

[60] True, these words were drafted with Munich and Ethiopia in mind, and therefore may be read to condone the use of force against such acts of aggression as Iraq's invasion and attempted annexation of Kuwait. But it is no less true that the United Nations was founded to be attentive first and foremost to the peaceful settlement of international disputes and to rely on the military instrument of policy only as an extreme last resort. For elaboration, see text at notes 64–70 *infra*.

[61] *Quoted in* S. Friedman, *Hussein Gets Eviction Notice; Resolution Giving Iraq Until Jan. 15 Approved,* Newsday, Nov. 30, 1990, at 5 (home ed.).

[62] *See* Doyle, *Crisis in the Gulf: UN "Has No Role in Running the War,"* Independent (London), Feb. 11, 1991, at 2. *See also* text at notes 96–97 *infra*.

[63] This characterization of the damage to Iraq's infrastructure is drawn from an account of a report prepared by UN Under-Secretary-General Martti Ahtisaari following a mission to Iraq between March 10 and 17, 1991, in the company of representatives of UNICEF, the UNDP, the High Commissioner for Refugees, the WHO, and the FAO. *See* Lewis, *U.N. Survey Calls Iraq's War Damage Near-Apocalyptic,* N.Y. Times, Mar. 22, 1991, at A1, col. 6.

Surely this is not what the UN founders and Charter drafters had in mind. Surely they must have thought, in a crisis of the magnitude and complexity of this one, that the Security Council would meet around the clock and that the Secretary-General would work feverishly to produce a peaceful, diplomatic solution—even, and perhaps especially, after the guns of January went off.[64] The articulated purposes and principles of the UN Charter certainly indicate as much. However, except for some belated expressions of Soviet concern toward the end of the fighting, no one—certainly no one in or of the United Nations—was able or willing to challenge the U.S.-led coalition about the scope and ultimate purposes of its military campaign. The unrestricted character of Resolution 678 may have been legal in the technical sense. But from a perspective that values UN autonomy and authentic progress toward multilateral responsibility for world peace and security, especially the actual waging of war, it cannot be said to have been legitimate either in the sense of Franck's definition of "legitimacy"[65] or in any larger aspirational sense. The United Nations itself, and not just the promise of UN collective security as long understood, was made to stand on its head.

This paradoxical circumstance was substantially a consequence, of course, of the antiquated, anachronistic composition of the Security Council itself. The failure so far to ensure more equitable Third World representation among the Council's permanent members (in the name, say, of Brazil, Egypt, India, Indonesia, or Nigeria), plus the absence among the permanent members of economically powerful Germany and Japan, raises fundamental questions about the determination and orchestration, not to mention the moral premise, of UN peace and security operations. The system of world order that the Security Council evokes, Michael Reisman observes, "continues to depend centrally on the United States."[66]

Primarily, however, the paradoxical circumstance was occasioned by the political and military power of the United States, centrally positioned and supported by an enthusiastic junior partner, Great Britain, intent on pressing the military option to the virtual disregard of any alternative world order strategy[67] (and on doing so before December 1, 1990, when Yemen was due to take over the Security Council's rotating presidency[68]). All of the U.S. activity, including the pressure diplomacy that influenced the drafting of Resolution 678, appears to have been shaped by this confrontational design. Stalwart independence and resolve on the part of, say, China or the Soviet Union, it is true, could have made it otherwise, as could have united opposition by the nonpermanent members of the Security Council.[69] The veto power exists to guard against great-power stampedes, among

[64] The Secretary-General, it appears, held out little hope for a diplomatic solution before the outbreak of hostilities. According to one informed account, "the Secretary-General had predicted as long ago as early December [that] there was little prospect of meaningful diplomatic initiative until, as his spokesman, François Giuliani, put it—'the American interest runs its course.' " *Gulf's Big 2 Rob S-G of Peacemaker Halo,* 13 UN OBSERVER AND INT'L REP., No. 3, March 1991, at 1.

[65] *See* text at note 1 *supra.*

[66] Reisman, *supra* note 51, at 205.

