

THE JUST DEMANDS OF PEACE AND SECURITY: INTERNATIONAL LAW AND THE CASE AGAINST IRAQ

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By: Paul Schott Stevens, Andru E. Wall & Ata Dinlenc¹

In his dramatic speech to the United Nations on September 12, 2002, President Bush declared that Iraq must comply with all relevant Security Council resolutions and with the terms of the 1991 cease-fire agreement, or face the consequences. Vowing that the United States will not “stand by and do nothing while dangers gather,” he urged that the terms of the Security Council’s previous resolutions against Iraq be enforced — and with them “the just demands of peace and security.” Recalling the ineffectiveness of the League of Nations, the President emphasized that the Security Council framework was established precisely so that UN “deliberations would be more than talk,” and Security Council resolutions not be “cast aside without consequence.” The President catalogued the major actions taken by the Security Council following Iraq’s invasion of Kuwait, and chronicled Iraq’s notorious and continuing non-compliance. He argued forcefully that Iraq’s actions are more than “a threat to peace,” they are a threat to the very “authority of the United Nations” itself.

In the widening international and domestic debate over Iraq, some insist that US or coalition military action against Iraq today would be unlawful unless once again explicitly authorized by the Security Council. As a matter of international law, this clearly is not the case. A renewed Security Council mandate may be useful or desirable, but it is not necessary. The Security Council previously has authorized the use of force against Iraq, the Council has not rescinded but rather reaffirmed its position on numerous occasions since, and the circumstances justifying the Council’s conclusion that Iraq is a threat to international peace and the security of the Middle East region remain unchanged. The UN Charter contemplates that the Security Council may — as it has with respect to Iraq — authorize the use of force to remove threats to international peace and security. The Charter also recognizes that, in response to acts of aggression, states — such as the US and its coalition partners — have an inherent right to act individually and collectively in their defense. Further military action against Iraq may, we believe, be justified on either or both grounds.

This paper will review briefly the framework in which the Security Council operates, the legal nature of its actions generally with respect to the restoration and maintenance of international peace and security, and the right to self-defense enshrined in the United Nations Charter. It then will analyze the succession of resolutions that the Security Council has adopted with respect to Iraq since 1990, and highlight the strong and continuing legal sanction they provide for military action by the US and other nations against Iraq.

I. The Use of Force, the Role of the United Nations Security Council and the Right of Self-Defense

The Charter of the United Nations has governed the use of force by states since 1945. The Preamble to the Charter leaves no question as to the UN’s fundamental purpose: “to save succeeding generations from the scourge of war.” The delegates that gathered in San Francisco in the closing days of World War Two envisioned a system of collective security that would

operate “to maintain international peace and security.” In this system, members of the international community would consider an attack on one state to be an attack upon all, and would cooperate to remove threats to the peace and suppress acts of aggression. Thus, Article 2 of the UN Charter provides that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” It further provides that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” In this manner, the UN Charter deprives states of any right they may have to use military force to resolve international disputes, subject to two broad exceptions: first, when force is authorized by the Security Council under its Chapter VII authorities; and second, when force is used in self-defense. We discuss each of these in turn below.

A. Actions of the UN Security Council

The Security Council, pursuant to Article 24 of the Charter, has primary responsibility to maintain international peace and security in accordance with the principles and purposes of the United Nations. Article 25 makes decisions of the Security Council legally binding on all states. While the General Assembly of the United Nations may make recommendations to states in matters concerning international peace and security, the Security Council alone has the power to decide such matters.

The Charter grants the Security Council wide discretion in carrying out this responsibility. For example, the Security Council has the responsibility, under Article 39 of Chapter VII, to determine “the existence of any threat to the peace, breach of the peace, or act of aggression.” After making such a determination, the Security Council may make recommendations or it may “decide” to take measures “in accordance with Articles 41 [non-force measures] and 42 [military force], to maintain international peace and security.”² With respect to authorizing the use of military forces, the Security Council may choose to deploy national forces under UN command and control (as in the Korean conflict), or it may authorize a regional organization to lead an enforcement action (as with NATO in the Balkans), or it may recognize the right of member states to use force individually or collectively (as in the Gulf War with respect to Iraq).³

When the Security Council acts “to restore international peace and security,” its pronouncements are determinative. By providing explicit legal authorization that is binding on all member states, the Security Council ratifies the pre-existing right of states to use force in individual or collective self-defense. At the same time, it brands the aggressor as an international outlaw.

The Security Council’s determinations thus typically resolve two questions: Has an armed attack occurred that gives rise to a right of self-defense? Who is the aggressor? Following its invasion and occupation of Kuwait, Iraq cited long-standing claims to sovereignty over Kuwaiti territory as a legal justification for its forceful annexation of that nation. On August 2, 1990, in Resolution 660, the Council promptly determined that the Iraqi invasion was “a breach of international peace and security,” repudiated the Iraqi claim, and thereby effectively foreclosed debate over the legitimacy of the coalition’s military response. Four days later, the

Security Council passed Resolution 661, in which it affirmed “the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait.” The Security Council thus decisively answered both questions: there had been an armed attack and Iraq was the aggressor.

B. The Right of Self-Defense

The second exception to the general prohibition on the use of military force concerns the right of self-defense against an armed attack. The Charter, in this regard, has preserved and carried forward a right to use force in individual or collective self-defense that clearly existed under customary international law before the founding of the UN. Article 51 of the Charter encapsulates this right:

Nothing in this present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to restore international peace and security....

