

Notre Dame Law School

NDLScholarship

Journal Articles

Publications

1991

Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait

Mary Ellen O'Connell

Notre Dame Law School, maryellenoconnell@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [International Law Commons](#)

Recommended Citation

Mary E. O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. Ill. U.L.J. 453 (1991).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/317

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ENFORCING THE PROHIBITION ON THE USE OF FORCE: THE U.N.'S RESPONSE TO IRAQ'S INVASION OF KUWAIT*

Mary Ellen O'Connell**

On August 2, 1990, Iraq invaded and swiftly occupied its neighbor, Kuwait.¹ Within hours, the United Nations Security Council ("Council") condemned the invasion, demanding immediate and unconditional Iraqi withdrawal.² During the Cold War, the United Nations (U.N.) rarely responded to aggression with anything more than such resolutions of condemnation.³ Either the Soviet Union or the United States regularly vetoed proposals to do more. The end of the Cold War has freed the U.N. to enforce the U.N. Charter's

* © Copyright 1991 by Mary Ellen O'Connell. All rights reserved.

** Associate Professor of Law, Indiana University — Bloomington. I would like to thank Kellye Y. Testy (J.D. '91), MaryAnn Ruegger (J.D. '91) and John D. Bessler (J.D. '91) for their editorial assistance.

1. Apple, *Invading Iraqis Seize Kuwait and Its Oil; U.S. Condemns Attack, Urges United Actions*, N.Y. Times, Aug. 3, 1990, at A1, col. 6.

2. U.N. Security Council Resolution No. 660, *reprinted in* 29 I.L.M. 1325 (1990) [hereinafter S/RES/660] states:

The Security Council,

Alarmed by the invasion of Kuwait on 2 August 1990 by the military forces of Iraq,

Determining that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait,

Acting under Articles 39 and 40 of the Charter of the United Nations,

1. *Condemns* the Iraqi invasion of Kuwait;

2. *Demands* that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990;

3. *Calls upon* Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences and supports all efforts in this regard, and especially those of the League of Arab States;

4. *Decides* to meet again as necessary to consider further steps to ensure compliance with the present resolution.

3. Cassese writes, "[t]he mechanism set up in San Francisco could have worked if the cold war had not broken out at once and the world had not split into two blocks." A. CASSESE, *VIOLENCE IN THE MODERN AGE* 33 (1986). Dinstein states, "[t]he record of the Security Council is replete with cases in which it has been deadlocked, due to political cleavages splitting the five Permanent Members. When a breach of (or a threat to) the peace directly affects one or more of the big Powers, or even their 'client States', the veto power can be counted on to ensure that only an anodyne resolution will be adopted." Y. DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 268-69 (1988).

prohibition on the use of force.⁴ After August 2, it began enforcing the prohibition against Iraq.⁵

When the drafters of the Charter outlawed the use of force, they understood the need for an enforcement mechanism. Most international law is enforced by self-help.⁶ But a small state invaded by a larger one would have difficulty enforcing its rights under the

4. The prohibition on the use of force refers to the U.N. CHARTER art. 2(4), which states "[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." The prohibition is now also a part of customary international law. *See* *Military and Paramilitary Activities In and Against Nicaragua* (Nic. v. U.S.), 1986 I.C.J. 14, 97-103 (Merits). The phrases "law of war" or "law of armed conflict" are sometimes used to mean the prohibition on force, but they are broader phrases that could also mean humanitarian law. The confusion stems from the translation of two Latin phrases, "jus ad bellum" and "jus in bello." In English both are rendered "law of war." To make clear that this article concerns the first phrase, the words "prohibition on the use of force" will be used.

The term "war" was an issue in the Gulf conflict. The United States Constitution provides that "Congress shall have the Power . . . To declare War" Thus, Congressmen and others want to know if the fighting in the Middle East was a "war." When the Constitution was written, a formal declaration of war was important in international law. It is no longer. Today, the laws of war — humanitarian and Charter-based — go into effect when fighting breaks out. *See, e.g.,* Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 *reprinted in* DOCUMENTS ON THE LAWS OF WAR (A. Roberts & R. Guelff eds. 1982). Article 2 says that the "Convention shall apply to all cases of declared war or of any other armed conflict which may arise" *See also* Schachter, *The Right of States to Use Force*, 82 MICH. L. REV. 1620, 1624 (1984). Thus, the term "war," as a term of art, may be important in interpreting the U.S. Constitution, but for purposes of this article, as with international law generally, "war" means armed conflict of any type. *See* Franck, *Declare War? Congress Can't*, N.Y. Times, Dec. 11, 1990, at A19, col. 2.

5. The Security Council first imposed a comprehensive economic embargo on Iraq and Kuwait. U.N. Security Council Resolution No. 661 *reprinted in* 29 I.L.M. 1325 (1990). It then gave permission for states to use force if necessary to enforce the embargo. U.N. Security Council Resolution No. 665 *reprinted in* 29 I.L.M. 1329 (1990) [hereinafter S/RES/665]. It further prohibited aircraft from bringing prohibited cargo to Iraq. U.N. Security Council Resolution No. 670 *reprinted in* 29 I.L.M. 1334 (1990). Finally in Resolution 678, the Security Council authorized the use of force against Iraq to liberate Kuwait:

Acting under Chapter VII of the Charter,

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

2. *Authorizes* Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement the resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;

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

U.N. Security Council Resolution No. 678 *reprinted in* 29 I.L.M. 1565 (1990) [hereinafter S/RES/678].

6. *See, e.g.,* A. D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 21-25 (1987).

Charter. The Charter, therefore, gives the Security Council authority to deal with threats to the peace and acts of aggression.⁷ When necessary, the Council may use troops of the member nations to counter aggression.⁸

Because of the Cold War, the Security Council has never used this mechanism. In the Korean conflict, the Council managed to call on members to send troops voluntarily, but only because the Soviet Union was boycotting the Council when the resolution was adopted.⁹ In contrast, with regard to Iraq, the Council has had the cooperation of all the permanent members.¹⁰ Yet, the Council still has not called on members to send troops under the U.N. flag,¹¹ which is regrettable, for purposes of achieving respect for the prohibition on force.¹² Nevertheless, the coordinated response to Iraq demonstrates the U.N.'s ability to respond to unlawful force.

But will the U.N.'s response convince critics that law is relevant to war? Since the adoption of the Charter, some political scientists have argued that state sovereignty does not admit the possibility that states would restrain their use of armed force. Morgenthau, Kennan, Hoffmann and others have belittled the attempt to achieve peace through law.¹³ They conclude that governments will not refrain from using force when their states' vital interests are at stake merely because of a rule, especially when no sovereign exists to sanction

7. U.N. CHARTER art. 39 states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

8. U.N. CHARTER art. 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

9. For a complete account of the U.N.'s actions regarding Korea, see L. GOODRICH, *KOREA, A STUDY OF U.S. POLICY IN THE UNITED NATIONS* (1956).

10. With regard to Resolution 678 authorizing the use of force to liberate Kuwait, all permanent members voted in favor except China, which abstained. The other members voted 8 to 2 in favor. *N.Y. Times*, Nov. 30, 1990, at A1, col. 6. Abstention does not defeat a resolution. See, e.g., Gross, *Voting in the Security Council*, 62 AM. J. INT'L L. 315 (1968).

11. Resolution 678 only cites Chapter VII of the Charter which contains articles 39-54. S/RES/678, *supra* note 5.

12. See *infra* notes 147-66 and accompanying text. The Charter provisions authorizing force speak in terms of U.N. action, not authorizing force by an independent group of states. See also, Urquart, *Learning From the Gulf*, NEW YORK REVIEW OF BOOKS 34 (March 7, 1991).

13. S. HOFFMANN, *International Law and the Control of Force in THE RELEVANCE OF INTERNATIONAL LAW* 25 (Hoffmann & Deutsch ed. 1968); H. MORGENTHAU, *POLITICS AMONG NATIONS* 281 (5th eds. 1978); G. KENNAN, *AMERICAN DIPLOMACY 1900-1950* 95 (1950).

rule violations.¹⁴ A variation on this theme holds that the international system is too chaotic and violent for legal rules to work.¹⁵ Again, however, the chaos is due to competing sovereigns who are subject to no superior authority. According to this view, governments see no reason to concede their important national interests to another state when the government has an army available to protect those national interests.¹⁶ As empirical proof of their position, political scientists invariably offer the record of conflict since the Charter's adoption. Iraq's invasion of Kuwait is only the latest example.

Admittedly, the list of conflicts is long, but looking at the wars fought in recent years suggests international law has had some success. To the extent war persists, the problem seems to lie in the weakness of the enforcement system, not in law's irrelevance.

In response to Iraq, the weakness in enforcement has been overcome, and the U.N. has acted dramatically.¹⁷ It has adopted sweeping, comprehensive enforcement measures culminating in Desert Storm.¹⁸ Desert Storm seems to be what conventional thinking in international law has wanted in terms of enforcement: force authorized by the United Nations to counter aggression.¹⁹ Desert Storm is the answer to critics of the law. Nevertheless, international lawyers should now question whether it is the sort of enforcement the nations of the world really want.²⁰ In light of the Gulf War, U.N. members need to consider how best to meet aggression in the post-Cold War era: what should "a new world order" under the "rule of law" mean?²¹

14. D. ZIEGLER, *WAR, PEACE, AND INTERNATIONAL POLITICS* 167-69 (1977).

15. S. HOFFMANN, *supra* note 13, at 25. "It is once again the uniqueness of the international milieu and the seriousness of the problem of violence that oblige one to take a dim view of the role of law in ordering such a group."