[67] For elaboration, see text at notes 70–89 *infra.*

[68] *See* S. Friedman, *Baker Planning Trip to Seek UN OK on Force,* Newsday, Nov. 15, 1990, at 6 (city ed.).

[69] The individual veto power of the Security Council's permanent members under Article 27(3) of the UN Charter is well-known. Less well-known is the Article 27(3) collective veto power that, theoretically, the nonpermanent members (usually small states) may exercise when at least seven unite against policies proposed by the permanent members.

other things. But in view of the widespread need for Western (and Japanese) money and good will at this particular time, especially by China and the Soviet Union, it is plainly naive to expect such independence and resolve, irrespective of the merits of a counterdesign.[70] A world organization that is supposed to be attentive first and foremost to the peaceful settlement of international disputes must at this time pin its hopes for less confrontational world order strategy upon the enlightened leadership of its most powerful members and their citizenries, a leadership that thinks long and hard about the true costs of war and about the enormous complexities of waging peace once war has been unleashed.

THE REJECTION OF ECONOMIC SANCTIONS AND OTHER NONVIOLENT OPTIONS

Many have commented critically on the prematurity of President Bush's decision to forgo primary reliance on the Article 41 economic sanctions imposed by the Security Council via Resolution 661,[71] in favor of the military option initiated by the President's unilateral "offensive" deployment decision of November 8,[72] and later implicitly authorized by Resolution 678. The United States, some critics pointed out, had been extremely patient about the UN sanctions imposed against South Africa; and this was so notwithstanding that, over time, the international crimes committed by Pretoria matched—indeed exceeded—those committed by Baghdad. Still others noted that economic sanctions mixed with patience had had its rewards in bringing home alive, without major warfare, the unlawfully seized and detained American Embassy hostages in Tehran in the late 1970s.

I agree with those who were critical of the President's decision, and not just because it was rendered only two short days after the November 1990 elections, preceding which the President had been urging the American people to practice patience and "stay the course."[73] The Iraqi sanctions were reliably reported to have been having an increasingly useful bite.[74] They appeared to have commanded broad and politically salient support even in the face of widespread knowl-

[70] Few countries are *not* dependent upon the West's largesse and good will at this time. Thus, though the U.S. policies were clearly popular to some, especially those Arab elites whose economic and political interests would immediately be served by a vanquished Iraq, it is unrealistic to expect that many would have been inclined to suffer the same disapproving consequences that befell Yemen for its opposition to Resolution 678 within the Security Council, or Jordan on the outside. As ruefully editorialized in *The Nation, supra* note 45, at 809: "We should do all we can to strengthen the U.N. as an instrument for the peaceful settlement of world disputes, but let us not delude ourselves: The old socialist bloc is irrevocably broken, and the ever-promising nonaligned group is practically non-functional now that there's only one world power."

[71] *Supra* note 3.

[72] *See* Gordon, *supra* note 34.

[73] *See Confrontation in the Gulf: Excerpts from President's Remarks to V.F.W. on the Persian Gulf Crisis,* N.Y. Times, Aug. 21, 1990, at A12, col. 1; Rosenthal, *Confrontation in the Gulf: Baker Warns U.S. to Have Patience on Iraq Embargo,* N.Y. Times, Sept. 6, 1990, at A1, col. 5.

[74] *See* Hufbauer & Elliott, *Sanctions Will Bite—And Soon,* N.Y. Times, Jan. 14, 1991, at A17, col. 1. *See also U.S. Policy in the Persian Gulf: Hearings Before the Senate Comm. on Foreign Relations,* 101st Cong., 2d Sess. 60–73 (1990) (testimony of Prof. Gary C. Hufbauer) [hereinafter *Senate Hearings*]. On economic sanctions generally, see G. HUFBAUER, J. SCHOTT & K. ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (2d ed. 1990); *idem.*, ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES (2d ed. 1990). *See also* M. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE (1990).

edge that they would not likely produce decisive results for at least a year.[75] And, while no one could claim with certainty or even optimism that the sanctions *alone* would ultimately have succeeded to the fullest extent desired, the military alternative was well understood at the time to risk death and destruction on a widespread basis, staggering economic costs and dislocations, large-scale environmental harm, and the possible enmity of the Arab and Islamic worlds for years—even decades—to come, threatening "free-lance terrorism" against Western, and particularly American, persons and institutions everywhere.