In these terms, the Charter recognizes a legal right of self-defense — “inherent” in the English version, and “*droit naturel*” in the French text — in situations involving an armed attack, where the Security Council has not itself “taken measures necessary” to restore peace. This right of self-defense extends to states both individually and collectively. An armed attack upon one member of the United Nations is regarded as an attack upon all, giving all members the right to act in collective self-defense against the aggressor. As Professor Yoram Dinstein, in his seminal treatise on the *jus ad bellum*, affirms: “There is no doubt that, in principle, Article 51 permits any UN Member to help another if the latter has fallen prey to an armed attack.”⁴

Subject to the customary limits of necessity and proportionality, the inherent right of self-defense continues until international peace and security actually are restored.⁵ The text of the Charter, the record of its adoption, and subsequent practice makes clear that states individually and collectively may lawfully act in self-defense until such time as international peace and security are actually restored.⁶

The condition that defensive measures be “proportional” requires that military action be limited to what is reasonably necessary to achieve lawful objectives.⁷ This means simply that there must be “some symmetry or approximation” between those measures resorted to in defense and the original (unlawful) use of force.⁸ The key here is what steps reasonably are necessary to restore the peace. A full-scale invasion of an aggressor may not be a proportionate response to a single minor attack — but in the case of a ongoing series of such attacks, invasion may be altogether proportionate, indeed it may be the only response that suffices to foreclose the possibility of continuing aggression and thus achieve the lawful purpose of the defenders.

In considering further military action against Iraq, it should be noted that state practice provides no support for the notion that lawful defensive actions extend only to expelling an aggressor. The Security Council itself confirmed that Kuwait and the coalition of member states that came to its defense in 1990 were authorized not merely to expel Iraq, but also to take further

actions necessary to restore international peace and eliminate future threats to the security of the region. The legal import of the Security Council's actions, as discussed below, reflected its judgment about what measures were both necessary and proportionate to vindicate these most fundamental purposes of the UN Charter.

II. The Security Council's Response to Iraq's Invasion of Kuwait

A. The Security Council's Coercive Measures

Within hours of Iraq's invasion of Kuwait on August 2, 1990, the Security Council passed **Resolution 660** — the first of some fifty-seven resolutions that it has adopted concerning Iraq over the past twelve years. The Security Council determined that the invasion constituted a “breach of international peace and security” and, “[a]cting under Articles 39 and 40 of the Charter,” the Security Council condemned the invasion, demanded that Iraq withdraw, and called upon the parties to negotiate an end to the conflict. As noted above, the Security Council's determination that Iraq's invasion constituted a breach of the peace decisively answered the question of the legality of Iraq's actions.⁹

Iraq defied the Security Council's demand that it withdraw from Kuwait. As a result, on August 6, the Security Council adopted **Resolution 661**, in which it affirmed “the inherent right of individual or collective self-defence” and, “acting under Chapter VII,” enacted a comprehensive economic embargo. The embargo prohibited states from importing commodities from Iraq or occupied Kuwait, or exporting commodities to Iraq or Kuwait (with the exception of medical supplies and humanitarian foodstuffs). At that time, the Security Council stated that the purpose of the embargo was to “secure [the] compliance of Iraq with paragraph 2 of resolution 660 (1990) and to restore the authority of the legitimate Government of Kuwait.” Thus, the Security Council initially limited its objectives — and the Chapter VII measures enacted to achieve those objectives — to an Iraqi withdrawal and the restoration of the Kuwaiti government. Not long thereafter, however, the Council dramatically expanded its objectives.

Because Iraq openly defied the embargo, the Security Council passed **Resolution 665** on August 25, 1990, which called upon the US-led coalition to use naval forces to interdict maritime shipping to ensure compliance with the sanctions enacted in Resolution 661. In so doing, the Security Council arguably crossed a threshold from Article 41 measures (which include economic sanctions) to Article 42 measures (which include such uses of military force as a blockade). However, the Security Council's resolutions refer to neither of these articles; rather, the resolutions are rooted more generally under Chapter VII (which includes Article 51). This fact, taken together with the Security Council's recognition of the right of self-defense in Resolution 661, makes it clear that the Security Council acted to delegate enforcement of its resolutions to those states acting in collective self-defense with Kuwait.¹⁰

Iraq remained obdurate, so the Security Council, acting under Chapter VII of the Charter, adopted the following additional resolutions:

- **Resolution 662** (Aug. 9, 1990) declared Iraq's annexation of Kuwait “null and void.”

- **Resolutions 664 and 666** (Aug. 18 and Sep. 13, 1990) demanded the protection and release of third-state nationals and compliance with international humanitarian law.
- **Resolution 667** (Sep. 16, 1990) condemned Iraq's "aggressive acts" and violations of international law, including "acts of violence against diplomatic missions and their personnel," and demanded the immediate release of foreign nationals and respect for Security Council decisions.
- **Resolution 669** (Sep. 24, 1990) addressed the issue of assisting countries harmed by the sanctions regime.
- **Resolution 670** (Sep. 25, 1990) condemned Iraq's "flagrant violation ... of international humanitarian law," reminded Iraq that those individuals who order or commit grave breaches of the Geneva Conventions may be prosecuted, and strengthened the sanctions regime by banning most flights to and from Iraq and Kuwait.
- **Resolution 674** (Oct. 29, 1990) again condemned Iraq's treatment of third-state nationals and reminded Iraq of its obligation under international law to pay reparations for the "invasion and illegal occupation of Kuwait."
- **Resolution 677** (Nov. 28, 1990) condemned Iraq's attempt to alter the demographic composition of the Kuwaiti population.

Between August and November 1990, while coalition military forces were massing in the Saudi Arabian desert near the border with Iraq, the Security Council, through these and other actions, sought to secure Iraq's prompt withdrawal from Kuwait and otherwise to make it conform its conduct to the requirements of international law. In this regard, the Security Council may be said to have acted as its founders intended — by resorting to ever more stringent and coercive measures in an effort to restore international peace and security without the use of military force. This effort was unavailing. Iraq's utter defiance of its demands compelled the Security Council to give its explicit authorization to the use of force against Iraq.