16. *Id.* at 33.

17. *See supra* note 5.

18. Desert Storm is the code name given to the coalition forces fighting to oust Iraq from Kuwait. Rosenthal, *War in the Gulf*, N.Y. Times, Jan. 17, 1991, at A1, col. 5.

19. *See* G. CLARK & L. SOHN, *WORLD PEACE THROUGH WORLD LAW* xvi (1966).

20. Before any hint of the war in the Gulf, Professor Louis Henkin had already questioned whether the Charter's collective security system would be the right one for the post-Cold War era: "From several perspectives, the machinery for maintaining international peace and security which may have seemed appropriate then [in 1945] may not seem appropriate now." Henkin, *International Law, Politics, Values, and Functions, General Course on Public International Law*, 216 *Recueil des Cours* 144 (1989-IV).

21. In his address to the United States at the outset of Desert Storm, President Bush said:

This is an historic moment. We have in the past year made great progress in ending the long era of conflict and cold war. We have before us the opportunity to forge for ourselves and for future generations a new world order, a world where the rule of law, not the law of the jungle, governs the conduct of nations.

When we are successful, and we will be, we have a real chance at this new world

This article considers, first, whether it is relevant to discuss a law prohibiting force. Can law actually restrain war? It concludes that law has restrained the use of force and that with better enforcement of the law, we can expect even more restraint. The article then considers how the prohibition on force applies to Iraq's invasion of Kuwait, and to the response to the invasion. Finally the article offers suggestions for improving enforcement of the prohibition on force in light of Desert Storm.

I. VERIFYING THE RELEVANCE OF THE PROHIBITION ON FORCE

In 1945, members of the United Nations prohibited by law the use of force in international relations. Article 2(4) of the U.N. Charter states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This prohibition, the culmination of efforts over a hundred years,²² has changed how governments use force. No longer is force considered an unfettered prerogative of states. Powerful states do not use it with impunity against weaker ones. When governments use force today, officials consistently provide a legal argument for using it and invariably add that it was used as a last resort.²³

Despite the evidence that Article 2(4) has had an impact on how nations behave, many lay people and apparently most political scientists do not accept that law can restrain force. The political scientists argue that the anarchical nature of the state system prevents states from abandoning the use of force.²⁴ Governments may sign solemn pledges against war, but, the argument goes, such pledges are not worth the paper on which they are written. While it is clear that

order, an order in which a credible United Nations can use its peacekeeping role to fulfill the promise and vision of the U.N.'s founders. We have no argument with the people of Iraq. Indeed, for the innocents caught in this conflict, I pray for their safety.

N.Y. Times, Jan. 17, 1991, at A14, col. 1.

22. For a history of the attempt to outlaw war, see L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 668-77 (2d ed. 1987).

23. Schachter, *supra* note 4, at 1623.

24. *But see* Bull, *The Continuing Validity of the Rule of Nonintervention* in *THE ANARCHICAL SOCIETY* 184 (H. Bull ed. 1984).

force persists and that international law can go further to restrain the use of force, it is not true that law has not and cannot have an impact.

A. The Historic Relevance of Law to War

For two hundred years international law did not contain rules against using force. Quite the contrary, under international law states could use force to protect their legal rights.²⁵ War was the system's enforcement mechanism.²⁶ Moreover, the ability to wage war was considered an essential attribute of statehood. The state sought exclusive control over the use of force and resisted inroads on this exclusive right.

Nevertheless, states never considered law irrelevant to force. From the beginning of the interstate system, international law rules flourished to control how war was fought.²⁷ Grotius wrote on both the law of war and the law of peace.²⁸ By the law of war he meant rules on conducting war, including how to declare war, declare neutrality, and respect belligerency.²⁹ These rules had a very old pedigree, dating from the middle ages and the time of chivalry. They were observed in part because they had reciprocal benefits. Any state that wanted to enjoy them had to respect them.³⁰

After the United States Civil War, however, some world leaders realized that with advances in technology the only way to humanize war was to outlaw it.³¹ During the Hague Peace Conferences at the end of the 19th century, attempts were made to find alternatives to war for the settlement of disputes and the enforcement of rights,³² such as a permanent court of arbitration. The First World War

25. According to Dinstein, "the freedom to wage war was countenanced without reservation [in the 19th and early 20th centuries]" Y. DINSTEIN, *supra* note 3, at 166.

26. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 2-3 (1956).

27. Moreover, the laws of war were the first to be systematically codified in international law. THE LAWS OF ARMED CONFLICTS ch. V (Schindler & Toman ed. 1981).

28. GROTIUS, *DE JURE BELLI AC PACIS* (1624); *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* 150 (1986); NUSSEBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 102-14 (rev. ed. 1954).

29. *See supra* note 4.

30. *See, e.g.*, THE LAWS OF ARMED CONFLICTS, *supra* note 27.

31. "Efforts to outlaw war intensified as war became more terrible and more expensive of human resources" Henkin, *supra* note 20, at 144. Schindler and Toman also suggest that the call for more humane warfare was a result of civilization advancing. THE LAWS OF ARMED CONFLICTS, *supra* note 27, at ch. V.

32. Y. DINSTEIN, *supra* note 3, at 76.

further spurred the movement for peace. With the founding of the League of Nations and the adoption of the Kellogg-Briand Treaty, states took the first important steps toward outlawing war.³³ But had the underlying problem been addressed? How could law restrain war if the use of force lay at the heart of state sovereignty: would states really participate in the process of undermining one of the attributes that made them states?

After the Second World War, they did. As discussed at the outset of this section, the United Nations Charter prohibits the use of force by states.³⁴ This is the law President Bush has referred to in condemning the invasion of Kuwait by Iraq.³⁵ It is the legal basis of the numerous resolutions by the United Nations against Iraq and other aggressors.³⁶ The International Court of Justice pronounced in a decision in 1986 that a rule against the use of force not only exists in the Charter but is now part of customary international law.³⁷ In the same case, the United States argued that the prohibition on the use of force is a rule of *jus cogens* — a peremptory norm of international law.³⁸

B. The Political Science Critique of Law and War

While the terror of modern war makes these legal developments understandable, they conflict with much theory about international

33. Henkin, *supra* note 20, at 144.

34. The prohibition is found in Article 2(4), *supra* note 4. See also the Definition of Aggression which is an elaboration of the U.N. Charter prohibition on the use of force. The Definition states in Article 3: "Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof . . ." U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1975).

35. "People aren't doing this for the United States, they're doing it for world order and international law. . . ." Dowd, *Argentina Hailed by Visiting Bush*, N.Y. Times, Dec. 6, 1990, at A15, col. 6; "The question here is international law and respect for one's neighbors." Schmitt, *U.S. Views Threat by Iraq As Strategy to Split Critics*, N.Y. Times, Sept. 25, 1990, at A12, col. 1; "Saddam Hussein has been so resistant to complying with international law that I don't yet see fruitful negotiations." Rosenthal, *Confrontation in the Gulf*, N.Y. Times, Aug. 28, 1990, at A1, col. 6.

36. See *supra* note 5.

37. See *Military and Paramilitary Activities In and Against Nicaragua (Nic. v. U.S.)*, 1986 I.C.J. 14, 103 (Merits).

38. *Id.* at 101. States may not opt out of or derogate from a rule of *jus cogens*, even though the states of the system make the rules and the making of new rules can usually only begin with the derogation from existing rules. See I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 203-07 (2d ed. 1984).

relations. The state system has no sovereign; the units compete, and they use violence regularly. In such conditions, some question how any international law can exist, let alone restrain force.³⁹

Most political scientists recognize the existence of international law.⁴⁰ Most would agree that Austin's definition of law as "an evil annexed to a command" does not adequately characterize law, while H.L.A. Hart's broader concept of law, as the consensus rules of a community, does. Hart explicitly includes international law within the category of law.⁴¹ Moreover, Louis Henkin's authoritative work, *How Nations Behave*, makes the case that states routinely comply with international law, and international law helps create a relatively orderly international community.⁴²

But many who accept the existence of general international law reject the ability of law to restrain war.⁴³ Stanley Hoffmann argues

39. John Austin is invariably cited by those who hold the view that international law is not law: "Every sanction properly so called is an eventual evil *annexed to a command* And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author." J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 133, 201 (1954) (emphasis in original).

40. Indeed, Roger Fisher implies that some who do not believe any international law exists draw this general conclusion from examples based on violations of the prohibition on force. "Conflict and violence often obscure both the fact that international law is a significant factor in today's world and that there is a vast amount of routine compliance with it." R. FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* 12 (1981); see also L. HENKIN, *HOW NATIONS BEHAVE* (1979); H. MORGENTHAU, *supra* note 13, at 281.

41. See H.L.A. HART, *THE CONCEPT OF LAW* 222-25 (1961). Obviously this debate is treated in the most cursory fashion here. See, e.g., T. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); cf. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84 (1990).