As it happens, of course, many of the projected harms that a less militant policy might have avoided did take place, including unprecedented and continuing damage to the Kuwaiti and surrounding natural environment, the "near-apocalyptic" destruction of Iraq's civilian infrastructure,[76] and, not least, the killing and maiming of an estimated hundreds of thousands of Iraqis, Kuwaitis, and others.[77] Not to be overlooked, either, are the values that were forsaken to assemble and maintain the U.S.-led military coalition; the implications of devastating, perhaps for a generation, "the most industrialized and scientifically advanced Arab country";[78] the creation of new, large, and long-term refugee populations (an estimated three million as of this writing) demanding assistance greater in scope and complexity than that known in Europe following World War II; the as-yet-untold price of neglecting Soviet transformations critical to enduring national and world security; and the seeming loss of the "peace dividend" and all its potential benefits in at least the United States.

It is thus exceedingly troublesome that President Bush chose not to step back from the precipice of military confrontation long enough to give the economic sanctions—and the time for diplomacy that they would have bought—at least a chance to succeed.[79] Arguably more troublesome, however, was the apparent

[75] *See* Gordon, *Mideast Tensions: Two Ex-Military Chiefs Urge Bush to Delay Gulf War*, N.Y. Times, Nov. 29, 1990, at A1, col. 1. *See also* Passell, *Confrontation in the Gulf: How Vulnerable is Iraq?*, N.Y. Times, Aug. 20, 1990, at A1, col. 4. For pertinent additional comment, see *infra* note 79.

[76] *See supra* note 63.

[77] Oscar Schachter, *supra* note 7, at 465–66, reflects sensitively, as follows:

> An especially tragic aspect of the gulf war was the extensive destruction of civilian lives and property that resulted from the coalition's aerial bombing and long-distance missiles. Critics of the war, and not only critics, have called attention to apparent violations of the prohibitions in the international law of armed conflict against causing disproportionate and unnecessary suffering to noncombatants. International lawyers, faced with cynicism, are not likely to be comfortable in reviewing the events.
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> . . . .
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> . . . The enormous devastation that did result from the massive aerial attacks suggests that the legal standards of distinction and proportionality did not have much practical effect.

[78] Khalidi, *Grim Prospects in the Middle East: Instability Scenarios for a Post-War Iraq*, IN THESE TIMES, No. 15, March 20–26, 1991, at 9.

[79] Former Under-Secretary-General for Special Political Affairs Brian E. Urquhart, who held the post for 18 years, is reported to have observed that the sanctions against Iraq were unprecedented in their complexity and comprehensiveness. *See* Editorial, *supra* note 45, at 809. "And Iraq," he went on to say, "is uniquely vulnerable to sanctions. It has a single economic base [oil] and a poor infrastructure." *Quoted in id.* Mussolini is reported to have confided to Hitler that he would have been forced to withdraw from Ethiopia within a week had the League of Nations included oil in its sanctions against Italy in 1935–1936. *See* Hufbauer & Elliott, *supra* note 74.

failure of the President, despite the grave risks known to him and despite the humanitarian purposes of the UN Charter, really to consider coupling the economic sanctions with other nonviolent techniques, techniques that, over time and deftly employed, *as a medley of interdependent policy options,* could have enhanced or reinforced the sanctions to the point of forcing Iraq's complete and unconditional withdrawal from Kuwait. Article 33 of the UN Charter, calling for the settlement of interstate disputes *first* by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means," was never fully pursued. Additionally, introducing what Gene Sharp calls "the methods of nonviolent action" or "political jiu-jitsu at work"[80]—domestic methods of social, economic, and political civil resistance and noncooperation—appears never to have been contemplated. Indeed, curiously for an administration that placed unusual emphasis on respect for law, there does not appear to have been even a genuflection in the direction of what David Caron usefully recommends as "a rule-of-law strategy," i.e., "bringing to bear the force of law possessed by municipal courts around the world" in respect of claims arising out of Iraqi misdeeds.[81]