B. The Authorization to Use Force Against Iraq

While the United States and the United Kingdom urged adoption of a Security Council resolution authorizing military action against Iraq, neither nation believed international law required such authorization as a prerequisite to the use of force. United Nations support for the exercise of the right of collective self-defense was important and even essential for many other reasons, but not as a legal matter. As President Bush's National Security Adviser Brent Scowcroft later observed:

While we had sought United Nations support from the outset of the crisis, it had been as part of our efforts to forge an international consensus, not because we thought we required its mandate. The UN provided an added cloak of political cover. Never did we

think that without its blessing we could not or would not intervene.¹¹

While unambiguously authorized to use military force under Article 51 of the Charter, the coalition, led by the United States, nonetheless sought and received Security Council approval of its actions. **Resolution 678**, passed on November 29, 1990, authorized “all necessary means” to eject Iraq from Kuwait and “to uphold and implement. . . all subsequent relevant resolutions and to restore international peace and security to the area.” The Security Council reaffirmed its eleven previous resolutions concerning Iraq and explicitly recognized the right of those “States co-operating with the Government of Kuwait” to use force in collective self-defense.

The international community understood the words “States co-operating with the Government of Kuwait” to recognize the right of collective self-defense, because the phrase took note of the *voluntary* actions of coalition member states, as distinct from the creation of a UN force. This point was highlighted in paragraph three of Resolution 678, in which the Security Council formally “request[ed] all States” to support the actions of the coalition. By contrast, when the Security Council acts under Article 42, Article 48 provides that states “shall” carry out the decisions of the Security Council. As Nicholas Rostow has observed, these circumstances make it clear that “article 51 rights can be exercised in the context of Security Council approval.”¹²

C. The Cease-Fire Resolutions

Iraq ignored the ultimatum — the “one final opportunity” — given it by the Security Council in Resolution 678, which delayed military action by the coalition until after January 15, 1991. The next day, a 28-nation, US-led coalition commenced Operation Desert Storm. After six weeks of intense bombing followed by an astonishingly successful 100-hour ground campaign, the coalition liberated Kuwait and then unilaterally halted offensive military operations.

Within days the Security Council passed **Resolution 686** (March 2, 1991), which recalled and reaffirmed the continuing validity of its twelve previous resolutions addressing the Iraqi aggression (including Resolution 678). It also noted “the suspension of offensive combat operations” by coalition forces, but did not mention any definitive termination. Resolution 686 reiterated the Security Council’s need “to be assured of Iraq’s peaceful intentions,” took note of the objective expressed in Resolution 678 “of restoring international peace and security in the region,” and highlighted the “importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities.” The Security Council demanded that Iraq “cease hostile or provocative actions by its forces against all Member States,” set up a meeting to arrange “the military aspects of a cessation of hostilities,” and provide information on weapons or explosives in and immediately around Kuwait.

On March 3, 1991 General H. Norman Schwarzkopf, USA, the commander of coalition forces, and Lieutenant General Sultan Hashim Ahmad al-Jabburi, the deputy chief of staff of the Iraqi ministry of defense, negotiated a cease-fire agreement.¹³ The cease-fire agreement, among other things, established a demarcation line and addressed the issue of repatriation of Kuwaitis

and POWs held in Iraq. The terms of the cease-fire were not crafted by the Security Council. Rather, they were dictated by the coalition to the Iraqis, who accepted the terms in the field.

The cease-fire agreement reached by Schwarzkopf and al-Jabburi on March 3, 1991 was committed to writing by the United States, vetted by the Security Council, and on April 3 adopted by the Security Council in **Resolution 687**. That resolution embodies what has been described as the “most peremptory and far-reaching cease-fire terms ever resorted to by the Security Council.”¹⁴ Resolution 687 recalled and reaffirmed all of the Council’s prior actions — reflected in thirteen earlier resolutions — concerning Iraq. In addition, Resolution 687 —

- Noted statements by Iraq threatening to use chemical weapons and its prior use of such weapons in violation of Iraq’s treaty obligations
- Deplored “threats made by Iraq ... to make use of terrorism against targets outside Iraq”
- Demarcated the border between Kuwait and Iraq, and established a UN observer group to monitor the border
- Outlawed Iraq’s nuclear, biological, and chemical weapons programs, established a comprehensive program to monitor and verify Iraq’s disarmament, and decided “that Iraq shall unconditionally accept the destruction, removal, or rendering harmless [of such weapons], under international supervision” (three times the resolution refers to Iraq’s “unconditional” acceptance of a rigorous on-site UN weapons inspections program)
- Required Iraq “to condemn unequivocally and renounce all acts, methods and practices of terrorism” and to prohibit terrorist organizations from operating from Iraq
- Reaffirmed Iraq’s obligations under international law to pay reparations, and established a compensation fund to be paid out of Iraq’s sale of oil
- Declared Iraq’s repudiation of its foreign debt to be “null and void”
- Modified and strengthened the sanctions regime that had been in place against Iraq since the fall of 1990
- Established a UN border observer unit
- Demanded the repatriation of third-State nationals
- Declared that “a formal cease-fire” would become effective upon Iraq’s unconditional acceptance of all these provisions.