42. "The deficiencies of international law and the respects in which it differs from domestic law do not justify the conclusion that international law is not law, that it is voluntary, that its observance is 'only policy'. They may be relevant in judging claims for the law's success in achieving an orderly society. In many domestic societies, too, the influence of law is not always, everywhere, and in all respects certain and predominant; the special qualities of international society, different perhaps only in degree, may be especially conducive to disorder. Violations of international law, though infrequent, may have significance beyond their numbers: international society is a society of states, and states have power to commit violations that can be seriously disruptive; also the fact that the units of international society are few may increase the relative significance of each violation. Still, violations of international law are not common enough to destroy the sense of law, of obligation to comply, of the right to ask for compliance and to react to violation Over-all, nations maintain their multivaried relations with rare interruptions." L. HENKIN, *supra*, note 40, at 97-98; see also Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) ("[M]ost states observe systematic rules much of the time in their relations with other states.").

43. Hoffmann believes that international law exists, despite regular violations, because for all law there is a tension between observation and non-observation. Only unnecessary rules

that states cannot observe the prohibition on force due to the inherent nature of the state system.⁴⁴

In the case of international law, however, the nature of the group — i.e., a fragmented, competitive coexistence of rival societies — is such that the resort to violence is of the essence of the group: violence is the outcome of its structure; and the tensions between actual or desired behavior and the legal system tend to destroy or to cripple the latter.⁴⁵

The structure lacks a single sovereign. It has instead over 160 sovereigns, all with armies competing for national interests. In this chaotic situation states have not developed a restraint system that could get state compliance. According to Hoffmann, law in general has three types of restraint, all of which are weak in the international system: 1) obedience owing to expectations of benefits or detriments; 2) obedience to rules owing to a sense of duty; and 3) obedience after coercion.⁴⁶

Yet the system cannot be too weak, because, as noted above, most of international law is obeyed most of the time.⁴⁷ The widespread compliance international law enjoys can be attributed, for the most part, to Hoffman's "expectations of benefits or detriments."⁴⁸ States also obey some international law out of a sense of duty.⁴⁹ Admittedly, coercion plays a less significant role than the other two forms of restraints, though it remains a factor.⁵⁰

Even without coercion, however, states generally observe the prohibition on force, along with the rest of international law. Costs, benefits and duty can and do restrain the use of force. Admittedly, coercion might do a better job, and the lack of a coercive restraint may explain why the use of force persists. But the fact that international law needs better enforcement does not prove it cannot restrain force. It can and has.

are uniformly observed. S. HOFFMANN, *supra* note 13, at 21-22. In fact despite Hoffmann's implication, most of international law is observed most of the time. L. HENKIN, *supra* note 40, at 47.

44. S. HOFFMANN, *supra* note 13, at 22.

45. *Id.* at 23.

46. *Id.* at 25.

47. L. HENKIN, *supra* note 40; R. FISHER, *supra* note 40, Franck *supra* note 42; Brownlie, *The Reality and Efficacy of International Law*, 52 BRIT. Y.B. INT'L L. 1, 2-3 (1981).

48. See R. FISHER *supra* note 40; A. D'AMATO, *supra* note 6.

49. Franck, *supra* note 42.

50. Hoffmann suggests that coercion is weak because international law lacks a central authority. S. HOFFMANN, *supra* note 13, at 32-36. He does not think such an authority can be achieved.

C. The Evidence of Law's Restraint on Force

We can find evidence that law has restrained force by comparing the state of affairs before the adoption of the Charter with the situation today. Most uses of force today conform with the Charter. Law will not restrain all uses of force, nor is it the only means of restraint. Nevertheless, the rules explain much of the change.⁵¹

Many types of armed conflict lawful 100 years ago have disappeared from the arsenal of states since the adoption of prohibitions on the use of force. As Cassese points out, states generally restrict their use of armed force to intervention in civil war and to security issues. In relatively few instances, for example, have states sought to take control of territory through armed force: China in Tibet, Iraq in Iran, Arab states in Israel, Argentina in the Falklands, Indonesia in East Timor, India in Goa, Pakistan in Kashmir, and Iraq in Kuwait.⁵² Half of these attempts have failed.⁵³

Moreover, States rarely use force when issues other than security are at stake. States no longer use force to collect debts, for example. They do not use it to respond to insults, not involving force,⁵⁴ or to treaty violations. By contrast, the Soviet Union used force in Afghanistan because it feared the influence of an Islamic state on its borders.⁵⁵ The United States used force in Grenada and Nicaragua to stop communism.

Arguably, states have abandoned the casual use of force out of a sense of duty,⁵⁶ Hoffmann's second restraint.⁵⁷ Nuclear de-

51. One would hope that leaders in the United States and the Soviet Union have not risked direct confrontation during the Cold War in part because of the risk of using nuclear weapons. L. HENKIN, S. HOFFMANN, J. KIRKPATRICK, A. GERSON, W. ROGERS & D. SCHEFFER, *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 80-81 (1987) [hereinafter L. HENKIN & S. HOFFMANN].

52. In December 1990, Former Secretary of Defense Robert McNamara put the number of armed conflicts since the adoption of the U.N. Charter at one hundred-twenty.

53. Interestingly, in all these cases the attacking state had some colorable legal claim to the territory in question. No cases since the U.N. Charter exist of a state attempting to annex territory by force to which it had no claim, even though as late as the 1940's this was obviously an activity which states thought they could engage in with impunity.

54. Some might characterize the U.S. bombing of Libya after terrorist attacks accomplished with Libyan support to be an armed response to insults. See Greenwood, *International Law and the United States Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1987).

55. See, e.g., H. BRADSHER, *AFGHANISTAN AND THE SOVIET UNION* (1985).

56. Professor Henkin concludes that states are deterred from using force by the adoption of a legal norm:

Despite common misimpressions, Article 2(4) has indeed been a norm of behavior and has deterred violations. In inter-state as in individual penology, deterrence often cannot be measured or even proved, but students of politics agree that traditional

terrence, for example, does not explain the change in behavior because large nations could accomplish their goals with conventional weapons.

Besides the restraint of duty, states also face a cost for using force unlawfully. States most commonly enforce international law by conferring benefits and detriments,⁵⁸ Hoffmann's first restraint.⁵⁹ Hoffmann believes states have difficulty seeing the long term interest in obeying international law.⁶⁰ Yet, in almost all cases of unlawful use of force, states have imposed costs on the wrongdoer, even if only condemnation in the United Nations.⁶¹ States generally face some cost for disobedience.

Though duty, costs, and benefits can and do enforce the prohibition on force, the law is not uniformly enforced. Ironically, however, much of the violence cited by international law's critics is lawful. Hoffmann admits that the Charter rules themselves actually permit much contemporary armed conflict.⁶² In particular, the Charter does not prohibit civil war or aid to governments fighting civil wars.⁶³ Most major fighting occurring today, including the fighting in Ethiopia, Angola, Sri Lanka, Lebanon, Liberia, El Salvador and Mozambique are all civil wars. Only the Iraqi invasion of Kuwait and the Vietnamese invasion of Cambodia do not qualify as civil wars.

war between nations has become less frequent and less likely. The sense that war is not done has taken hold, and nations more readily find that their interests do not in fact require the use of force after all. Expectations of international violence no longer underlie every political calculation of every nation, and war plans lie buried deep in national files. Even where force is used the fact that it is unlawful cannot be left out of account and limits the scope, the weapons, the duration, the purposes for which force is used.

Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971).

57. S. HOFFMANN, *supra* note 46.

58. See, e.g., D'Amato, *supra* note 6.

59. S. HOFFMANN, *supra* note 46.

60. *Id.*

61. This has been true even regarding powerful states, presumably with a certain amount of influence. The General Assembly voted 75 to 20 to condemn the United States invasion of Panama. G.A. Res. 44/240 (29 Dec. 1989). It voted 111-9 to condemn the invasion of Grenada. U.N. Doc. A/38/PV.43 (1983), at 45; see also Schachter, *supra* note 4, at 1623. In some cases there have been higher costs. The United States levied sanctions against the Soviet Union for the invasion of Afghanistan and against Argentina for the invasion of the Falklands. The United States levied sanctions against India for fighting Pakistan.

62. S. HOFFMANN, *supra* note 13, at 30.

63. But see Doswald-Beck, *The Legality of Military Intervention By Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 251 (1985) (arguing that aid to even the government in a civil war is a violation of the right to self-determination).

Cassese, writing four or five years ago, made the same observation.⁶⁴ He showed that states using armed force either claim to do so in self-defense or at the invitation of a legitimate government.⁶⁵ Both types of claims, if supported by the facts, would be lawful uses of force. Cassese wants, therefore, to reform the rules by narrowing the exceptions.⁶⁶ But Hoffmann asks, "why bother?" Governments would only ignore the revised rules. Hoffmann's conclusion, however, does not take into account that he, Cassese, and others agree that states have shifted their behavior to avoid violating the rules. Indeed, he believes, paradoxically, that states would resist any call to revise the rules, because "even though, in a crisis, legal restraints prove to be fragile indeed, the statesmen do not enjoy being pushed to the point where they may have to demonstrate this fragility."⁶⁷ In other words, governments do not "enjoy" violating the law.

They do not "enjoy" violating the prohibition on force. They observe it enough to support the conclusion that such a prohibition exists. Yet it is violated enough without adverse response to conclude that it is not well enforced. Neither duty, condemnation, nor benefits kept the United States out of Vietnam, Grenada or Panama, the Soviet Union out of Afghanistan or Czechoslovakia, or Vietnam out of Cambodia. The rules are often ignored and the enforcement system is inadequate. It lacks coercive enforcement.