In other words, rather than view the "all necessary means" language of Resolution 678 as a license to use force only as a last resort, as it could and should have been seen according to some delegations at the time of its adoption,[82] the President chose to construe it as an unconditional warrant to go to war come January 15, as not requiring *first* the exhaustion of all viable nonviolent strategies of persuasion. To be sure, precisely when *nonmilitary* means have been exhausted and *military* means therefore become "necessary" is a judgment regarding which reasonable commanders in chief may differ. However, it seems scarcely an exhaustion of nonviolent options to have had a high-ministerial-level meeting only once, for only six hours, and subject to the following presidential instructions: "No negotiations, no compromises, no attempts at face-saving, and no rewards for aggression."[83] Surely in the face of a major threat to human life and other important values, it is right to expect more—that "extra mile," as President Bush called it,[84] which turned out to be, in the Persian Gulf, very short.

One can insist, of course, as did British Foreign Secretary Douglas Hurd, that it is wrong to negotiate with a burglar.[85] The analogy is unduly simplistic, however,

[80] *See, e.g.,* G. SHARP, THE METHODS OF NONVIOLENT ACTION: PART TWO OF THE POLITICS OF NONVIOLENT ACTION (1973).

[81] Caron, *Iraq and the Force of Law: Why Give a Shield of Immunity?,* 85 AJIL 89, 90 (1991).

[82] For example, Colombian Foreign Minister Jaramillo stated before the Security Council on November 29:

> It is the responsibility of the Security Council, in accordance with Chapter VII of the Charter, not merely to threaten Iraq and hope for the best, but rather to take positive action towards achieving a peaceful settlement. If today we are opening the way for the option of using force, let us do so also for the peace option. The best hope of reaching a peaceful solution lies in creating a framework for negotiations.

UN Doc. S/PV.2963, at 41 (Nov. 29, 1990).

[83] *Quoted in* T. Friedman, *Confrontation in the Gulf: Games Over Dates; U.S.-Iraqi Minuet on Talks Drags On in a Struggle to Project the Best Image,* N.Y. Times, Jan. 4, 1991, at A8, col. 1.

[84] *Mideast Tensions: Excerpts from President's News Conference on Crisis in Gulf,* N.Y. Times, Dec. 1, 1990, at A6, col. 1.

[85] *See* McEwen, *Britain Dismisses Diplomatic Peace Efforts as Premature,* The Times (London), Aug. 31, 1990, at 3, col. 1.

and not just because it overlooks the common practice of plea bargaining, which aims at conserving energy and resources without sacrificing principle. When the burglar is heavily armed (in part because the chief of police has been complicitous) and especially when the fate of millions is at stake, in a circumstance of unprecedented and infinite complexity, it seems wantonly irresponsible and self-destructive to refuse to negotiate, or not to communicate unambiguously *and respectfully* the benefits of peace in addition to the burdens of war—the carrots as well as the sticks.[86]

True, a key cost of a nonwar strategy is time—time during which Iraq probably would have oppressed its victims further. "Yet war," Caron sensitively observes, "also entails great, if not greater, human suffering,"[87] as, indeed, the aftermath of "the hundred-hour war" bears distressing witness.[88] Reisman is altogether correct when he notes that "[i]n the real life of which law is a part, evil abounds in all shapes and sizes and one has to assign priorities."[89] The question is, however: what should the priorities be and who decides?