Iraq formally accepted the terms of the cease-fire in a letter delivered to the Security Council on April 6, 1991, which denounced the “iniquitous resolution” but ultimately declared that Iraq had “no choice but to accept.”¹⁵

As noted above, when the Security Council authorized the use of force against Iraq in Resolution 678, it prospectively approved the exercise of the right of collective self-defense. So, too, when the Security Council enshrined the cease-fire agreement in Resolution 687, it validated and lent its own legal mandate to all the terms of the agreement between Iraq and the coalition, as to which it insisted upon Iraq's "unconditional acceptance." This elevated the terms of the cease-fire from a mere agreement between warring parties to an obligation enforceable against Iraq under the terms of the UN Charter itself.

D. Iraq's Continuing Violation of the Cease-Fire

The terms of the cease-fire, as set forth in Resolution 687, were intended as a comprehensive framework to restore peace and maintain the security of the region. From April 1991 to this very day, however, Iraq has flaunted its legal obligations under that resolution and others adopted by the Security Council since the invasion of Kuwait. This has necessitated continuing military operations by the coalition, acting in collective self-defense and under color of the Security Council's resolutions, and it also has necessitated subsequent pronouncements by the Security Council regarding Iraq's violations of its legal obligations.

1. The Military Conflict from 1991 to Present

Resolution 687 obligated Iraq to, among other things, cease further offensive military actions. Despite the "cease fire," however, hostilities were suspended only temporarily in 1991. In the intervening eleven years, Iraq's unceasing military provocations have required United States and coalition partners to engage Iraqi forces repeatedly. Coalition combat and reconnaissance aircraft have flown more than 250,000 sorties over Iraq since April 1991 to enforce the terms of the cease-fire agreement and maintain the no-fly zones. Iraqi forces have fired on these aircraft thousands of times, and US and coalition pilots have returned fire thousands of times. Noting that so many people seem to be unmindful of Iraq's conduct and the ongoing military response it has necessitated, Time magazine has referred to this as "The Forgotten War."¹⁶

A brief catalogue of these operations accordingly may be instructive. In 1993, for example, the United States determined that Iraq had mounted a plot to assassinate former President George Bush. In June of that year, the US responded by launching twenty-four Tomahawk cruise missiles against the Iraqi intelligence headquarters in Baghdad. President Clinton justified this attack under Article 51 and stated that it "should be clear ... that we will strike directly at those who direct and pursue Iraqi policies when it is necessary to do so in our self-defense."¹⁷

In January of the same year, Iraq notified the UN Special Commission (UNSCOM), the body entrusted by the Security Council to oversee Iraq's compliance with its disarmament obligations, that it would be prohibited from using the Habbaniyah airfield, which had the effect of precluding short-notice inspections. US, UK and French forces responded with air strikes in southern Iraq. The President of the Security Council denounced Iraq's actions as a violation of Resolution 687, and warned that "serious consequences" would flow from "continued defiance."¹⁸

Also in January 1993, Iraq deployed surface-to-air missile (SAM) batteries close to the border of the no-fly zone. Following attacks by Iraq on American F-15 and U-2 aircraft, US, British, and French air forces engaged SAM sites and air-defense control centers in southern Iraq. That same month, US naval forces in the Red Sea and the Arabian Gulf launched Tomahawk cruise missiles against a nuclear fabrication facility near Baghdad. The next day coalition air forces re-engaged SAM sites and air-defense control centers that had been missed in the strikes of the previous week. At the time, UN Secretary-General Boutros Boutros-Ghali stated publicly that the coalition had taken these military actions lawfully under “a mandate from the Security Council” in response to Iraq’s violations of Resolution 687.¹⁹

Shortly thereafter, in response to a series of border “incidents” and other “actions by Iraq in violation of relevant Security Council resolutions,” the Security Council adopted **Resolution 806** (February 5, 1993), in which it pointed out “once again its guarantee of the inviolability” of the Iraq-Kuwait border. Circumstances compelled the Security Council to reiterate this guarantee only a few months later in **Resolution 833** (May 27, 1993), which again reaffirmed Resolution 687 and reminded Iraq that its fulfillment of its obligations thereunder formed “the basis for the cease-fire.” The Security Council also determined to take “all necessary measures” pursuant to Resolutions 687 and 773²⁰ and the Charter to enforce its decision to guarantee the border.

In the fall of 1994, Iraq moved a large military force threateningly close to the Kuwaiti border, pulling it back only after the United States denounced the move and responded by sending a carrier battle group, scores of attack aircraft, and over 50,000 troops to the region. The Security Council, in **Resolution 949** (October 15, 1994), once again determined that the Iraqi actions constituted “a threat to peace and security in the region.” The Security Council demanded that Iraq “not again utilize its military or any other forces in a hostile or provocative manner” and “cooperate fully with the United Nations Special Commission.”

In October 1998, Iraq abruptly halted any further cooperation with UNSCOM. In November 1998, Iraq reneged on a promise to permit UNSCOM to resume its inspections. As a result, President Clinton ordered the deployment of military forces in Operation Desert Fox,²¹ which was launched on December 16, 1998. During this operation, US and UK forces engaged hundreds of Iraqi targets, in order to deprive Iraq of the capability to produce and use weapons of mass destruction and to wage further offensive military operations.²²

In the three years following Operation Desert Fox, the Iraqis have engaged coalition aircraft with missiles and anti-aircraft fire on over 1,000 separate occasions.²³ In the majority of those incidents, the coalition has responded by bombing the offending Iraqi site and in the process has damaged or destroyed over 400 targets. On other occasions US and British aircraft attacked anti-ship missile sites, command-and-control sites, military communications sites, and fuel and ammunition dumps.²⁴ Since 2001 and the inauguration of President George W. Bush, the coalition has been compelled to continue its military operations, launching dozens of attacks on Iraqi anti-aircraft defenses and other targets, including a Silkworm anti-ship missile site on September 5, 2002. As Defense Secretary Donald Rumsfeld has stated, these continuing operations have had the objective of degrading Iraqi air defense capabilities, reducing the threat posed to coalition aircraft and aircrews, and enforcing the no-fly zones in Iraq.²⁵