D. The Need for Coercive, Institutional Enforcement

Improving enforcement must take into account the difference between the rules against force and other international rules. As argued above, states today use force in response to serious issues. That means the cost of deterring them from using force in those instances will be high, higher than in other areas of the law.

Even small states can enforce their legal rights in areas other than the use of force because the rights are reciprocal or the costs involved are within their resources. One of the world's smallest states, Nauru, objected to United States tuna fishers operating within its economic zone. It arrested tuna fishers who did so until negotiations took place. Due to the low level of this issue, the United States did not use force against Nauru.⁶⁸

64. A. CASSESE, *supra* note 3, at 35-39.

65. *Id.*; see also Schachter, *supra* note 4, at 1623.

66. A. CASSESE, *supra* note 3, at 39-45.

67. S. HOFFMANN, *supra* note 13, at 41.

68. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 22, at 1317. The United

But these remedies are less useful to the smaller state attacked by one its own size or larger. Building on the examples of Italy's invasion of Ethiopia, Germany's invasion of Poland, and Japan's invasion of Manchuria, the drafters of the Charter believed weaker states would need the help of the international community to oppose violations of the Charter's prohibition on force.⁶⁹ Coordinated sanctions and, in some instances, coordinated force, would even the balance. More importantly, the potential to use force would deter aggressors.⁷⁰

The U.N. has attempted to implement the Charter scheme on a few occasions. It ordered some sanctions against South Africa and Rhodesia for violations of international law where the victims could not successfully oppose the violations. In the case of South Africa, sanctions probably helped to emphasize the moral bankruptcy of apartheid. The sanctions ordered against Iraq were much more impressive, and, if given time, might have been highly effective.⁷¹ In Korea, and now in the Middle East, the U.N. has authorized the use of force.

In neither case of authorized force, however, did the Security Council follow the Charter. The Charter calls for the U.N. itself, not a small group of members, to do the countering. Article 45 requires:

In order to enable the United Nations to take urgent military measures, Members⁷² shall hold immediately available national air-

States breached a boundary agreement with Mexico over an area called El Chamizal. Mexico refused to negotiate about other matters until the dispute was resolved. The United States owes Nicaragua reparations for U.S. support of the contras. With some determination, Nicaragua can get some of this money. O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 VA. J. INT'L L. 891 (1990). Reciprocal rights and self-help offer all states the means to enforce a wide range of their rights, regardless of the size of the state involved. See O.Y. ELAGAB, *THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW* (1988); E. ZOLLER, *PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTER-MEASURES* (1984).

69. See L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 290-353 (1969).

70. *Id.* at 317. In the case of large states attacking large states, the U.N. could help, but a large state would probably have the resources to defend itself.

71. See Malloy, *The Iraqi Sanctions: Something Old, Something New*, 15 S. ILL. U.L.J. 413 (1991); see also Hufbauer & Elliott, *Sanctions Will Bite — and Soon*, N.Y. Times, Jan. 14, 1991, at A15, col. 1.

72. Presumably all members of the United Nations are required to send troops, even Germany and Japan. See U.N. CHARTER art. 48. But apparently most German international lawyers argue that Germany is not so obliged. See, e.g., Klein, *Rechtsprobleme einer deutschen*

force contingents for combined international enforcement actions. The strength and degrees of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.⁷³

The U.N. has never negotiated agreements with members, nor has it made contingency plans. It has never, therefore, realized the deterrence value of such a force, let alone the coercive restraint it might provide.⁷⁴

The Charter first prohibited the use of force fifty years ago. That prohibition has changed how states use force, despite the skepticism of political scientists. But force has not been eliminated. Indeed, it remains frequent. The U.N.'s enforcement mechanism has not functioned as planned, though it has finally come close to doing so in the Middle East.

II. THE RULES APPLICABLE TO IRAQ'S INVASION OF KUWAIT

Iraq violated the prohibition on the use of force by invading Kuwait. Despite arguments which Iraq or others might raise, the prohibition is good law and applies to this situation. Moreover, Iraq has no defenses which could justify the invasion. The U.N., therefore, had the right to respond to Iraq, even to the point of authorizing force. The U.S. and its coalition partners needed U.N. authorization before they could launch Desert Storm. The authorization they

Beteiligung an der Aufstellung von Streitkräften der Vereinten Nationen, 34 ZaöRV 444-51 (1974).

73. U.N. CHARTER art. 45; see also *supra* note 12 and accompanying text. U.N. CHARTER art. 43 states:

(1) All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

(2) Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

(3) The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

74. See *infra* notes 147-66 and accompanying text.

received permitted only the liberation of Kuwait, not the eradication of Iraq or its leader.

A. Iraq's Violation of Article 2(4)

1. *Is 2(4) Good Law?*

This article argues that Iraq violated Article 2(4) by invading Kuwait — but is Article 2(4) good law? It has not been well enforced. States make the rules in international law; if they regularly ignore a rule, it may lapse.⁷⁵ Over twenty years ago, Thomas Franck wrote that Article 2(4) was dead.⁷⁶ He pointed out that with the frequent violations of 2(4) it no longer counted as good law.⁷⁷ He supported his argument, however, by showing that the type of wars being fought since the Charter do not fit within the prohibition intended in 2(4).⁷⁸ He does not show therefore that 2(4), as written, is being ignored. His argument stands only for the proposition that 2(4) is not as important as its drafters might have thought. He does not show that it is today a useless rule. In response to Franck, Louis Henkin pointed out that 2(4) has not made war obsolete but rather has made obsolete “the notion that nations are as free to indulge in it as ever, and the death of that notion is accepted in the Charter.”⁷⁹ If, as Franck suggests, nuclear weapons account for some of the restraint on the use of force, “Article 2(4) would not be the less a norm: law often reflects dispositions to behavior as much as it shapes them.”⁸⁰

75. It is well accepted that an international customary rule can change when states begin a contrary practice combined with *opinio juris*. A new treaty may also change a rule of custom. The question “Is Article 2(4) good law?” implies that an old treaty rule could be changed by a new custom. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter’s note 4 (1987).

76. Franck, *Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809 (1970).

77. Franck notes:

But if the rules prohibiting recourse to force were imperfect and, to some extent, already obsolescent by the time the Charter came into operation, this does not alone account for the demise of Article 2(4). Blame for this must be shared by powerful, and even some not-so-powerful, states which, from time to time over the past twenty-five years, have succumbed to the temptation to settle a score, to end a dispute or to pursue their national interest through the use of force.

Id.

78. Cf. A. CASSESE, *supra* note 3.

79. Henkin, *supra* note 57, at 545.

80. *Id.*

Moreover, no state has disclaimed Article 2(4).⁸¹ On the contrary, the members of the U.N. have reconfirmed it with the adoption of the Definition of Aggression in 1974.⁸² In addition, states regularly invoke Article 2(4) in condemnation of states that have violated it. In 1986, the International Court of Justice had the task of determining the status of Article 2(4). It concluded that because no state has denounced it and, because it is regularly invoked, it is good law.⁸³ Even in the Nicaragua case, where it was accused of violating the rule, the United States never tried to argue that it was not good law. For that matter, neither has Iraq, though basically it claims Article 2(4) does not apply to its invasion of Kuwait.

2. Does Article 2(4) Apply to the Invasion of Kuwait?

Article 2(4) has rather precise terms. It prohibits the 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." These terms have suggested to some international lawyers over the years that its scope is narrow.⁸⁴ The better view is to treat Article 2(4) as a broad prohibition on the use of force. Under almost any interpretation, however, Iraq has violated its terms.

For example, Iraq claims Kuwait is part of its territory.⁸⁵ Thus, Iraq might argue its invasion could not be in violation of a prohibition on the use of force against the territorial integrity of another state.⁸⁶

81. Y. DINSTEIN, *supra* note 3, at 93-94; Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

82. See *supra* note 34.

83. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force. . . . The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

Military and Paramilitary Activities In and Against Nicaragua, *supra* note 37, at 98.

84. Schachter, *supra* note 4, at 1624-27.

85. Sciolino, *Unto Itself; Iraq Yearns for Greatness*, N.Y. Times, Aug. 26, 1990, § 4, p.1, col 1; N.Y. Times, June 26, 1990, at D1, col. 6.

86. See Schachter, *supra* note 4, at 1627-28. Schachter points out that this argument has been implied in other territorial disputes.

Iraq does not appear to have a good claim to the territory of Kuwait.⁸⁷ Even if it did, states are not permitted to use force to recover claimed territory.⁸⁸ States must use peaceful means to resolve such questions.⁸⁹ Peaceful means are available and work well. Numerous countries since the end of colonialism have gone to the International Court of Justice, to name but one forum, to resolve disputes just like the one between Iraq and Kuwait. Libya and Chad, Burkina-Faso and Mali, Cambodia and Thailand are all examples.⁹⁰

Article 2(4) also prohibits states from using force against the territorial integrity and political independence of other *states*. Thus, 2(4) only protects states. If it could be shown that Kuwait is not a state, 2(4) would arguably not apply to the case of the Iraqi invasion of Kuwait.