True also, Iraq's leadership displayed a singular lack of imagination and not a little obstinacy as the crisis unfolded, criminally trivializing the Security Council's goals and foolishly underestimating the U.S.-led coalition's resolve to secure them. At the same time, the coalition's strategy, especially after November 8, was consistently to rebuff or temporize each of Iraq's conciliatory gestures, of which there were several,[90] and to humiliate its leader at every turn. Diplomacy to pre-

[86] See, in this particular connection, the recommendations of Professor Roger Fisher, director of the Harvard Negotiation Project, in a series of opinion-editorials preceding the outbreak of hostilities on January 16, 1991: *Four Lessons on Building a "Golden Bridge" to Peace,* Int'l Herald Trib., Sept. 3, 1990, at 4, col. 3; *For Saddam, Where's the Carrot?,* Christian Sci. Monitor, Oct. 15, 1990, at 18; *How to Win Without A War,* L.A. Times, Oct. 23, 1990, at B7, col. 1; *The Gulf Crisis: Winning Without War,* Boston Globe, Nov. 4, 1990, at A17, col. 5; *Getting to "Yes" with Saddam: How Words Can Win; Talks Will Succeed Once Iraq Knows It Can Only Lose by Staying in Kuwait,* Wash. Post, Dec. 9, 1990, at K1, col. 4. *See also Senate Hearings, supra* note 74, at 14–55 (testimony of Prof. Roger Fisher). Among Fisher's recommendations was a Security Council resolution designed to make an Iraqi withdrawal from Kuwait look tolerable, making clear that upon withdrawal specific things would happen, including: (1) termination of the sanctions; (2) no military attack against Iraq; (3) appointment of an Arab mediator to seek an equitable settlement of the Ramaila oil field and offshore islands disputes; (4) fair procedures to settle all frozen asset and financial claims; (5) ultimate withdrawal of the multinational forces from the gulf; and (6) Security Council consideration of the Palestinian question.

[87] Caron, *supra* note 81, at 91.

[88] See especially the heart-rending opinion-editorial by Anthony Lewis, *The New World Order,* N.Y. Times, Apr. 5, 1991, at A15, cols. 5–6. "[W]ars," Lewis writes, "have consequences not faced by those who launch them: terrible consequences."

[89] Reisman, *supra* note 51, at 208.

[90] Beginning as early as August 21, 1990, the White House steadfastly rejected Iraqi calls for a negotiated end to the Persian Gulf crisis (*see, e.g.,* T. Friedman, *Confrontation in the Gulf: Behind Bush's Hard Line; Washington Considers a Clear Iraqi Defeat to be Necessary to Bolster its Arab Allies,* N.Y. Times, Aug. 22, 1990, at A1, col. 4), and the rigor with which this policy was applied was seen especially clearly when President Hussein agreed to release Western women and children being held hostage in Iraq in response to U.S. and allied threats of military attack. Stated Hussein at the time, challenging President Bush and British Prime Minister Margaret Thatcher to a television debate: "I say to Bush, I say to Thatcher, I am prepared now, really prepared, for direct talks, dialogue . . . immediately." *Quoted in* Atlas, *Hussein Says Western Women, Children Can Leave Iraq,* Chicago Trib., Aug. 29, 1990, at A1, col. 1. The State Department's only response to this gesture, in a statement by spokeswoman Margaret Tutwiler, was: "It's sick. . . . There is nothing to debate." *Id.* Later, when President Hussein agreed to release *all* the hostages in stages and then proceeded to do so, Secretary of State

vent war was never seriously pursued. With no possibility of even a modest face-saving escape for a vain leader, war was made virtually inevitable.

It seems, then, that Resolution 678 and the confrontational path it reflected were shaped more by a desire to go to war than by a desire to prevent one, or, in any event, by war aims, Machiavellian and otherwise, that were to be better served by the destruction of Iraq than by its simple withdrawal from Kuwait. Accordingly, when assessing the true legitimacy and not merely the formal legality of the process that led to Resolution 678's adoption and execution, one must ask why, in an organization that is committed to the notion that nonmilitary solutions are preferable to the enormous costs of war, an essentially unilateral decision by the United States to go to war on January 16 was allowed, and why it occasioned so little UN or other official challenge or dissent. One must wonder whether the United States did not exert a disproportionate influence over the UN decision process, subordinating and possibly subverting the United Nations as a meaningful actor in global and regional peacemaking. The refusal of the United States to activate the Military Staff Committee, as the Soviets proposed,[91] suggests that this may be so.