2. Iraq's Treatment of its Civilian Populations

Within just two days of Iraq's acceptance of the formal cease-fire agreement, the coalition (led by the United States, United Kingdom, and France) was compelled to establish a "no-fly zone" in northern Iraq in response to Iraq's continuing disregard of international humanitarian standards and brutal suppression of a Kurdish popular uprising there. "Deeply disturbed by the magnitude of human suffering involved," the Security Council in **Resolution 688** (April 5, 1991) condemned "the repression of the Iraqi civilian population" and branded Iraq once again a "threat to international peace and security." The coalition established a second no-fly zone in southern Iraq after Shiite dissidents were brutally attacked by Iraqi helicopter gunships in August of 1992. Iraq denounced the legality of the no-fly zones as a violation of its sovereignty and an act of aggression by the coalition, and announced that it would attack any coalition aircraft found flying in its airspace.

Under Saddam Hussein, human rights abuses against Iraqi civilians — clear violations of Resolution 688 and its predecessors — have been "widespread, serious, and systematic."²⁶ The regime has carried out a twenty-year campaign against the Kurds, attacking them with chemical weapons on dozens of occasions, destroying over 4,000 Kurdish villages, killing at least 50,000 people, and forcing hundreds of thousands to flee their homes.²⁷ In a 1994 report, the Special Rapporteur of the UN Commission on Human Rights concluded that the regime in Baghdad was guilty of war crimes, crimes against humanity, and possibly genocide.²⁸

3. Iraq's Violation of Disarmament and Inspection Obligations

Over the past decade, the Security Council has found numerous other violations of Resolution 687 by Iraq — particularly with respect to those provisions outlawing Iraq's nuclear, chemical and biological weapons programs, and demanding that Iraq agree unconditionally to destroy its weapons of mass destruction and submit to a rigorous UN inspections and monitoring program. Within months of the cease-fire, the Security Council in **Resolution 707** (August 15, 1991) determined that Iraq was concealing its weapons programs and providing incomplete information to the Security Council. The Security Council condemned these actions as "a material breach" of the cease-fire. It directed Iraq immediately to provide "full, final and complete disclosure, as required by Resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction," and otherwise to cooperate fully with UN weapons inspectors.

It bears emphasizing that the Security Council's determination that Iraq was in material breach of its cease-fire agreement removed any question of the coalition's legal right to resume offensive military operations. Regrettably, this was not done. As a senior UNSCOM official commented in 1997, Security Council resolutions condemning Iraq appeared to have "all the impact of traffic tickets"²⁹ — a lesson clearly not lost on Saddam Hussein.

Between 1991, when the Security Council first found Iraq in "material breach" of the cease-fire in Resolution 707, and 1999, when the UN Monitoring, Verification and Inspection Commission (UNMOVIC) was created to supplant UNSCOM, the Security Council passed fully twelve resolutions addressing Iraq's refusal to meet its disarmament and inspection obligations. **Resolution 715** (October 11, 1991) demanded that Iraq "meet unconditionally all its obligations

under the plans approved by the present resolution and cooperate fully” with UNSCOM and the International Atomic Energy Agency. Additional inspection, verification and monitoring plans were approved by the Security Council in **Resolution 1051** (March 27, 1996), which again demanded that Iraq “meet unconditionally all its obligations.”

In June 1996, Iraq took non-compliance with its cease-fire obligations to a new level, when it blocked access to various Republican Guard sites. In response, the Security Council passed **Resolution 1060** (June 12, 1996), which recalled Resolutions 687, 707 and 715 and demanded that Iraq allow “immediate, unconditional and unrestricted access to any and all areas, facilities, equipment, records and means of transportation” for UN inspection. The next month an UNSCOM inspection team, denied admission to a Republican Guard camp, viewed “long, round objects looking for all the world like Scud missiles being hurriedly driven away.”³⁰

On August 23, 1996, the President of the Security Council observed on the Council’s behalf: “The denial by Iraq, on repeated occasions, of immediate, unconditional and unrestricted access to sites ... constitute a gross violation of its obligations.”³¹ Other “clear and flagrant” violations of Resolution 687 were cited in **Resolution 1115** (June 21, 1997), in which the Security Council yet again demanded “immediate, unconditional and unrestricted” access for UN inspectors. During a visit to the Iraqi Chemical Corps headquarters in September 1997, UNSCOM inspectors were detained at the gate “for hours while files were openly trucked away and other documents burned on the roof of the building.”³² On November 12, 1997, the Council considered Iraq’s refusal to permit entry for certain UN inspectors and its intentional hiding of “significant pieces of dual-capable equipment.” In **Resolution 1137** it again determined that Iraqi conduct constituted “a threat to international peace and security, and demanded that Iraq “cooperate fully and immediately and without conditions or restrictions.” Noting that the terms of the cease-fire resolution were “the governing standard of Iraqi compliance,” the Security Council once more insisted on “immediate, unconditional and unrestricted access to any and all areas” for UN inspectors.

Hoping to retrieve the situation, UN Secretary-General Kofi Annan traveled to Baghdad in early 1998 and agreed with Iraq to modify the inspections regime. This agreement was embodied in **Resolution 1154** (March 2, 1998), which nonetheless reiterated that all previous Security Council resolutions “constitute[d] the governing standard of Iraqi compliance” with respect to disarmament and inspections. The Security Council then emphasized anew its demand for “immediate, unconditional and unrestricted access ... necessary for the implementation of resolution 687,” and warned “that any violation would have the severest consequences.”