It is true that Kuwait is small, that its government is not representative and that it obviously does not have the military capability to defend itself from aggressive states. These are not the criteria, however, under which international law determines statehood. Traditionally, international lawyers established statehood by citing certain indicia of statehood such as the existence of a government, territory, boundaries, population, and the ability to enter into international relations.⁹¹ Today these indicia are not regarded so formalistically but rather are considered in a broader context. For the most part, states reach a consensus on whether an entity is sufficiently like a state to be considered one. Membership in the United Nations is therefore an important indicator. Only states may be members and since most states in the world are members, when they vote on accepting a new entity, they are giving their collective

87. IRAQ-KUWAIT IN BORDER AND TERRITORIAL DISPUTES (A. Day ed. 1982). Applying the principle of prescription, Kuwait has been in control of territory since the turn of the century — enough time to defeat Iraq's adverse claim. See R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* (1963).

88. Y. DINSTEIN, *supra* note 3, at 87.

89. See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, adopted by U.N. General Assembly, Oct. 24, 1970, U.N.G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970).

90. These examples concern land boundaries. States regularly resort to the ICJ for maritime boundary decisions as well, including: U.S. and Canada, Germany, Denmark and Holland, Norway and Denmark, Libya and Tunisia, Malta and Libya, and El Salvador and Honduras.

91. See, e.g., Montevideo Convention on the Rights and Duties of States (26 Dec. 1933) reprinted in VI INTERNATIONAL LEGISLATION 620 (M. Hudson 1932-34); see also I. BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 72-79 (4th ed. 1990).

opinion that the entity is a state.⁹² Kuwait is a member of the United Nations.⁹³

Kuwait does not, however, have a representative government.⁹⁴ With the demand for democracy in so many countries today, international lawyers have begun to discuss whether democracy is not now a criterion in international law for a legitimate government, and whether without a legitimate government an entity may not be a state.⁹⁵ The existing criterion is only that the government be in effective control.⁹⁶ Even so, at times the international community has agreed that certain governments, such as the government of Rhodesia under Ian Smith, while in effective control were still illegal.⁹⁷ As a result, Rhodesia was not treated as a state. The current move to make democracy a criterion of legitimate government is similar to past debates over what makes a government legitimate. The international community may decide that states with non-representative governments are not to be treated as states. But any such development is a long way into the future. As of today, only a minority of states have representative governments. It would be impossible for them to deny statehood to the others, including Kuwait.

The above discussion all relates, however, to a Kuwait before the invasion of Iraq. After the successful invasion, was Kuwait any longer a state? Iraq's attack violated international law. Under international law Iraq could not benefit from its violation (*ex injuria jus non oritur*). In particular, the Definition of Aggression says that states cannot acquire territory by aggression.⁹⁸ For purposes of international law, therefore, Kuwait's statehood continued.

92. See Conditions for Admission of a State to Membership in the United Nations, 1947-48 I.C.J. 63.

93. Kuwait is also a member of the Arab League but this may not be as good an indicator since the Arab League also admits Palestine which does not have a government or boundaries or, more importantly, has never existed without a foreign occupying army. Palestine is not a member of the United Nations.

94. Although Time Magazine describes the government as "quasi democratic . . ." having voluntarily created an oligarchy of competing interests, Kuwait, in effect, was ruled by popular consent. The contract among the families was the seed of a quasi-democratic tradition that has persisted for nearly three centuries. Taif, *Toward a New Kuwait*, TIME, Dec. 24, 1990, at 26.

95. See Declaration of Copenhagen 1990, reprinted in 29 I.L.M. 1305 (1990).

96. See, e.g., Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L L. 503 (1990) (recent reiteration of the effective control principle).

97. Resolution Concerning Southern Rhodesia, S/RES/217, 20 SCOR, *Resolutions and Decisions*, at 8 (Nov. 20, 1965).

98. Definition of Aggression, *supra* note 34, at art. 5(3) ("No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful"); see also Schachter, *supra* note 4, at 1636.

Moreover, Kuwait's statehood would have continued even if the occupation had lasted many years. Israel occupied the Gaza and the West Bank of the Jordan in defensive actions after aggression by surrounding Arab states.⁹⁹ Although it was not the aggressor, most international lawyers conclude that Israel may not annex those territories, even now, after some twenty years.¹⁰⁰ United Nations members do not believe the legal status of the territories has changed. If Israel had been the aggressor, the argument against annexation would be even stronger. Kuwait remained, therefore, even while occupied, to be a separate state, and would have for a very long time.

3. *Are There Defenses for Iraq's Invasion of Kuwait?*

International lawyers categorize aggression as an international crime.¹⁰¹ As with domestic crimes, there are defenses to international crimes, even for the use of force. But the primary defense is narrow and does not exonerate Iraq. Article 51 of the Charter permits states to use force in self defense, if an armed attack occurs.¹⁰² Kuwait had not attacked Iraq and so on its face Article 51 does not provide a defense for Iraq's actions.

a. Economic Necessity

According to news reports, Iraq invaded Kuwait to resolve economic difficulties.¹⁰³ Iraq owes Kuwait a considerable amount of

99. A. GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* (1978).

100. An Israeli writer, Yoram Dinstein, speculates that if the de facto control of the territory annexed by the aggressor continues uninterrupted for generations, the non-prescription rule may have to give way in the end. International law must not be divorced from reality. When a post-debellatio annexation is solidly entrenched over many decades, there may be no escape from the conclusion that new rights (valid de jure) have crystallized, although they flow from a violation of international law in the remote past.

Y. DINSTEIN, *supra* note 3, at 161. *But cf.* Gerson, *supra* note 99.

101. *See, e.g.*, Draft Code of Crimes Against the Peace and Security of Mankind, Y.B. INT'L COMM'N 59, U.N. Doc. A/CN.4/SER.A/1988.

102. U.N. CHARTER art. 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

103. "Seeking to explain Iraq's rationale for invading and occupying Kuwait, [Foreign

money and apparently cannot pay. Iraq also wanted to seize shared oil fields because it believed Kuwait was cheating on a sharing agreement. Iraq also has a long-standing desire to get better access to the Persian Gulf by controlling Kuwait's Bubiyan Island.¹⁰⁴

None of these economic or legal grievances satisfies the requirements of Article 51.¹⁰⁵ No matter how threatened a state may be by economic difficulties, it is not justified in using armed force. The International Court of Justice has recently reiterated that Article 51 permits force only "if an armed attack occurs."¹⁰⁶

b. Invitation

Iraq argued that a group of Kuwaitis seeking to overthrow the government of Kuwait invited it to invade.¹⁰⁷ In making this argument, Iraq borrowed from the Soviet Union and the United States. Both countries have justified recent interventions on the basis of dubious invitations.¹⁰⁸ Externally-created invitations, however, do not

Minister] Aziz told reporters that Iraq's action was defensive in nature because it felt threatened by 'economic war' from Kuwaiti policies that were driving down oil prices and bankrupting Iraq." Drozdiak, *Baker, Aziz Describe Six Hours of Talking Past Each Other*, Wash. Post, Jan. 10, 1991, at A23, col. 2.

104. Kifner, *Iraq Proposes Peace Talks, Then Lashes Out at the U.S.*, N.Y. Times, Aug. 22, 1990, at A9, col. 4; Ibrahim, *Iraq Seeks Bigger Role in OPEC*, N.Y. Times, June 28, 1990, at D1, col. 6.

105. The Definition of Aggression does not mention economic pressure as amounting to aggression. The 1952 Report on the Question of Defining Aggression suggests that "unilateral action to deprive a State of the economic resources derived from the fair practice of international trade, or to endanger its basic economy" might be a form of aggression. U.N. Doc. A/2211, at 58 quoted in L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 22, at 688. But no form of economic aggression was included in the final document. See also Schachter, *supra* note 4, at 1624.

106. Military and Paramilitary Activities, *supra* note 37, at 103.

In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries'

Even providing military supplies to insurgents does not justify using force in the territory of the supplying state, let alone causing economic pressure. *Id.* Although the Court said it was not addressing the "issue of the lawfulness of a response to the imminent threat of armed attack." *Id.*; see also Y. DINSTEIN, *supra* note 3, at 173.

107. Kifner, *Iraq Proposes Peace Talks, Then Lashes Out at the U.S.*, N.Y. Times, Aug. 22, 1990, at A9, col. 4.

108. During the Afghan conflict, the Soviets intervened at the Afghan government's invitation, but to get the invitation, the Soviets had first to collude with pro-Soviet Afghanis to have Afghanistan's president killed. See *The Russians Reach the Khyber Pass at Last*, THE

justify forceful intervention. Moreover, the Soviets and Americans at least argued they had invitations from the governments in authority. International law has never authorized assistance to those seeking to topple a government, except perhaps in the colonial context.¹⁰⁹ At a minimum, the invitation must be issued by a government.

But even that minimum may not be enough. Louise Doswald-Beck has collected the state practice through 1985 on the right of states to intervene by invitation in civil war. She demonstrates that in most cases, the community of states criticizes intervenors regardless of their invitation. Her conclusions coincide with the principle of self-determination. If peoples do not have the vote, armed struggle is often the only alternative means of changing a government. Outside powers intervening to keep a government in power may deny the wishes of the majority. In most cases, intervention also heightens the conflict.