CONCLUSION

To a joint session of Congress about five weeks into the Persian Gulf crisis, President Bush declared: "Today [a] new world is struggling to be born. A world quite different from the one we have known. A world where the rule of law supplants the rule of the jungle. . . . America and the world must support the rule of law."[92] Repeatedly during the crisis, the President returned to this invocation of international law, partly to condemn Iraq, partly to rally worldwide resistance against Baghdad's crimes.

It is not easy to argue against such rhetoric when it is invoked at the highest levels, least of all when it is wrapped in consensus-building political and military successes directed at manifest villainy. It is, in fact, refreshing to see international law paid at least verbal respect after several decades of conspicuous disregard, even contempt.[93] One wants to join the chorus.

But a process of war-peace decision that, in the face of grave risk, is marked by indeterminate legal authority, highly questionable pressure diplomacy, a virtually

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James Baker III denounced Iraq as running a "hostage bazaar," stating that the freeing of Western hostages had nothing to do with compassion and was simply the latest cynical political move by Hussein. *See* Bruning, *Hussein Denounced for "Hostage Bazaar,"* Newsday, Oct. 25, 1990, at 13. The move was rejected outright, via spokeswoman Tutwiler, as "one more act of barbarism." *Id.*

[91] *See supra* text at note 32.

[92] Address Before a Joint Session of Congress on the Persian Gulf Crisis and the Federal Budget Deficit, Sept. 11, 1990, 26 WEEKLY COMP. PRES. DOC. 1358, 1359 (Sept. 17, 1990), N.Y. Times, Sept. 12, 1990, at A10, col. 1.

[93] *See, e.g.*, Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES. J. INT'L L. 295 (1987). *See also* Malawer, *Reagan's Law and Foreign Policy, 1981–1987: The "Reagan Corollary" of International Law*, 29 HARV. INT'L L.J. 85 (1988). *Cf.* Beres, *Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America*, 14 DEN. J. INT'L L. & POL'Y 76 (1985); Highet, *Remarks at the 1987 Annual Banquet*, 81 ASIL PROC. 501 (1987); Kreisberg, *Does the U.S. Government Think That International Law Is Important?*, 11 YALE J. INT'L L. 479 (1986); Quigley, *The Reagan Administration's Legacy to International Law*, 2 TEMPLE INT'L & COMP. L.J. 199 (1989). For more general treatment, see Farer, *International Law: The Critics Are Wrong*, FOREIGN POL'Y, Summer 1988, at 22.

unrestricted license to kill and destroy, and an essentially unilateralist rejection of nonviolent options necessarily provokes great skepticism—particularly when, in the Persian Gulf war's messy aftermath, we contemplate the devastating direct and indirect impact that the process ultimately had upon Iraq and Kuwait, their people, and the surrounding Middle East region.[94] Legal? Yes, technically. But legitimate? A borderline proposition at best. Doubters need only consider whether they would be as supportive of the process followed if, all else being equal, the one person principally calling the strategic shots was not the President of the United States but, instead, the President of the Soviet Union.

Of course, there is a more positive way to assess the situation. "Were it not for the United States initiatives and a commitment by President Bush to use the United Nations," Reisman writes (before January 16),

> the Security Council could have been expected to pass an anodyne resolution, condemning Iraq and perhaps calling for sanctions, but doing little more. Iraq would have hunkered down and waited for the dust to settle or attention to be diverted to some more current crisis while it consolidated its control over Kuwait.[95]

Probably so. It is well that the United States turned to the United Nations initially. And it is possible that, as a result of the U.S. efforts, a genuinely multilateralist collective security system will emerge over time, one that does not depend so much on the energy and resources of the United States. But it is distortive to imply that a less bellicose strategy would have failed or to assert, as Reisman goes on to do, that, on this occasion, "the United Nations became a significant force in countering the Iraqi aggression,"[96] which suggests that the UN system worked as it should have done. As Secretary-General Pérez de Cuéllar is reported to have remarked to the press on February 10, the Persian Gulf war was not "a classic United Nations war in the sense that there is no United Nations control of the operations, no United Nations flag, blue helmets, or any engagement of the Military Staff Committee."[97] He continued:

> 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 [Security] Council, which has authorized all this, is informed only after the military actions have taken place.[98]

Then, signaling discomfort with the turn of events and a serious concern for the loss of human life, the Secretary-General added—ruefully: "As I am not a military expert I cannot evaluate how necessary are the military actions taking place now . . . . I consider myself head of an organization which is first of all a peaceful organization and secondly a humanitarian organization."[99]

[94] For a poignant, soul-searching account, see Lewis, *supra* note 88.