The Security Council passed a similarly worded resolution on September 9, 1998. **Resolution 1194** noted Iraq’s decision not to cooperate with weapons inspectors, condemned the decision as “a totally unacceptable contravention of its obligations,” and reaffirmed the Security Council’s “intention to act in accordance with the relevant provisions of resolution 687” with respect to the embargo until Iraq complied with UN inspections. After Iraq declared that it was ceasing all cooperation with UNSCOM, the Security Council in **Resolution 1205** (November 5, 1998) condemned Iraq’s decision as a “flagrant violation” of the cease-fire agreement.

The last resolution directly addressing weapons inspections was **Resolution 1284** (December 17, 1999), in which the Security Council established UNMOVIC to supplant

UNSCOM and assume responsibility for further inspections and monitoring. As it had with respect to UNSCOM, the Security Council called upon Iraq to provide UNMOVIC “immediate, unconditional and unrestricted access to any and all areas as well as to all officials” and other authorities in Iraq that UNMOVIC deemed necessary to fulfill its mission.

As this succession of resolutions indicates, the mechanisms used by the Security Council to monitor Iraq’s compliance with its disarmament and inspection obligations have proved utterly unavailing in the face of what Richard Butler, former head of UNSCOM, has termed “Iraq’s unremitting policy of concealment and resistance.”³³ In the most recent formal assessment, a comprehensive expert review conducted under the Security Council in 1999 concluded that Iraq had not met its legal obligations, set forth a list of outstanding disarmament issues, and described the extensive requirements associated with an effective monitoring program if one is ever to be implemented to secure Iraq’s future compliance.³⁴ As Ambassador Butler points out, no one has been watching Saddam Hussein in the interim and “[y]ou can be sure that he is ... building weapons.”³⁵

The record before the Security Council has the highest significance for policymakers concerned with the threat of weapons of mass destruction.³⁶ But it also has great significance as a matter of international law. In Resolution 678, the Security Council authorized the US and its coalition partners to take “all necessary means” not only to eject Iraq from Kuwait, but also to “uphold and implement resolution 660 (1990) and all *subsequent* relevant resolutions to restore international peace and security to the area.” The record admits no doubt that Iraq has not fulfilled and does not intend to fulfill its disarmament, inspections and monitoring obligations under Resolution 687, a “subsequent” resolution that is not merely relevant but rather of central importance to the Security Council’s efforts to restore peace and security. Accordingly, under Resolution 678, the US and other UN member states clearly have the Security Council’s authorization to resort to the use of force and other “necessary means” to secure Iraq’s compliance. As a legal matter, no further or additional Security Council action is necessary for this purpose.

III. Collective Defense or Collective Inaction?

As Senator Robert Kerry recently observed, “the war against Iraq did not end in 1991.”³⁷ Hostilities with Iraq, precipitated by Iraq’s invasion of Kuwait on August 2, 1990, have not ceased and are not over. Coalition military operations (including but not limited to the enforcement of the no-fly zones) have continued without interruption since Operation Desert Storm. Both the United States and the United Kingdom have consistently maintained that these operations are legally justified under both Article 51 *and* Resolution 678. Actions taken in the exercise of the right of self-defense may parallel actions taken under Security Council authorization or direction (up to and including the use of force). Here, the Security Council explicitly recognized the legitimacy of the coalition’s operations at their outset. Unquestionably, it also has acknowledged, in the extreme circumstances posed by Iraq, that principles of necessity and proportionality encompass a broad range of measures to restore international peace and security.

It has been said that a “cease-fire is, in essence, a reaffirmation by the parties of their obligations under Article 2(4) of the Charter.”³⁸ Others have taken this argument a step further,

claiming that when a cease-fire is negotiated, any use of force previously authorized by the Security Council automatically terminates and the parties revert back to the controlling general prohibition on the use of force under Article 2(4). On this view, “[a]rmed responses to breaches of cease-fire agreements cannot be made by individual states; a new Security Council authorization must be adopted.”³⁹ The fundamental error of the position is this: it confuses the suspension of hostilities with the termination of hostilities. As Professor Dinstein has emphasized, the legal status of a conflict remains unchanged after a cease-fire agreement has been reached: “a suspension of hostilities connotes that the state of war goes on, but temporarily there is no warfare.”⁴⁰ There cannot be a “reversion” back to Article 2(4) until the circumstances giving rise to a lawful use of force are addressed and peace and security thereby restored, matters typically made the subject of a final peace agreement.

Operational realities likewise suggest that a party to a cease-fire agreement, even one endorsed by the Security Council, may determine that it has been breached materially by the other side. The United States and other members of the coalition have responded forcefully to numerous violations of the cease fire by Iraq since 1991. As Professor Ruth Wedgwood has noted, for example, the “right to use force unilaterally to vindicate the inspection regime is ... ratified by the institutional history of UNSCOM....”⁴¹ The Security Council has not taken exception to these actions. Rather, in 1993 the Secretary-General explicitly acknowledged the legality of the armed responses, and in 1994 the Security Council itself recognized the continuing validity of Resolution 678 in which it originally authorized the use of force.

Thus, a cease fire does not, in itself, extinguish the right of self-defense, and certainly does not do so not when its terms are disregarded *ab initio*.⁴² The persistent, well-documented Iraqi violations of the cease-fire agreement constitute a renunciation of the agreement, and justify the resumption of military operations designed to achieve the lawful objectives that the coalition has had in view since the invasion of Kuwait. As a legal matter, this conclusion seems only more compelling where the Security Council has embraced the terms of the cease fire in numerous resolutions, identified numerous, flagrant and material violations, and warned repeatedly of the consequences. Significantly, at no time has the Council retreated from its insistence that the cease-fire resolution “constitutes the standard of compliance,” and logically also of non-compliance. Presumably, the Security Council might, in different circumstances, determine that there was no material breach of a cease fire and that resumption of defensive military actions accordingly was unjustified. Such is not the case here.