Despite the logic of this argument against intervention, the Reagan administration argued that international law should permit intervention to install democratic regimes. In other words, the outside power should be able to change the government if it does not represent the people. This view basically fits Iraq's invasion of Kuwait. According to Jeanne Kirkpatrick and Alan Gerson,

[t]he Reagan Doctrine, as we understand it, is above all concerned with the moral legitimacy of U.S. support — including military support for insurgencies under certain circumstances: where there are indigenous opponents to a government that is maintained by force, rather than popular consent; where such a government depends on arms supplied by the Soviet Union, the Soviet bloc, or other

ECONOMIST, Jan. 5, 1980, at 25. The United States intervened in Grenada arguing the island's Governor General invited it to invade. International lawyers have questioned whether the Governor General had the authority to invite the U.S. in, but even if he did, the invitation was apparently issued after the United States began the invasion. THE ECONOMIST, Mar. 10, 1984, at 31. The United States also claimed to have an invitation to intervene in Panama, but as discussed above, for purposes of international law, governments must be in effective control to be considered a government, at least at some point. Governments in exile do have legitimacy, like Kuwait's, if they have been deposed by aggression. The Endara government never had control of Panama. Farer, *supra* note 96.

The French often respond to invitations from their former colonies to intervene but at least they usually do so in response to a government in control through its own efforts. Indeed, the French are scrupulous on this point. During the recent conflict in Chad, the French changed sides in the middle of the battle for the capital when they perceived the insurgents had gained the upper hand.

109. Doswald-Beck, *supra* note 63.

foreign sources; and where the people are denied a choice regarding their affiliations and future.¹¹⁰

Kirkpatrick and Gerson say the Reagan doctrine was never actually invoked by the United States as the justification for U.S. intervention during the Reagan years. Moreover, the doctrine appears to have no support from other states. Thus, it has not even begun to develop into a rule of customary international law.¹¹¹

Nevertheless, some international lawyers argue that the Bush administration acted under a version of the Reagan Doctrine when the United States used force in Panama in December 1989.¹¹² The Bush administration did not cite the doctrine. Rather, it argued that it could lawfully invade under a combination of three other arguments: that it had received an invitation to invade from the legitimate government of Panama, that it was rescuing U.S. nationals, and, that it was protecting the Panama Canal as permitted in the Canal Treaties.¹¹³ Neither the law nor the facts support the Administration's combination argument, however.¹¹⁴ Thus, Anthony D'Amato, among others, argues that the U.S. should have relied on the argument that it had the right to intervene to install a democratic regime,¹¹⁵ a version of the Reagan doctrine. In fact, most states criticized the U.S. action and do not support a modification of the rules to accommodate what the United States did in Panama.¹¹⁶

A variation on the Reagan doctrine holds that states should be able to intervene to stop massive violations of human rights.¹¹⁷ Proponents of this argument cite the Tanzania invasion of Uganda,¹¹⁸ the Vietnamese invasion of Cambodia, and the Indian invasion of West Pakistan.¹¹⁹ In fact, however, neither Vietnam nor Tanzania

110. L. HENKIN & S. HOFFMANN, *supra* note 51, at 20.

111. *Id.* at 42-43.

112. D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

113. Sofaer, 1990 PROC. OF AM. SOC'Y INT'L L.

114. The best of the arguments is that U.S. nationals were in danger. Many international lawyers support the right of states to rescue their nationals. See, e.g. L. HENKIN & S. HOFFMANN, *supra* note 51, at 41-42. The problem with this justification is that the operation was far out of proportion to what was needed for a rescue.

115. D'Amato, *supra* note 112.

116. G.A. Res. 44/240, *supra* note 61.

117. See F. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1987).

118. *Id.*

119. R. LILICH, HUMANITARIAN INTERVENTION: A REPLY TO IAN BROWNLIE AND A PLEA FOR

justified their invasions as humanitarian. As with the argument favoring force to install democracy, this one also contains a contradiction. Killing people to enforce human rights obviously harms the human rights of the deceased. Iraq committed far more serious human rights abuses than Kuwait's traditional rulers.

Iraq could not justify its invasion by citing the cause of democracy, human rights, invitation by insurgents, or economic self-defense. The only justification for the use of force is self-defense in response to an armed attack. Iraq suffered no such attack.

B. The Response to Iraq

Iraq cannot invoke Article 51 in its defense but Kuwait can. This section reviews the terms of Article 51 and what they mean for Kuwait and other states, in particular the United States, joining with Kuwait against Iraq.

1. *The Scope of Article 51*

The United States almost immediately flew troops to Saudi Arabia at the request of the Saudi government in case Iraq decided to continue its invasion beyond Kuwait.¹²⁰ Kuwait also asked for United States assistance in countering the Iraqi invasion.¹²¹ Governments may ask for help when responding to an armed attack from an outside power (as opposed to help in civil war). Article 51 says in pertinent part, "[n]othing in the Charter shall impair the inherent right of individual or collective self defense." Collective self-defense means a third state may join the victim state to counter an armed attack.¹²²

Kuwait was unable, on its own, to counter Iraqi force in any meaningful way. It may appear, therefore, that once Iraq occupied Kuwait, the chance to defend had ended. A use of force months after Iraq's occupation by states joining with Kuwait may seem to be "a first use of force".¹²³ This view, however, would doom small

CONSTRUCTIVE ALTERNATIVES IN LAW AND CIVIL WAR IN THE MODERN WORLD, 229-33, 235-51 (J.N. Moore ed. 1974).

120. Kifner, *Iraq Proposes Peace Talks, Then Lashes Out at the U.S.*, N.Y. Times, Aug. 22, 1990, at A9, col. 4.

121. Apple, *Bush said to Approve Plan to Activate Some Reserves*, N.Y. Times, Aug. 18, 1990, at 1, col. 6; N.Y. Times, Aug. 13, 1990, at A11, col. 1.

122. Schachter, *supra* note 4, at 1638-41.

123. This view was expressed to the author by a reporter. Telephone interview with *The Philadelphia Inquirer* (Jan. 19, 1991).

states to the aggression of larger ones because in many cases small states would need time to mount a counterattack. Even Great Britain needed several weeks to organize a counterattack when Argentina invaded the Falkland Islands. The United Nations did not suggest that the delay precluded Britain's right to respond in self-defense.

At some point the right to defend might end.¹²⁴ No actual rule exists saying when that time might be, but the United Nations has provided something of a precedent in the current crisis. It authorized the use of force after January 15, 1991 — five-and-a-half months following the invasion.¹²⁵ Thus, six months would not appear to be too long a time to wait under these facts.

During the wars of national liberation, some writers described colonialism as a state of permanent aggression justifying the use of armed force in defense of such aggression.¹²⁶ It is difficult to find support from the state system for this view, but in the case of Iraq's invasion of Kuwait, the concept is useful. Until the international community decided that Kuwait no longer exists, Iraq in a sense committed on-going aggression.

2. *Security Council Pre-emption of Self-defense*

The Security Council was active in opposing the Iraqi invasion from the first. It adopted numerous resolutions condemning the invasion and calling on members to take measures to oppose Iraq.¹²⁷ Article 51 of the U.N. Charter says states may act in self defense

until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in anyway affect the authority and the responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 makes clear that the Security Council has primary authority for repelling an armed attack. During the Cold War, how-

124. As Dinstein suggests regarding occupied territory, legal rights can grow out of an illegality. Moreover, under doctrines of laches and acquiescence, an aggressor could argue in some circumstances that the time to defend had passed. Y. DINSTEIN, *supra* note 3.

125. S/RES/678, *supra* note 5.

126. Y. DINSTEIN, *supra* note 3, at 88 (citing Gorelick, *Wars of National Liberation: Jus Ad Bellum*, 11 CASE W. RES. J. INT'L L. 71, 77 (1979)).

127. See *supra* note 5.

ever, the Council did not take "measures necessary to maintain" the peace and so states were free to conduct their defense as they saw fit.

In this case, because the Security Council took a number of measures to ensure the peace, the question arose whether the United States or even Kuwait was free to act without Security Council authorization. The United States argued that it need not get the Council's authorization,¹²⁸ but gave no explanation for ignoring the plain meaning of Article 51. Nevertheless, the United States sought and the Security Council granted permission to use force. The Administration acted contrary to its stated legal position because it wanted to maintain multilateral support. It is for this very reason, however, that the Administration's interpretation of Article 51 is incorrect. The Charter drafters knew it would take multilateral action to successfully oppose aggression in many cases. The Security Council has the responsibility to coordinate those efforts. If some states act unilaterally, including the defended state, the Council's efforts could be undermined.¹²⁹

Dinstein's analysis, pre-dating the Middle East crisis, supports the pre-emption theory:

Self defence exercised by States (legal entities) is not to be equated with self-defence carried out by physical persons. . . . It is not

128. Lewis, *U.S. Preparing U.N. Draft On Claims Against Baghdad*, N.Y. Times, Nov. 1, 1990, at A12, col. 1. Michael Reisman would agree, arguing that states always have the right of self defense, whether the Council orders other action or not. This is his interpretation of the word "inherent" in Article 2(4). M. Reisman, Remarks at the U.S.-Soviet Conference on International Law and the Non-Use of Force, Carnegie International Center, Washington, D.C. (Oct. 4-6, 1990) [hereinafter U.S.-Soviet Conference]. Dinstein, however, believes the term "inherent" in Article 51 is not so important. He agrees with the International Court of Justice that it means the right is customary, not that it is irrevocable. Y. DINSTEIN, *supra* note 3, at 169-71. Moreover, Reisman does not adequately explain the meaning of the phrase "until the security council acts" if states need not follow the Council's lead when acting in self defense.