[95] Reisman, *supra* note 51, at 206.

[96] *Id.*

[97] *Quoted in* Doyle, *supra* note 62; *also quoted in* Bassir-Pour, *Un Entretien avec le Sécrétaire Général des Nations Unies,* Le Monde, Feb. 9, 1991, at 1, 6, and 13 UN OBSERVER & INT'L REP., No. 3, March 1991, at 14.

[98] *See* note 97 *supra.*

[99] *See* note 97 *supra.*

From November 8 forward, when President Bush announced the doubling of U.S. troop strength in the Persian Gulf, a pattern of barely polite tolerance for the United Nations and its legal requirements was manifest.[100] One can only wonder how differently the war's aftermath might have been, in particular the humanitarian assistance (military and otherwise) that might have been given in response to Iraq's genocidal brutalization of its Kurdish and Shiite peoples, had the war been genuinely under United Nations control[101] and therefore more or less free of the charge of "internal meddling" that increasingly haunts, and in this instance did haunt, unilateralist strategy.[102]

Thus, contrary to the popular wisdom assiduously cultivated by Washington and its allies, the process of war-peace decision that led to Resolution 678 and its horrific aftermath appears to have had more to do with personal leadership styles and political and geostrategic self-interest than it did with the vindication of international law or the celebration of the United Nations. Without Kuwait's oil, Iraq's aggression would probably have been dismissed as a minor regional irritant at best, a minor blip on the radar screen of international diplomacy.[103] An authentically multilateralist strategy, truly committed to the avoidance of war if at all possible and otherwise showing genuine respect for the purposes and principles of the United Nations, was not what took place, at least not after November 8. Underneath the surface, something else—something less benign—was going on.[104]

[100] "[F]or weeks during the most critical period of the Gulf conflict," according to one informed source, "U.S. resistance blocked the [Security] Council from even holding open sessions. Instead, there were interminable, pointless and unproductive consultations and closed-door Council meetings." *Gulf's Big 2 Rob S-G of Peacemaker Halo, supra* note 64, at 1. As stated in *The Economist:* "The Americans kept the United Nations at arm's length during the fighting of the war." *United Nations Peacefire,* ECONOMIST, Mar. 30, 1991, at 39.

[101] E.g., national forces assembled under a unified UN command of direction and accountability, with the military commander designated by whichever country happens to be the major contributor of troops.

[102] Russett and Sutterlin put the issue this way: "In any operation, if the Security Council has asserted no control over the military action authorized, will it be possible for it to assert control over the terms of peace?" Russett & Sutterlin, *The U.N. in a New World Order,* FOREIGN AFF., Spring 1991, at 69, 77.

[103] Among other things, Ambassador April Glaspie's controversial conversation with President Hussein on July 25, 1990, appears as impressive testimony. *See Confrontation in the Gulf: Excerpts from Iraqi Document on Meeting with U.S. Envoy,* N.Y. Times, Sept. 23, 1990, §1, pt. 1, at 19, col. 1. *Cf.* T. Friedman, *Envoy to Iraq, Faulted in Crisis, Says She Warned Hussein Sternly,* N.Y. Times, Mar. 21, 1991, at A1, cols. 4–5. Also supportive of this view is the failure of the United States to act boldly and swiftly in response to Bahgdad's gross violations of the internationally guaranteed human rights of the Iraqi Kurdish and Shiite peoples in the immediate aftermath of the Persian Gulf war, suggesting the absence of a principled foreign policy. In the words of columnist Richard Cohen, commenting on the postwar events: "The war against Iraq hardly lacked its moral aspects. But it's hard to escape the suggestion that it was not morality that motivated Bush, but a raging hatred for Saddam Hussein." Cohen, *Pictures and the President,* Wash. Post, Apr. 23, 1991, at A19, col. 2.