If the right of collective self-defense recognized in Article 51 were extinguished upon acceptance of a cease-fire agreement, aggressors would have a perverse incentive to enter into such agreements without intending to honor them. By the same token, states acting legitimately in their own defense would have every reason not to cease hostilities short of unconditional surrender. Such a principle would serve no humanitarian interest, and leave little room for negotiating conditions on the cessation of hostilities in conflicts, like the Gulf War, where doing so would save further unnecessary loss of life and property.

IV. Conclusion

It is tempting but inaccurate to view the road forward with Iraq in singular terms — a process driven by the Security Council, through the various measures it may take now or in the

future to restore international peace and security. In fact, the Security Council already has spoken to all fundamental legal issues — Iraq’s unlawful aggression, Iraq’s violation of its cease fire obligations, the legitimacy of the coalition’s military actions from 1991 to date, and the range of those measures the Security Council deems necessary and proportionate in order to restore peace and security in the region. Moreover, quite apart from the Security Council’s pronouncements, international law recognizes an inherent right of collective self-defense, a right that continues and that may be exercised as necessary until international peace and security actually are restored. To be sure, the United Nations process is important. It is *the* process by which Iraq can be readmitted to the community of law-abiding nations. Meantime, while the political and moral value of a new Security Council mandate should not to be underestimated, the Security Council’s prior actions and Article 51 of the UN Charter provide complete and independent legal bases for the US and coalition partners to resume large-scale offensive military actions against Iraq.

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² The utilization of military force by the Security Council through military units provided by member states is addressed in Articles 42 through 48 of Chapter VII. The Charter envisioned that states would agree to loan troops to the United Nations, which would establish a Military Staff Committee to command the forces. The Security Council’s use of military force under Article 42 would be carried out by a United Nations force under Article 43 and all member states would be obligated to assist. No such agreements have been made and the Military Staff Committee has remained dormant.

The distinction between these three options became clearer in 1995 when the Security Council in Resolution 1031 “[a]cting under Chapter VII” authorized “Member States acting through or in cooperation with the organization [NATO] ... to take all necessary measures” to enforce the Dayton Peace Accord. Article 53, which authorizes the Security Council to utilize regional organizations in enforcement actions, is in Chapter VIII. In practical terms, the Security Council determined pursuant to Article 39 that the situation in Bosnia was a threat to international peace and security and then went through Article 39 to authorize NATO’s enforcement action under Article 53.

³ See Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 LOY. L.A. INT’L & COMP. L.J. 727, 731 (1998).

⁴ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 223-4 (3d ed. 2001).

⁵ Importantly, Article 51 refers to security Council actions “necessary to restore international peace and security.” See Andru E. Wall, *Concluding The War With Iraq*, 2003 ISRAEL YEARBOOK ON HUMAN RIGHTS (Yoram Dinstein, ed.) (forthcoming 2003).

⁶ Testimony of US Secretary of State John Foster Dulles to the US Senate during debate over ratification of the Charter leaves no question that the right of self-defense continues until such time as international peace and security is actually restored. See Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT’L L. 229, 240-8 (1996).

⁷ M.S. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 242 (1961).

⁸ Dinstein, *supra* note 4 at 198. Professor Dinstein emphasizes that this does not mean there must be equality in “scale and effect.”

⁹ The Charter envisions that a state exercising the right of self-defense under Article 51 will report its actions to the Security Council, which in turn will consider the legality of the actions. Resolution 660 prospectively made that determination

¹⁰ This point becomes even more apparent as one analyzes the resolutions up to and including the “authorization” to use force contained in Resolution 678.

¹¹ GEORGE BUSH AND BRENT SCOWCROFT, A WORLD TRANSFORMED 416 (Knopf, 1998).

¹² Nicholas Rostow, *The International Use of Force after the Cold War*, 32 HARV. INT’L L.J. 411, 420 (1991).

¹³ See H. NORMAN SCHWARZKOPF, IT DOESN’T TAKE A HERO 485-90 (Bantam, 1992).

¹⁴ DINSTEIN, *supra* note 4, at 50.

¹⁵ U.N. Doc. S/22456 (Apr. 6, 1991). During Security Council debates at the time Iraqi forces were leaving Kuwait, the United Kingdom noted that this signified merely a new phase of the crisis. Recalling the language of Resolution 678, the UK representative, Sir David Hannay, said that this new phase was “probably the most difficult, and certainly the most important and it is the one that must be dedicated to the restoration of peace and security in the region.” Ambassador Hannay urged that the Security Council “should establish the basic framework within which the conditions can be created for a definitive end to the hostilities, and that is what the present resolution is designed to do.” Such requirements, he observed, “flow from the resolutions we have adopted and from the statements previously made....” and “must be explicitly accepted by Iraq, and that is essential to permit the definitive end to the hostilities.” (U.N. Doc. S/PV.2978 (Mar. 2, 1991)).