129. Article 51 could permit the Security Council to require Kuwait and even its freedom fighters still in Kuwait to follow the Security Council's lead. Richard Gardner believes such a notion is absurd. U.S.-Soviet Conference, *supra* note 128. But when the United Nations took over command of operations in Korea, General MacArthur had supreme command of U.N. forces. If he had wanted irregulars to cease fighting to suit the U.N.'s strategic or tactical purposes, such a command would hardly have seemed absurd to him. See, e.g., M. HARRELSON, *FIRE AROUND THE HORIZON* 49 (1989) ("[t]he United States provided the manpower, the weapons, the money, and the strategy"); see also L. GOODRICH, *supra* note 9 ("The Command of the United States forces was so organized as to assure to the United States Government complete operational control of the armed forces of other Members in Korea."). Forces must fight in a coordinated fashion, under one authority — the Security Council or those authorized by it.

beyond the realm of the plausible that a day may come when States will agree to dispense completely with the use of force in self-defence, exclusively relying thenceforth on some central authority wielding an effective international police force.¹³⁰

Moreover, members of the Security Council made it clear to the United States that they thought the Council had to authorize force before it could be used.¹³¹ Thus, the best view today is that the Security Council can pre-empt a state's right to self-defense. That is also the best policy for enforcing the prohibition on the use of force. The Council is more likely to authorize force consistently with the letter and spirit of the Charter than would states acting unilaterally and should therefore have superior rights.¹³²

What if the Council had vetoed rather than approving the United States request for authorization to use force? A veto complicates matters because it is not the same as an explicit decision by the Council that its measures, short of force, were proving adequate. The Council has vetoed numerous requests for action when threats to and breaches of the peace have occurred. In those cases, a veto has left the requesting state free to act. The same must be true even after the Council has authorized systematic measures against an aggressor. One states's veto of a request to use force should not be interpreted as a decision by the Council that force is not necessary. The only way for the Council to convey such a decision is by a Council resolution, adopted by a majority vote with no veto by a permanent member, forbidding force and stating positively that its measures were sufficient to maintain peace without force.

Abe Chayes would agree that the U.S. had to seek authorization before using force against Iraq but he also expressed the view that the U.S. could not have used force if China or another permanent member vetoed resolution 678.¹³³ This does not seem consistent, however, with the Council's practice, as explained above. Oscar Shachter also expressed the view that the U.S. needed to seek authorization but he added that it could veto a resolution opposing force and thus be free to act.¹³⁴ This may be true but it does not

130. Y. DINSTEIN, *supra* note 3 at 171.

131. Friedman, *Allies Tell Baker Use of Force Needs U.N. Backing*, N.Y. Times, Nov. 8, 1990, at A14, col. 1.

132. See *infra* notes 147-157 and accompanying text.

133. U.S.-Soviet Conference, *supra* note 128.

134. *Id.*

explain how the U.S. would go forward were its request for authorization vetoed by another permanent member. The suggestion here offers the way forward — when authorization is vetoed, another resolution must follow stating the Council believes its measures, short of force, are adequate. If the U.S. vetoes that resolution, it could proceed to use force, though it would face justifiable criticism if it were in the minority.

3. *Limits on Authorized Force*

The Security Council authorized the use of “all necessary means to uphold and implement” the Council’s resolutions on Kuwait.¹³⁵ Did this language permit any and all use of force? Was the force limited to liberating Kuwait? What would such a limit mean during hostilities?

The Charter permits the Council to authorize force only after other measures have proved or will prove inadequate:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.¹³⁶

Many experts thought the embargo of Iraq had not proved inadequate.¹³⁷ Nevertheless, the Security Council was required to draw such a conclusion before it could authorize the use of force.¹³⁸ The Council authorized force only to liberate Kuwait. The words of the resolution limited action to enforcing prior resolutions, in particular,

135. S/RES/678, *supra* note 6.

136. U.N. CHARTER art. 41 states:

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

137. See, e.g., Hufbauer & Elliott, *Sanctions Will Bite and Soon*, N.Y. Times, Jan. 14, 1991 at A15, col. 1.

138. Some doubt remains on this question. See *infra* notes 162-66 and accompanying text. Force must have been authorized under article 42 and not simply collective self-defense because presumably the United States would not need permission for collective self-defense.

the one calling on Iraq to withdraw from Kuwait.¹³⁹ The coalition used massive force directly against Iraq to accomplish this goal. Some reports suggested that the coalition was aimed at crippling Iraq's military capacity, which would have gone beyond the coalition's authorization.¹⁴⁰ It appears, however, that Desert Storm conformed with the Council's resolutions.

In addition to Resolution 678, the doctrine of proportionality is a general limit in international law,¹⁴¹ and would apply to the force used in liberating Kuwait. Invading and occupying Iraq would not be proportional to the liberation of Kuwait. Proportionality means putting a stop to the provocation, not taking revenge. Israel was criticized, for example, for invading Lebanon in 1982 after armed provocation.¹⁴² The critics said Israel should have stopped at the source of the attacks — southern Lebanon. Instead, it attacked the Lebanese capital.¹⁴³

Korea may provide the closest analogy. The Security Council resolutions on Korea called for withdrawal of North Korean troops north of the 38th parallel.¹⁴⁴ The Unified Command under the United States went to the General Assembly for permission to go beyond the 38th parallel. The Assembly gave this permission. Resolution 678 on Kuwait authorized force to counter the aggression against Kuwait. This did not mean that no military action could be carried out in Iraq. Saddam Hussein was simply not to be a target, unless the Council gave further authorization. The Second World

139. S/RES/660, *supra* note 2. In resolution 675, the Council authorized force to enforce sanctions against Iraq. The Jordanians complained that their trucks in Iraq were bombed, but 675 authorized such bombing and indeed authorized force against Jordan itself, within the limits of proportionality, for undermining measures necessary to maintain the peace. See U.N. CHARTER art. 39.

140. According to President Bush: "We're not in the business of targeting Saddam Hussein." N.Y. Times, Jan. 26, 1991, at 5, col. 1; N.Y. Times, Jan. 31, 1991, at A15, col. 1. *But cf.* Editorial, 'All the Way' in the Gulf?, N.Y. Times, Jan. 25, 1991, at A28, col. 1 ("We will stay the course, and we will succeed — all the way."); Friedman, *Pax Americana; What the United States has Taken on in the Gulf, Besides a War*, N.Y. Times, Jan. 20, 1991, at § 4, p. 1, col. 1 ("The goal is to render Iraq unable to project power beyond its borders for years to come.").

141. Schachter, *supra* note 4, at 1637-38.

142. *Id.*

143. Israel, in responding to armed attacks or threatened attacks in 1967 and 1973, occupied territory in Egypt, Jordan and Syria. It argued that it needed to hold these territories as a defensive buffer for itself. The United Nations has called on Israel to return the zones in exchange for promises by its neighbors to respect Israel's borders. Thus the U.N. action does not necessarily clarify whether the U.N. thought Israel was justified in taking the territories.

144. M. HARRELSON, *supra* note 129, at 47.

War may be a contrary example. At the end of the war, the Allies dismantled the governments of Germany and Japan, trying the remaining Axis leaders for international crimes. Saddam Hussein has committed crimes and he, too, could be tried were he to be captured.¹⁴⁵ But the question is whether an effort to capture him and to dismantle his government was authorized. It was not. The U.N. did not exist to limit the Allies' actions after World War II. Thus, that example is unpersuasive.¹⁴⁶

III. IMPROVING ENFORCEMENT OF THE PROHIBITION ON FORCE

Desert Storm enforced the U.N.'s prohibition against the use of force. It is a rare example of lawful, coercive enforcement against aggression and was certainly an improvement over unilateral, unauthorized uses of force. Nevertheless, there is a better means of enforcing the prohibition on the use of force. The U.N. Charter provides for the formation of U.N. forces to counter aggression. These forces, not non-U.N. forces, should respond to violations of the prohibition on the use of force. The reason for the preference is clear: The existence of U.N. forces, ready to respond to any aggression at any time, will act as a deterrent to future aggression in a way that Desert Storm will not.

Desert Storm is less likely to deter because deterrence depends on the credibility of the enforcement mechanism, in other words, the likelihood that it will be used in a consistent, fair manner.¹⁴⁷ It is unlikely that Desert Storm will be reformulated, especially if important United States interests are not involved. On the other hand, having U.N. forces in place, prepared to respond consistently to violations, according to Charter rules, could entail a credible deterrent. Detering force and eliminating the need for enforcement would clearly be the best goal of an enforcement system.

Critics might argue, however, that the likelihood of forming a U.N. force is even less than the chance of reformulating Desert

145. The state of Iraq, too, could be held responsible. And indeed, probably will be because the Council resolutions say it owes reparations. Nevertheless, in a non-representative regime, the people should not have to pay punitive, as opposed to compensatory, damages. Their responsibility for the actions of a dictator is diminished.

146. Even if Hussein should not be a target of the coalition, he could be tried for his crimes. The Iraqi people themselves could turn him over to the U.N. for justice.