[104] In *The Uses of Force,* NEW YORKER, Apr. 29, 1991, at 82, Richard J. Barnet, senior fellow of the Institute for Policy Studies, put it this way:

> From the first . . . , [Bush] Administration officials worried that failure to use American military power in a just cause, blessed by the United Nations, at a time when the Soviet Union was immobilized by its domestic turmoil would confirm the pessimistic judgments of the "declinists"—those at home and abroad who spoke of the United States as if it were a fading empire.

Earlier, in *Pax Americana II,* NATION, Feb. 11, 1991, at 148, 148–49, respected defense and military affairs analyst Michael Klare addressed U.S. motives as follows:

The world abroad senses this. With the unambiguous military victory over Iraq, there is not a little apprehension that the United Nations, financially dependent upon the United States and stripped of the prior check and balance of Cold War rivalry, has become but a venue for imposing upon the world a *pax* or *lex americana,* apprehension that the "new world order" of which President Bush speaks will in fact be a unipolar world of unbridled American power in which Washington will enforce its economic and strategic policies worldwide in whatever way it sees fit.[105] Not that the United States should not seek the vindication of international law in the Persian Gulf or anywhere else that it may be threatened. It should, notwithstanding that its own recent lapses over the core rules it purports to be defending and its own too-selective approach to the application of international law against others bespeak an unseemly hypocrisy. The point is that it should do so in a manner that demonstrates true respect for multilateral responsibility and accountability, akin to what the San Francisco drafters had in mind in 1945—a model for combating aggression everywhere and not just where the United States feels that it has "disproportionate responsibility."[106] The time is long past due for the United States and others to reject the old diplomacy, the old violence, and to pursue "right process" in its most comprehensive sense. It is necessary to ensure our collective well-being, perhaps even our collective survival. As William Butler Yeats warned at an earlier critical time of world order challenge, "there is no longer a virtuous nation, and the best of us live by candlelight."[107]

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Although President Bush refers continually to "the liberation of Kuwait," the U.S. plan has far broader objectives: to eliminate Iraq as a significant competitor for hegemony in the gulf; to make Kuwait, Saudi Arabia and the United Arab Emirates permanently dependent on U.S. military power for their external, and possibly internal, security; to force every local power, including Israel, to consult Washington when undertaking political, economic or military initiatives of any significance; and to deter future challengers ("the next Saddam") from contesting American hegemony over Middle East oilfields. More than this, Washington seeks to rein in Germany and Japan by forcing them to rely on American troops to protect their oil deliveries—just as they were once forced to rely on U.S. nuclear arms ("the nuclear umbrella") to deter attack by the Soviet Union.

Similarly, in *A Secret Deal to Carve Up Iraq?*, Village Voice, Dec. 4, 1990, at 21, James Ridgeway speculated that the true purpose of "Operation Desert Storm" (then "Operation Desert Shield") might well turn out to be a Middle Eastern map redrawn to suit U.S. hegemonic interests, with the United States left "in direct military control . . . [of] . . . over 50 percent of all the world's oil reserves" in Iraq, Kuwait, Saudi Arabia, and the gulf sheikdoms—ergo, "a stranglehold on all oil supplies to Japan, Germany, and the rest of Europe [that] would allay American fears of being left behind Germany and Japan after 1992."

[105] "The manner in which the gulf military action was executed by the United States and its coalition partners," write Russett & Sutterlin, *supra* note 102, at 83, "will likely limit the willingness of council members to follow a similar procedure in the future—a procedure that leaves council members little control over the course of military operations and over the conclusion of hostilities."

[106] For recently articulated proposals and their evaluation, including "a variant of the procedure followed in Korea" and "the procedure defined in Articles 42 and 43 of the U.N. Charter," see Russett & Sutterlin, *supra* note 102, at 77–82.

[107] THE LETTERS OF W. B. YEATS 691 (A. Wade ed. 1954).

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