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- ¹⁶ Mark Thompson, *The Forgotten War*, Time, Sep. 23, 2002, p. 43.
- ¹⁷ William J. Clinton, Letter to Congressional Leaders on Iraq, July 22, 1993, 29 WEEKLY COMP. PRES. DOC. 1420 (1993).
- ¹⁸ U.N. Doc. S/25091 (1993).
- ¹⁹ George H. W. Bush, Letter to Congressional Leaders Reporting on Iraq's Compliance With United Nations Security Council Resolutions, Jan. 19, 1993, 29 WEEKLY COMP. PRES. DOC. 67 (1993).
- ²⁰ Resolution 773 (Aug. 26, 1992) was in furtherance of paragraphs 2 through 4 of Resolution 687 dealing with the demarcation of the Iraq-Kuwait border. Paragraph 4 of Resolution 773 underlined the Security Council's decision to "take as appropriate all necessary measures" to guarantee the "inviolability" of the border, "as provided for in paragraph 4 of resolution 687 (1991)."
- ²¹ President Clinton justified US military actions on the grounds that, among other things, "Iraq's actions were a material breach of the Gulf War cease-fire resolution (UNSC Resolution 687)...." See Letter to Congressional Leaders Reporting on Iraq's Compliance With United Nations Security Council Resolutions, March 3, 1999, 35 WEEKLY COMP. PRES. DOC. 341 (1999).
- ²² Operation Desert Fox continued over four days and reportedly involved almost 30,000 troops, 37 warships, and 348 aircraft from the United States, as well as additional forces from the United Kingdom. Those forces launched over 300 Tomahawk cruise missiles from the sea, 90 cruise missiles from B-52 bombers, and over 600 other bombs and missiles. Among the targets were air defense systems, command and control sites, security and military intelligence facilities, alternate command and control and leadership sites, Republican Guard sites, airfields, anything related to the research, development, production, or delivery of weapons of mass destruction, and the Basrah petroleum oil lubricant facility that was contributing to the illegal export of gas and oil. See Secretary of Defense William Cohen and General Anthony Zinni, Press Briefing, US DoD Transcript of News Briefing of 21 Dec. 1998
- ²³ US DoD Transcript of News Briefing on 10 Aug. 2001.
- ²⁴ See *U.S. Fires on Anti-Ship Sites*, NEWSDAY (New York, NY), Feb. 3, 1999 at A17; Michael Kilian, *Allies hit targets in Iraq*, CHICAGO TRIBUNE, Aug. 11, 2001 at 6; Dana Priest, *U.S. Planes Intensify Iraq Strikes*, WASH. POST, Mar. 2, 1999 at A1. It is indicative of Iraq's attitude toward its cease-fire obligations that Saddam Hussein, in February 2000, offered a sizable cash bounty to any Iraqi who shot down a US or British aircraft or captured an "enemy" pilot. John Correll, *Northern Watch*, AIR FORCE MAGAZINE, Feb., 2000 at 32
- ²⁵ News Release from the United States Department of Defense, February 16, 2001, No. 069-01.

²⁶ As the US State Department has reported, dissidents are decapitated and their family members tortured, women are routinely raped for blackmail and torture, the tongues of critics are amputated, and Shiite clerics and political opponents are summarily executed. *See* Country Reports on Human Rights Practices — Iraq (US Department of State)(Mar. 4, 2002).

²⁷ IRAQ'S CRIME OF GENOCIDE 14 (Human Rights Watch Books, 1995). Hussein's use of chemical weapons on the Kurds reportedly became so well-known and such a joke among his troops that on one occasion in 1991 Iraqi troops terrorized Kurds by dropping flour on them from helicopters. ANDREW COCKBURN AND PATRICK COCKBURN, *OUT OF THE ASHES: THE RESURRECTION OF SADDAM HUSSEIN* 264 (HarperCollins, 1999).

²⁸ U.N.Doc. A/49/651 (Nov. 8, 1994).

²⁹ *Id.*

³⁰ COCKBURN, *supra* note 27, at 266.

³¹ U.N. Doc. S/PRST/1996/36.

³² COCKBURN, *supra* note 27, at 271.

³³ RICHARD BUTLER, *THE GREATEST THREAT: IRAQ, WEAPONS OF MASS DESTRUCTION AND THE CRISIS OF GLOBAL SECURITY* 228 (Public Affairs, 2000).

³⁴ U.N. Doc. S/1999/94 (Jan. 29, 1999).

³⁵ *Id.* at 277.

³⁶ Charles Duelfer, who served a deputy executive chairman of UNSCOM from 1993 to 2000, recently wrote that “the lesson of Iraq’s weapons of mass destruction is that they helped the regime survive; and regional states, such as Iran, have taken note.” Charles Duelfer, *The Inevitable Failure of Inspections in Iraq*, *Arms Control Today* (Sep. 2002), p. 10. Other independent experts also believe that Iraq is rebuilding its programs. *See Iraq’s Weapons of Mass Destruction*, International Institute of Strategic Studies (Sep. 2002).

³⁷ *Finish The War: Liberate Iraq*, Wall Street Journal (Sep. 12, 2002).

³⁸ David Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT’L L. 801, 893 (1996).

³⁹ *See* Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires, and the Iraqi Inspections Regime*, 93 AM. J. INT’L L. 124, 129 (1999).

⁴⁰ DINSTEIN, *supra* note 4, at 51. Professor Dinstein continues by pointing out that a prolonged general cease-fire has the psychological feel of neither war nor peace, but legally a

state of war remains until a peace treaty is reached — “despite the absence of combat in the interval.”

⁴¹ Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq’s Weapons of Mass Destruction*, 92 AM. J. INT’L L. 724, 727 (Oct. 1998).

⁴² As the Yemeni representative on the Security Council accurately observed, Resolution 687 “aims at the formal declaration of a cease-fire — only a cease-fire. This means that the state of war will continue between Iraq and the forces of the alliance until a definitive end is put to the military operations and hostilities.” The US representative stated, to similar effect, that Resolution 687 laid “the groundwork for the permanent cease-fire” and would “in stages produce a return to normalcy and non-belligerency.” U.N.Doc. S/PV.2981 (Apr. 3, 1991).



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