147. R. FISHER, *supra* note 40, at 41. Professor Franck makes the same point using somewhat different terms: "The inconsistent application of a rule or general principle undermines its capacity to elicit compliance." T. FRANCK, *supra* note 41 at 138.

Storm. That may be, but if it is ever to happen, now is the best moment since the founding of the U.N. to do so. Foregoing this opportunity also means foregoing the chance to get the best compliance possible with the prohibition on the use of force.

President Bush has at least indicated that the United States might now be ready to participate in the reform of the U.N. Upon launching the ground war against Iraq he promised a credible U.N., one that fulfilled its founders' vision.

When we are successful, and we will be, we have a real chance at this new world order, an order in which a credible United Nations can use its peacekeeping role to fulfill the promise and vision of the U.N.'s founders.¹⁴⁸

To fulfill the vision, at least three things must happen in the use of force area: a U.N. force must be created; it must be available against all aggressors, including permanent members of the Security Council; and it must only be used as a last resort.¹⁴⁹

A. A United Nations Army

The Charter calls for all members to contribute troops to the U.N. to be ready to counter aggression at the command of the Security Council, under the U.N. flag.¹⁵⁰ The preparation of such a force will provide a credible deterrent and will conform more closely with notions of fairness and morality. Such conformity will in turn enhance the deterrence value of the force.

The current enforcement mechanism in international law is self-help. Sometimes states use it; sometimes they do not. This inconsistency makes self-help a less than credible deterrent. Desert Storm is similar. It is an American idea, one that could not have been predicted a month before Iraq's invasion.¹⁵¹ If the U.N. prepares a force, the likelihood that it will be used as intended is higher than the likelihood

148. N.Y. Times, Jan. 17, 1991, at A14, col. 1.

149. This section presents suggestions for improving enforcement. The suggestions focus only on improving law enforcement. Other things could be done to improve the prohibition on force. For example, the U.N. could improve the rules, civil war could be addressed, and so on. But those issues are beyond the scope of this paper, as is the general topic of enforcement.

150. U.N. CHARTER art. 43, *supra* note 73. Professor Schachter suggested in a telephone interview that states will not contribute forces. If so, they are conceding that the U.S. will continue to play the major role. Cf. Urquart, *supra* note 12.

151. Editorial, *How To Let Arab States Work It Out With Iraq*, N.Y. Times, Nov. 27, 1990, at A22, col. 4.

that some state, somewhere in the world, will respond to a use of force, especially where it has no national interest involved. The drafters of the Charter believed that the very existence of a ready force would deter.¹⁵² Moreover, the force would be credible because it would have the means to respond. African organizations have tried to intervene in several African conflicts, but, with limited resources, they have had little success.¹⁵³ The U.N., however, can call on the whole world and thus organize a force which should discourage would-be aggressors.¹⁵⁴

Also, the more fair and the more morally acceptable a deterrent, the more credible it is. Enforcement by U.N. troops is fairer because it is universal, not unilateral. It is universal in two senses — the troops making up the force will be international and the decision-making is international.¹⁵⁵ Thus, U.N. decision-making avoids creating the sense, existing in the Gulf today, that a few countries fought their enemies instead of enforcing international law.¹⁵⁶

The existence of a U.N. force should undermine the excuses used by states, particularly the United States, to use force unilaterally. The world community could decide as a whole, through the U.N., whether force should be used against aggression or in other situations, such as to install democratic regimes, to stop genocide, or to aid a government battling insurgents.¹⁵⁷

Multilateral decisions to use force would diminish manipulations of the rules and the facts. Objective decision-making and concentration of the means of enforcement in the international organization

152. The knowledge that the Council had armed forces at its disposal and the expectation that they would be used, if necessary, was intended to make it easier for the Council to handle conflicts without having to resort to armed force. Thus, the inability to apply Article 42 has weakened the essential foundation of the whole United Nations system for maintaining peace and security, including its provisions for the pacific settlement of disputes.

L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 69, at 317.

153. N.Y. Times, June 12, 1982, at A21, col. 3.

154. Planning and resources could be shifted from NATO and the Warsaw Pact to the U.N.

155. Both Fitzmaurice and Fisher have pointed out the benefit of multilateral versus unilateral enforcement. Unilateral enforcement gives the impression of a political contest between two states, rather than an enforcement situation by a disinterested party. See Fitzmaurice, *The Future of Public International Law in Livre du Centenaire, Annuaire de l'Institut de Droit International* (1973).

156. See Ball, *The Gulf Crisis*, NEW YORK REVIEW OF BOOKS 8 (Dec. 6, 1990).

157. Article 39 permits the Security Council to respond to threats to the peace, breaches of the peace, and acts of aggression. These are broader circumstances than self-defense and would arguably include situations of genocide, and so on.

are essential components of a credible, persuasive enforcement system.

B. Uniform Application of the Law

To enhance the sense of fairness and multilateralism, the Security Council should implement Article 27(3).¹⁵⁸ It requires that states party to the conflict, including permanent members of the Security Council, abstain from voting in the Security Council. In practice the permanent members regularly veto resolutions in which they are implicated.¹⁵⁹ Obviously, the permanent members should not be voting on resolutions determining whether they have committed aggression. The law against war should apply to the permanent members, too, and should not be subject to the veto.

The very definition of justice subsumes the notion that "arbitrary distinctions" are eliminated.¹⁶⁰ An aggressor's military or economic power is an arbitrary distinction in determining whether the prohibition on force has been violated. Many will argue that the permanent members will not accept this limit on their power. That may be, but both the Americans and the Soviets are recommitted to the U.N.¹⁶¹ If that commitment means anything, it should mean the Charter applies to the permanent members, along with all others.

C. Force as a Last Resort

Of course, even if the veto were suppressed, it may not be practical to use force against the permanent members. But other measures, such as economic sanctions or denial of privileges, could be used against permanent members. Permanent members might leave the organization if they faced sanctions. But the U.N. has applied

158. U.N. CHARTER art. 27(3) states:

Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

159. See Y. DINSTEIN, *supra* note 3. This is an example of a treaty provision made obsolete by a contrary customary practice.

160. John Rawls defines justice as "the elimination of arbitrary distinctions and the establishment, within the structure of a practice, of a proper balance of competing claims." Rawls, *Justice as Fairness*, PHIL. REV. 165 (1958).

161. See *supra* note 140 (President Bush's Speech); Mikhail Gorbachev, "U.S.S.R. Arms Reduction: Rivalry into Sensible Competition," Speech delivered before the United Nations on December 7, 1988; reprinted in & translated in 55 VITAL SPEECHES OF THE DAY 234 (Feb. 1, 1989).

sanctions against numerous states and they do not seem to leave — even Iraq is still a member. Why would a permanent member be different?¹⁶²

The Security Council should only use force, in any case, if it determines that other measures will not work. Perhaps the most serious question about Desert Storm is whether the Security Council really believed no measure short of force would work.¹⁶³ For a deterrent to be credible it should also conform with some international sense of morality.¹⁶⁴ The Catholic Bishops' contemporary statement of the just war doctrine suggests all measures short of war should be tried.¹⁶⁵ This criterion also conforms with the requirements of Article 41, and, so, if implemented would enhance the credibility of the deterrent. Many experts thought the embargo against Iraq would have worked if given more time, or if more forceful measures had been used to enforce it.¹⁶⁶ Perhaps not, but in future cases, the Council must assure itself that it authorizes force only as a last resort. Additionally, the Council should make an explicit finding of that fact.

International law's system of horizontal, self-help enforcement which works for so many rules does not work as well where the cost of deterring powerful, militaristic states such as Iraq is high. The drafters of the Charter who outlawed force knew that multilateral efforts provided the answer. We may finally now have a chance to put their theory to work. If so, the U.N. needs to fully implement the Charter scheme. The U.N. as a whole should organize to counter aggression. It should apply the law to all members and it should exhaust measures short of force before using U.N. troops.

IV. CONCLUSION

Thousands died following Iraq's unlawful invasion of Kuwait on August 2, 1990. The fact that international law prohibits such invasions did not stop Iraq or the bloodshed. Nevertheless, international law has had an impact on how states use force. States do not use force casually today, and outright "grabs" for territory, like

162. If a permanent member left, would it lose its veto should it attempt to return? If the answer is yes, this loss alone might deter defections.

163. Urquart, *supra* note 12 at 35.

164. R. FISHER, *supra* note 40.

165. THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE, UNITED STATES CATHOLIC CONFERENCE (1983).

166. See *supra* note 137.

Iraq's in Kuwait, are unusual. Nevertheless, when states have used force unlawfully, the U.N. has done little in response during the last forty years of the Cold War.

With the end of the Cold War, we have the best opportunity to improve enforcement since the Charter's adoption. In the first major test of the prohibition on force since the end of the Cold War, the international community joined together to confront Iraq's aggression. This action is itself an important validation of the prohibition on force. But the goal now should be to institutionalize, along just and credible lines, the coordinated response to force. The best way to do so is through the United Nations. One state, especially one like the United States with its recent history of violating the prohibition on force, cannot achieve the same positive ends the United Nations can. The members of the U.N. need to prepare a U.N. force ready to counter aggression. Such a force, together with multilateral decision-making applied consistently and uniformly to all members of the U.N., will achieve maximum deterrence of the use of force. These reforms would be a fitting tribute to all who have died in the Gulf War.